

2021 -- H 5261 SUBSTITUTE A

LC000592/SUB A/3

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2021

A N A C T

RELATING TO LABOR AND LABOR RELATIONS -- FAIR EMPLOYMENT PRACTICES

Introduced By: Representatives Donovan, Williams, Alzate, Blazejewski, and Speakman

Date Introduced: January 29, 2021

Referred To: House 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 identity
3 or expression, disability, age, or country of ancestral origin by strengthening and closing gaps in
4 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 (1) "Age" means anyone who is at least forty (40) years of age.

11 (2) "Comparable work" means work that requires substantially similar skill, effort, and
12 responsibility, and is performed under similar working conditions. Determining whether jobs are
13 comparable will require an analysis of the jobs as a whole. Minor differences in skill, effort, or
14 responsibility will not prevent two (2) jobs from being considered comparable.

15 ~~(a)~~(3) "Director" means the director of labor and training.

16 ~~(b)~~(4) "Employee" as used in §§ 28-6-17 — 28-6-21 means any person employed for hire
17 by any employer in any lawful employment, but does not include persons engaged in domestic
18 service in the home of the employer, or employees of any social club, fraternal, charitable,
19 educational, religious, scientific, or literary association, no part of the net earnings of which inures

1 to the benefit of any private individual means any person as defined in § 28-14-1.

2 ~~(e)~~(5) "Employer" includes any person acting in the interest of an employer directly or
3 ~~indirectly~~ means any person or entity as defined in § 28-14-1.

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

8 (7) "Occurrence of discriminatory practice" means whenever a discriminatory
9 compensation decision or other practice is adopted; whenever an individual becomes subject to a
10 discriminatory compensation decision or other practice; or whenever an individual is affected by
11 the application of a discriminatory compensation decision or other practice.

12 (8) "Wage" means all amounts at which the labor or service rendered is recompensed,
13 whether the amount is fixed or ascertained on a time, task, piece, commission basis, or other method
14 of calculating the amount, and includes benefits. An employer shall not be liable under this chapter
15 for disparities in total gratuities as defined in § 28-12-5 or overtime pay as defined in § 28-12-4.1
16 or commissions if the disparity is due to a factor over which the employer does not have control.

17 (9) "Wage history" means the wages paid to an applicant for employment by the applicant's
18 current employer and/or previous employer or employers. Wage history shall not include any
19 objective measure of the applicant's productivity, such as revenue, sales, or other production
20 reports.

21 (10) "Wage range" as applied to an applicant for employment means the wage range that
22 the employer anticipates relying on in setting wages for the position and may include reference to
23 any applicable pay scale, previously determined range of wages for the position, the actual range
24 of wages for those currently holding equivalent positions, or the budgeted amount for the position,
25 as applicable. "Wage range" as applied to a current employee, may include reference to any
26 applicable pay scale, previously determined range of wages for the position, or the range of wages
27 for incumbents in equivalent positions, as applicable.

28 **28-6-18. Wage differentials based on sex prohibited Wage differentials based on**
29 **protected characteristics prohibited.**

30 (a) No employer shall ~~discriminate in the payment of wages as between the sexes or shall~~
31 ~~pay any female in his or her employ salary or wage rates less than the rates paid to male employees~~
32 ~~for equal work or work on the same operations~~ pay any of its employees at a wage rate less than
33 the rate paid to employees of another race, or color, or religion, sex, sexual orientation, gender
34 identity or expression, disability, age, or country of ancestral origin for comparable work, except

1 where the employer meets the standards set forth in subsection (b) of this section.

