

2018 -- S 2475 SUBSTITUTE A

LC004054/SUB A

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2018

A N A C T

RELATING TO LABOR AND LABOR RELATIONS - FAIR EMPLOYMENT PRACTICES

Introduced By: Senators Goldin, Goodwin, Ruggerio, Lynch Prata, and McCaffrey

Date Introduced: February 15, 2018

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 requires comparable skill, effort and responsibility,  
12 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, under which an employer has the right to control the details of

1 work performance.

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

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

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

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

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

20 (a) No employer shall ~~discriminate in the payment of wages as between the sexes or shall~~  
21 ~~pay any female in his or her employ salary or wage rates less than the rates paid to male~~  
22 ~~employees for equal work or work on the same operations~~ pay any of its employees at a wage rate  
23 less than the rate paid to employees of another race or color, religion, sex, sexual orientation,  
24 gender identity or expression, disability, age, or country of ancestral origin for comparable work,  
25 when viewed as a composite of skill, effort, and responsibility, and performed under similar  
26 working conditions, except where the employer meets the standards set forth in subsection (b) of  
27 this section.

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

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

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

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

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

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

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

5 (1) That the systems are fair, and are not being used as a pretext for an unlawful wage  
6 differential;

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

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

10 (ii) A merit system;

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

12 (iv) A bona fide factor other than race or color, religion, sex, sexual orientation, gender  
13 identity or expression, disability, age, or country of ancestral origin, such as education, training,  
14 or experience; including, but not limited to, to work-related travel, if the travel is a regular and  
15 necessary condition of the particular job; or reasonable shift differentials. This factor shall apply  
16 only if the employer demonstrates that the factor:

17 (A) Is not based on or derived from a differential in compensation based on race or color,  
18 religion, sex, sexual orientation, gender identity or expression, disability, age, or country of  
19 ancestral origin;

20 (B) Is job-related to the position in question; and

21 (C) Is consistent with a business necessity. For purposes of this subsection, "business  
22 necessity" means essential to effective job performance. This defense shall not apply if the  
23 employee demonstrates that an alternative business practice exists that would serve the same  
24 business purpose without producing the wage differential and that the employer has refused to  
25 adopt such alternative practice.

26 (3) Each factor is relied upon reasonably.

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

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

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

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

34 (f) No employer shall prohibit an employee from inquiring about, discussing, or

1 disclosing the wages of such employee or another employee, or retaliate against an employee who  
2 engages in such activities.

3 (1) No employer shall require an employee to enter into a waiver or other agreement that  
4 purports to deny an employee the right to disclose or discuss their wages. An employer shall not  
5 prohibit an employee from aiding or encouraging any other employee to exercise their rights  
6 under this subsection.

7 (2) Nothing in this subsection shall require an employee to disclose their wages.

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

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

22 (h) No employer shall:

23 (1) Rely on the wage history of an applicant for employment in considering them for  
24 employment, including, but not limited to, requiring that an applicant's prior wages satisfy  
25 minimum or maximum criteria that are a condition of being considered for employment;

26 (2) Rely on the wage history of an applicant for employment in determining the wages  
27 such applicant is to be paid by the employer upon hire; provided that an employer may rely on  
28 wage history after the employer makes an offer of employment with an offer of wages to the  
29 applicant. Then, if an applicant for employment provides wage history voluntarily and without  
30 prompting, to support the applicant's request for a wage higher than the wage offered by the  
31 employer, the employer may rely on such wage history in determining the final wage offer.

32 (3) Seek from an applicant for employment or their current or former employer the wage  
33 history of the applicant; provided, however, that an employer may seek to confirm an applicant's  
34 wage history only after an offer of employment with compensation has been made to the

1 applicant and the applicant has responded to the offer by providing wage history to support a  
2 wage higher than that offered by the employer.

3 (i) An employer shall provide an applicant for employment the wage range for the  
4 position for which the applicant is applying upon the applicant's request or prior to inquiring  
5 about the applicant's wage expectations or desired wages or prior to providing the applicant an  
6 offer of compensation, whichever comes first. An employer shall provide an employee the wage  
7 range for the employee's job title and for comparable jobs upon hire and, thereafter, annually and  
8 upon request.

9 (1) The department of labor and training may provide guidance to employers for  
10 determining the information to be provided pursuant to subsection (h)(1) of this section, which  
11 may include definitions for "wage range" and "comparable jobs."

12 (j) Except as provided in this section, any provision in any contract entered into after  
13 passage of this act establishing a variation in rates of pay based on race or color, religion, sex,  
14 sexual orientation, gender identity or expression, disability, age, or country of ancestral origin,  
15 shall be null and void.