2 ~~Nothing contained in this section shall prohibit a variation in rates of pay based upon either~~
3 ~~difference in:~~

4 ~~Seniority, experience, training, skill, or ability;~~

5 ~~Duties and services performed, either regularly or occasionally;~~

6 ~~The shift or time of day worked; or~~

7 ~~Availability for other operations or any other reasonable differentiation except difference~~
8 ~~in sex.~~

9 ~~Except as provided in this section, any provision in any contract, agreement, or~~
10 ~~understanding entered into after passage of this act establishing a variation in rates of pay as~~
11 ~~between the sexes, shall be null and void.~~

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

13 (1) The systems as referenced in § 28-6-18 are fair and are not being used as a pretext for
14 an unlawful wage differential;

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

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

18 (ii) A merit system;

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

20 (iv) Geographic location when the locations correspond with different costs of living;
21 provided, that no location within the state of Rhode Island will be considered to have a sufficiently
22 different cost of living. This clause shall apply at the employer's discretion and for the limited
23 purpose of determining wage differentials for employees.

24 (v) Reasonable shift differential, which is not based upon or derived from a differential in
25 compensation based on characteristics identified in § 28-6-18(a);

26 (vi) Education, training, or experience to the extent such factors are job-related and
27 consistent with a business necessity;

28 (vii) Work-related travel, if the travel is regular and a business necessity; or

29 (viii) A bona fide factor other than those characteristics identified by § 28-6-18(a), which
30 is not based upon or derived from a differential in compensation based on characteristics identified
31 in § 28-6-18(a); which is job-related with respect to the position in question; and which is consistent
32 with business necessity. This factor shall not apply if the employee demonstrates that an alternative
33 business practice exists that would serve the same business purpose without producing the wage
34 differential and that the employer has refused to adopt such alternative practice. A cost prohibitive

1 alternative business practice is not an alternative business practice under this section;
2 (3) The factor or factors relied upon must reasonably explain the differential; or
3 (4) Each factor is relied upon reasonably.
4 (c) An individual's wage history cannot, by itself, justify an otherwise unlawful wage
5 differential.
6 (d) An employer who discriminates in violation of this section shall not, in order to comply
7 with the provisions of this section, reduce the wage rate of any employee.
8 (e) The agreement of an employee to work for less than the wage to which the employee is
9 entitled under this chapter is not a defense to an action under this chapter; provided, however, in
10 the event an employer provides health insurance or retirement benefits as a benefit to employees, a
11 difference in such benefits due to an employee's decision, in writing, to decline such a benefit shall
12 not be considered a violation of this section, as long as the employer provides equal access to such
13 benefit.
14 (f) No employer shall prohibit an employee from inquiring about, discussing, or disclosing
15 the wages of such employee or another employee or retaliate against an employee who engages in
16 such activities. No employer shall require an employee to enter into a waiver or other agreement
17 that purports to deny an employee the right to disclose or discuss their wages. An employer shall
18 not prohibit an employee from aiding or encouraging any other employee to exercise their rights
19 under this subsection.
20 (1) Nothing in this subsection shall require an employee to disclose their wages.
21 (2) Nothing in this subsection shall be construed to limit the rights of an employee provided
22 by any other provision of law or collective bargaining agreement.
23 (g) No employer shall discharge or in any other manner discriminate or retaliate against
24 any applicant for employment or employee because the applicant or employee has opposed a
25 practice made unlawful by this chapter or because the applicant or employee has made a charge or
26 filed any complaint with the employer, the director of labor and training, or any other person, under
27 or related to the provisions of this chapter; has instituted or caused to be instituted any investigation,
28 proceeding, hearing, or any action under or related to the provisions of this chapter; has testified or
29 is planning to testify; or has assisted or participated in any manner in any such investigation,
30 proceeding, or hearing under the provisions of this chapter. No employer shall coerce, intimidate,
31 threaten, or interfere with any individual in the exercise or enjoyment of, or on account of their
32 having exercised or enjoyed, or on account of their having aided or encouraged any other individual
33 in the exercise or enjoyment of, any right granted or protected by the provisions of this chapter.
34 (h) Except as provided in this section, any provision in any contract entered into after the

1 effective date of this chapter establishing a variation in rates of pay based on the characteristics
2 identified by § 28-6-18(a) shall be null and void.

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

9 **28-6-19. Enforcement of provisions.**

10 (a) The director of labor and training shall have the power and it shall be his or her duty to
11 carry out the provisions of §§ 28-6-17 —~~28-6-21~~ through 28-6-24.

12 (b) In carrying out these provisions, the director shall have the same powers and duties as
13 set forth in chapter 14 of title 28 to investigate, inspect, subpoena, and enforce any violations
14 through administrative hearing complaints.

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

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

21 (e) At the request of any party aggrieved by a violation of this chapter, the director of labor
22 and training may take an assignment of the claim in trust for the assigning aggrieved party and may
23 bring any legal action necessary to collect the claim. The director of labor and training shall not be
24 required to pay the filing fee or other costs in connection with any action. The director of labor and
25 training shall have the power to join various claimants against the employer, in one cause of action.
26 If the director of labor and training prevails in an enforcement action, the aggrieved party shall be
27 awarded damages and the department of labor and training shall be awarded penalties in accordance
28 with §§ 28-6-20 and 28-6-21.

29 (f) An applicant for employment, an employee, or a former employee aggrieved by a
30 violation of this chapter, may file a complaint with the director of labor and training or may file a
31 civil action in any court of competent jurisdiction to obtain relief.

32 (g) An aggrieved applicant for employment, employee, or former employee may not file a
33 civil action under this section if they have also filed a complaint with the director of labor and
34 training and the director has issued notice of an administrative hearing pursuant to this section.

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

4 (i) All claims filed under this chapter shall be filed within two (2) years of when the
5 claimant knew of, or should have known of, the occurrence of a discriminatory practice; provided,
6 however, a claimant may file a sworn complaint demonstrating facts that establish a willful and
7 wanton violation of this chapter within three (3) years of when the claimant knew of, or should
8 have known of, the occurrence of a discriminatory practice; provided, further, that prior to
9 commencing an action alleging a violation of §§ 28-6-18(a) through (e), a claimant shall provide
10 the employer with written notice of the claimant's intent to commence such action at least forty-
11 five (45) days prior to the commencement of any such action and any such written notice shall
12 include a statement from the claimant indicating the claimant's belief that an unlawful wage
13 differential exists and that it applies to the claimant.

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

16 (k) Any party who is aggrieved by a final decision of the department of labor and training
17 is entitled to a trial de novo in superior court in the county having jurisdiction. Proceedings shall
18 be commenced by the aggrieved party by filing a complaint in the superior court within thirty (30)
19 days of the issuance of the final agency decision. The complaint shall name the opposing party.
20 The rules of civil procedure and evidence shall apply to the proceedings. Thereafter, either party
21 shall have the right of appeal to the supreme court.

22 **28-6-20. Civil liability of employer for sex differential — Actions Liability of employer.**

23 ~~An employer who violates the provisions of § 28-6-18 shall be liable to the employee or~~
24 ~~employees affected in the amount of their unpaid wages, and in an additional equal amount of~~
25 ~~liquidated damages. An action to recover the liability may be maintained in any court of competent~~
26 ~~jurisdiction by any one or more employees for and in behalf of himself or herself or themselves and~~
27 ~~other similarly situated employees. At the request of any employee paid less than the wage to which~~
28 ~~he or she is entitled under §§ 28-6-17 — 28-6-21, the director of labor and training may take an~~
29 ~~assignment of the wage claim in trust for the assigning employee and may bring any legal action~~
30 ~~necessary to collect the claim, and the liquidated damages provided for above. The director of labor~~
31 ~~and training shall not be required to pay the filing fee or other costs in connection with the action.~~
32 ~~The director of labor and training shall have the power to join various claimants against the~~
33 ~~employer in one cause of action.~~

34 (a) Any employee or former employee aggrieved by a violation of §§ 28-6-18(a) through

1 (i) shall be entitled to the same protections and relief as under § 28-14-19.2(a).