16 (k) Posting of statutory provisions. Every employer subject to this chapter shall post in a  
17 conspicuous place or places on its premises, a notice to be prepared or approved by the director  
18 which shall set forth excerpts of this chapter and any other relevant information which the  
19 director deems necessary to explain this chapter. Any employer who does not comply with the  
20 provisions of this section shall be punished by a fine of not less than one hundred dollars (\$100)  
21 nor more than five hundred dollars (\$500).

22 (l) Every employer shall keep a true and accurate record of hours worked and wages paid  
23 each pay period to each employee. The employer shall keep the records on file for at least three  
24 (3) years after the entry of the record.

25 **28-6-19. Enforcement of provisions.**

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

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

31 (c) The director shall be entitled to the same rights and remedies as set forth in chapter 14  
32 of title 28 for an employer's effort to obstruct the director and authorized representatives in the  
33 performance of their duties or any person's failure to comply with any lawfully issued subpoena,  
34 or subpoena duces tecum, or on the refusal of any witness to testify to any matter regarding which

1 they may be lawfully interrogated.

2 (d) An applicant for employment, employee, or former employee, for and on behalf of  
3 themselves and other similarly situated individuals, or any organization representing such an  
4 applicant, employee, or former employee, aggrieved by a violation of § 28-6-18 may file a  
5 complaint with the director of labor and training.

6 (e) The department of labor and training and the commission for human rights shall  
7 cooperate in the investigation of charges filed under this section when the allegations are within  
8 the jurisdiction of both agencies.

9 (f) All claims under this chapter must be filed with the director within three (3) years  
10 after the discriminatory practice declared unlawful by § 28-6-18. A discriminatory practice occurs  
11 when a discriminatory compensation decision or other practice is adopted, when an individual  
12 becomes subject to a discriminatory compensation decision or other practice, or when an  
13 individual is affected by the application of a discriminatory compensation decision or other  
14 practice, including each time wages, benefits, or other compensation is paid, resulting in whole or  
15 in part from such a decision or other practice.

16 (g) For a violation of § 28-6-18(a) through (g), an aggrieved party shall be entitled to  
17 recover any unpaid wages and/or benefits; compensatory damages; liquidated damages in an  
18 amount up to three (3) times the amount of unpaid wages and/or benefits owed, exclusive of  
19 interest; and where the aggrieved party demonstrates that the employer acted with malice or  
20 reckless indifference, punitive damages as may be appropriate; as well as an award of appropriate  
21 equitable relief, including reinstatement of employment, fringe benefits and seniority rights, and  
22 reasonable attorney's fees, expert fees and other litigation costs.

23 (h) For a violation of § 28-6-18(h) through (i), an aggrieved party shall be entitled to  
24 recover any compensatory damages; special damages not to exceed ten thousand dollars  
25 (\$10,000); where the aggrieved party demonstrates that the employer acted with malice or  
26 reckless indifference, punitive damages as may be appropriate; other equitable relief as may be  
27 appropriate; the costs of the action and reasonable attorney's fees. If special damages are  
28 available, an aggrieved party may only recover compensatory damages to the extent such  
29 damages exceed the amount of special damages.

30 **28-6-20. ~~Civil liability of employer for sex differential -- Actions.~~ Civil liability of**  
31 **employer for unlawful wage differential -- Actions.**

32 ~~An employer who violates the provisions of § 28-6-18 shall be liable to the employee or~~  
33 ~~employees affected in the amount of their unpaid wages, and in an additional equal amount of~~  
34 ~~liquidated damages. An action to recover the liability may be maintained in any court of~~

1 ~~competent jurisdiction by any one or more employees for and in behalf of himself or herself or~~  
2 ~~themselves and other similarly situated employees. At the request of any employee paid less than~~  
3 ~~the wage to which he or she is entitled under §§ 28-6-17— 28-6-21, the director of labor and~~  
4 ~~training may take an assignment of the wage claim in trust for the assigning employee and may~~  
5 ~~bring any legal action necessary to collect the claim, and the liquidated damages provided for~~  
6 ~~above. The director of labor and training shall not be required to pay the filing fee or other costs~~  
7 ~~in connection with the action. The director of labor and training shall have the power to join~~  
8 ~~various claimants against the employer in one cause of action.~~

9 (a) Any applicant for employment, employee, or former employee, for and on behalf of  
10 themselves and other similarly situated individuals, or any organization representing such an  
11 applicant, employee, or former employee, aggrieved by a violation of § 28-6-18 may file a civil  
12 action in any court of competent jurisdiction to obtain relief. A civil action under this chapter  
13 must be filed within three (3) years after the discriminatory practice declared unlawful by § 28-6-  
14 18. A discriminatory practice occurs when a discriminatory compensation decision or other  
15 practice is adopted, when an individual becomes subject to a discriminatory compensation  
16 decision or other practice, or when an individual is affected by the application of a discriminatory  
17 compensation decision or other practice, including each time wages, benefits, or other  
18 compensation is paid, resulting in whole or in part from such a decision or other practice.