2 (b) An employer who violates § 28-6-22 shall be liable for any compensatory damages; or
3 special damages not to exceed ten thousand dollars (\$10,000); appropriate equitable relief; and
4 reasonable attorneys' fees and costs. In setting the amount of damages, the appropriate finder of
5 fact should consider the size of the employer's business, the good faith of the employer, the gravity
6 of the violation, the history of previous violations, and whether or not the violation was an innocent
7 mistake or willful.

8 **28-6-21. Penalty for violations.**

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

16 (a) In addition to any other relief to which any aggrieved party may be entitled for such a
17 violation, an employer who violates § 28-6-18 or § 28-6-22 may be liable for a civil penalty to be
18 paid to the department of labor and training. That penalty shall be set within the following ranges:

19 (1) Up to one thousand dollars (\$1,000) for a first violation;

20 (2) Up to two thousand five hundred dollars (\$2500) for a violation where the employer
21 has had one violation of § 28-6-18 or § 28-6-22 within the five (5) years prior to the complaint or
22 action being filed; or

23 (3) Up to five thousand dollars (\$5,000) for a violation where the employer has had two
24 (2) or more violations of § 28-6-18 or § 28-6-22 within the seven (7) years prior to the complaint
25 or action being filed.

26 (b) In determining the amount of any penalty imposed under this section, the director or
27 the court shall consider the size of the employer's business, the good faith of the employer, the
28 gravity of the violation, the history of previous violations, and whether or not the violation was an
29 innocent mistake or willful. The director or the court may lower any penalty imposed under this
30 section if the employer demonstrates that they completed a self-evaluation as defined in § 28-6-24.

31 (c) No civil penalties shall be assessed from January 1, 2023 to December 31, 2024.

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

34 **28-6-22. Wage history and wage range.**

1 (a) No employer shall:

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

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

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

8 (4) Seek the wage history of an applicant.

9 (b) Notwithstanding the provisions of subsection (a) of this section, after the employer
10 makes an initial offer of employment with an offer of compensation to an applicant for employment,
11 an employer may:

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

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

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

20 (4) Nothing in this section shall penalize an employer for having knowledge of an
21 employee's wage history at that employer if the employee currently works for the employer.

22 (5) Notwithstanding any other provision to the contrary, nothing in this chapter shall
23 preclude an employer from verifying information voluntarily provided by a job applicant about an
24 applicant's unvested equity or deferred compensation that an applicant would forfeit or have
25 cancelled by virtue of the applicant's resignation from their current employer or any voluntary
26 disclosure of non-wage related information. Further, an employer may request a background check
27 that does not affirmatively seek wage history; provided, however, if the background check discloses
28 the applicant's wage history, such information shall not be relied on for purposes of determining
29 wage, benefits or other compensation for an applicant during the hiring process, including the
30 negotiation for a contract for employment.

31 (c) Upon the applicant's request, an employer shall provide an applicant for employment
32 the wage range for the position for which the applicant is applying. The employer should provide
33 a wage range for the position the applicant is applying for prior to discussing compensation. An
34 employer shall provide an employee the wage range for the employee's position both at the time of

1 hire and when the employee moves into a new position. During the course of employment, upon
2 an employee's request, an employer shall provide the wage range for the employee's position.

3 (d) The department of labor and training may provide guidance to employers for
4 determining the information to be provided pursuant to subsection (c) of this section, and may
5 include information regarding definitions applicable to this chapter.

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

10 **28-6-23. Regulations.**

11 The department shall coordinate implementation and enforcement of this chapter and shall
12 promulgate appropriate guidelines or regulations for such purposes.

13 **28-6-24. Self-evaluation by employer.**

14 (a) Any employer against whom an action is brought alleging a violation of §§ 28-6-18(a)
15 through (e) shall have an affirmative defense to all liability if the employer is able to demonstrate
16 that the employer has conducted a good faith self-evaluation pursuant to the provisions of this
17 subsection of the employer's pay practices within the previous two (2) years and prior to
18 commencement of the action and can demonstrate that any unlawful wage differentials revealed by
19 its self-evaluation have been eliminated. For purposes of this subsection, an employer's self-
20 evaluation may be of the employer's own design or on standard template or form to be issued by
21 the department of labor and training, as long as the scope and detail of the self-evaluation reflects
22 the exercise of due diligence by the employer to identify, prevent, and mitigate violations of this
23 chapter in light of the size of the employer.

24 (1) In determining whether a self-evaluation reflects the exercise of due diligence by the
25 employer, the factors the court shall consider include, but are not limited to, whether the evaluation
26 includes all relevant jobs and employees within those relevant jobs; whether the employer's analysis
27 makes a reasonable effort to identify similar jobs and employees using a consistent, fact-based
28 approach; whether the employer has tested explanatory factors for an unbiased and relevant
29 relationship to pay; whether the evaluation takes into account all reasonably relevant and available
30 information; and whether the evaluation is reasonably sophisticated in its analysis of potentially
31 comparable work, employee compensation, and the application of the permissible reasons for wage
32 differentials set forth in § 28-6-18(b). If an employer fails to retain the records necessary to show
33 the manner in which it evaluated and applied these factors, it may give rise to an inference that the
34 employer did not exercise due diligence in conducting its self-evaluation.

1 (2) In determining whether an employer has eliminated an unlawful wage differential
2 revealed by its self-evaluation, the court shall determine whether the employer has adjusted salaries
3 or wages in order that employees performing comparable work are paid equally and whether any
4 salary or wage adjustments have been completed prior to commencement of the action. An
5 employer shall have ninety (90) days from the date of completion of its self-evaluation to adjust
6 wages beginning from the day in the pay period the self-evaluation was completed.

7 (b) The affirmative defense to liability set forth in subsection (a) of this section shall be
8 available to employers beginning on January 1, 2023 and ending June 30, 2026. Thereafter, an
9 employer who has conducted a self-evaluation and eliminated any unlawful differentials as
10 provided in subsection (a) of this section shall not be liable for liquidated damages or compensatory
11 damages under § 28-6-20 or civil penalties under § 28-6-21; provided, however, that nothing
12 contained in this subsection (b) shall prevent an employee aggrieved by an unlawful wage
13 differential from filing a civil action in any court of competent jurisdiction to obtain unpaid wages
14 and equitable relief; provided, further, that in lieu of an employer being relieved of liability for
15 liquidated damages and compensatory damages under § 28-6-20 or civil penalties under § 28-6-21,
16 an employer who has conducted a self-evaluation and eliminated any unlawful differentials as
17 provided in subsection (a) of this section, and compensated the employee for any unpaid wages,
18 shall have an affirmative defense to all liability.

19 (c) Evidence that a self-evaluation has been conducted or that remedial steps have been
20 undertaken in accordance with this section is not sufficient evidence, standing alone, to find a
21 violation of §§ 28-6-18(a) through (e) that occurred prior to the date of the completion of the self-
22 evaluation.

23 (d) An employer who has not completed a self-evaluation shall not be subject to any
24 negative or adverse inference as a result of not having completed a self-evaluation.

25 SECTION 4. This act shall take effect on January 1, 2023.

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LC000592/SUB A/3
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EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF
A N A C T
RELATING TO LABOR AND LABOR RELATIONS -- FAIR EMPLOYMENT PRACTICES

1 This act would comprehensively address wage discrimination, based on religion, race,
2 color, sex, sexual orientation, gender identity or expression, disability, age or country of origin by
3 expanding employee protections and the scope of the remedies available to employees who have
4 experienced wage discrimination.

5 This act would take effect on January 1, 2023.

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