19 (b) For a violation of § 28-6-18(a) through (g), an aggrieved party shall be entitled to  
20 recover any unpaid wages and/or benefits; compensatory damages; liquidated damages in an  
21 amount up to three (3) times the amount of unpaid wages and/or benefits owed, exclusive of  
22 interest; as well as an award of appropriate equitable relief, including reinstatement of  
23 employment, fringe benefits and seniority rights, and reasonable attorney's fees, expert fees and  
24 other litigation costs; and where the aggrieved party demonstrates that the employer acted with  
25 malice or reckless indifference, punitive damages may be appropriate.

26 (c) For a violation of § 28-6-18(h) through (i), an aggrieved party shall be entitled to  
27 recover any compensatory damages; special damages not to exceed ten thousand dollars  
28 (\$10,000); other equitable relief as may be appropriate; the costs of the action and reasonable  
29 attorney's fees; where the aggrieved party demonstrates that the employer acted with malice or  
30 reckless indifference, punitive damages as may be appropriate; If special damages are available,  
31 an aggrieved party may only recover compensatory damages to the extent such damages exceed  
32 the amount of special damages.

33 (d) An aggrieved applicant for employment, employee, or former employee may not file  
34 a civil action under this section if they had also filed a complaint with the director of labor and

1 training and the director has issued notice of an administrative hearing pursuant to § 28-6-19.

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

5 **28-6-21. ~~Penalty for violations.~~ Civil Penalty for violations.**

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

13 (a) An employer who violates § 28-6-18(a) through (g), in addition to any other relief to  
14 which any department or any aggrieved party may be entitled for such a violation, shall be liable  
15 for a civil penalty in an amount up to three (3) times the amount of the total wages found to be  
16 due, exclusive of interest, which shall be payable directly to the aggrieved party. The order may  
17 further direct that an administrative penalty be paid to the department of labor and training in the  
18 amount up to one time the amount of the total wages found to be due.

19 (b) Any employer who violates § 28-6-18(h) through (l), shall, in addition to any  
20 other relief to which any department or any aggrieved party may be entitled for such a violation,  
21 be liable for a fine of not more than:

22 (i) Two thousand five hundred dollars (\$2500) for a first violation;

23 (ii) Three thousand dollars(\$3000) for a second violation; and

24 (iii) Five thousand dollars (\$5000) for a third or subsequent violation.

25 (c) In determining the amount of any penalty imposed under this section, the director or  
26 the court shall consider the size of the employer's business, the good faith of the employer, the  
27 gravity of the violation, the history of previous violations, and whether or not the violation was an  
28 innocent mistake or willful.

29 (1) The director or the court may consider lowering any penalty imposed under this  
30 section if the employer demonstrates, by a preponderance of the evidence, that the employer:

31 (i) Completed in good faith, within three (3) years before the date that the employee filed  
32 the action, a fair pay analysis of the employer's pay practices that;

33 (A) Was reasonable in detail and in scope in light of the size of the employer; and

34 (B) Was related to the protected class asserted by the plaintiff in the action.

1           (ii) Eliminated the wage differentials for the plaintiff and has made reasonable and  
2 substantial progress toward eliminating wage differentials for the protected class asserted by the  
3 plaintiff; and

4           (iii) Gathered the same wage record data collected at the end of each year by the  
5 department of labor and training from employers with one hundred (100) or more Rhode Island  
6 employees.

7           (2) Information that an employer has not completed a fair-pay analysis may not be used  
8 as evidence of a violation of § 28-6-18.

9           (d) At the request of any party aggrieved by a violation of § 28-6-18, the director of labor  
10 and training may take an assignment of the claim in trust for the assigning aggrieved party and  
11 may bring any legal action necessary to collect the claim, and the damages provided for above.  
12 The director of labor and training shall not be required to pay the filing fee or other costs in  
13 connection with the action. The director labor and training shall have the power to join various  
14 claimants against the employer in one cause of action.

15           SECTION 3. This act shall take effect on January 1, 2019.

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LC004054/SUB A  
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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 provide protections against employer-imposed wage differentials based  
2 upon the race or color, religion, sexual orientation, gender identity or expression, disability, age,  
3 or country of ancestral origin of the employee. This act would also provide that where wage  
4 differentials do exist, employers must justify said differentials based on bona fide factors other  
5 than race or color, religion, sexual orientation, gender identity or expression, disability, age, or  
6 country of ancestral origin. The act would further provide that an aggrieved party shall be entitled  
7 to recover any unpaid wages and/or benefits, compensatory damages, and liquidated damages in  
8 an amount up to three (3) times the amount of unpaid wages and/or benefits owed, an award of  
9 appropriate equitable relief, including reinstatement of employment, fringe benefits, and seniority  
10 rights.

11           This act would take effect on January 1, 2019.

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