

## Equal Pay and Opportunities Act Preliminary Draft Rule Language

### WAC 296-XXX-XXX Definitions.

(1) "Applicant" means an individual, including existing employees, who submits in good faith an application for a job posting with the intent of gaining employment.

(2) "Actual damages" means compensation – including but not limited to, wages, salary, or other employment benefit– denied or lost to an employee or applicant, and may include other monetary losses suffered, as a result of a violation.

(3) "Benefits" are added perks provided by an employer to an employee in addition to the employee's normal wage or salary. Benefits may be mandated by law or optionally provided by employers. Benefits may include, but are not limited to, health care benefits, retirement benefits, any benefits permitting paid days off (including more generous paid sick leave accruals, family leave, and paid time off or vacation benefits), and any other benefit that must be reported for federal tax purposes, such as fringe benefits.

(4) "Compensation" means discretionary and nondiscretionary wages and benefits provided by an employer to an employee as a result of the employment relationship.

(5) "Conference and conciliation" means an effort to find a voluntary resolution to the violation found as a result of an investigation. If the department finds that damages are owed to the employee or applicant as a result of the violation, the department may mediate, or appoint a third party to act as mediator, between the employee or applicant and the employer to find a mutually agreeable resolution. If the department finds that a violation occurred but the employee or applicant is not owed damages, the department may negotiate directly with the employer to resolve the violation.

(6) "Department" means the department of labor and industries

(7) "Director" means the director of the department of labor and industries, or the director's designated representative.

(8) "Effort" means the amount of physical or mental exertion needed to perform a job. "Effort" encompasses the requirements of a job as a whole, including any factors of the job that cause or mitigate mental fatigue and stress

(9) "Employee" means an employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise. For the purposes of this chapter, the term "employee" does

not include independent contractors or business partners but does include employees who are exempt under the chapter 49.46 RCW.

(10) "Employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, and includes the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation.

(11) "Protected class" means a person's age, sex, marital status, sexual orientation, race, creed, color, national origin, citizenship or immigration status, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, as those terms are defined in RCW 49.60.040.

(12) "Responsibility" means the degree of discretion or accountability involved in performing the essential functions of a job, and includes factors such as the amount of supervision the employee receives, whether the employee supervises others, the degree to which the employee is involved in decision-making such as determining policy, procedure, purchases, investments, or other such activities.

(13) "Retaliation" means any adverse action taken or threatened by an employer against an employee for their exercise of their rights under chapter **49.58** RCW or this chapter, which may include, but is not limited to:

- (a) Terminating, suspending, demoting, or denying a promotion;
- (b) Reducing or changing the number of work hours for which the employee is scheduled;
- (c) Altering the employee's preexisting work schedule;
- (d) Reducing the employee's rate of pay; and
- (e) Threatening to take, or taking action, based upon the immigration status of an employee or an employee's family member;
- (f) Preventing future job opportunities whether for the employer or elsewhere.

(14) "Skill" means factors such as experience, training, education, and ability required to perform a job. Only skills necessary to perform a particular job are relevant in determining whether employees are similarly employed.

(15) "Working conditions" means the environmental factors and similar circumstances, such as physical surroundings and hazards, encountered by employees while performing a job.

**WAC 296-XXX-XXX Wage Discrimination prohibited**

(1) Any employer in this state who discriminates in any way in providing compensation based on a person's gender, perceived gender, or membership or perceived membership in a protected class between similarly employed employees of the employer is guilty of a misdemeanor. If any employee receives less compensation because of discrimination on account of the person's gender, perceived gender, or membership or perceived membership in a protected class in violation of this section, that employee is entitled to the remedies in RCW 49.58.060 and 49.58.070 and associated rules. In such action, however, the employer shall be credited with any compensation which has been paid to the employee upon account.

(2) For purposes of this section, employees are similarly employed if the individuals work for the same employer, the performance of the job requires similar skill, effort, and responsibility, and the jobs are performed under similar working conditions. Job titles alone are not determinative of whether employees are similarly employed.

(3) (a) Discrimination within the meaning of this section does not include a differential in compensation based in good faith on a bona fide job-related factor or factors that:

(i) Are consistent with business necessity;

(ii) Are not based on or derived from a gender-based differential and are not based on or derived from the employee being a member of a protected class; and

(iii) Account for the entire differential. More than one factor may account for the differential.

(b) Such bona fide factors include, but are not limited to:

(i) Education, training, or experience;

(ii) A seniority system;

(iii) A merit system;

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

(v) A bona fide regional difference in compensation levels.

(c) A differential in compensation based in good faith on a local government ordinance providing for a minimum wage different from state law does not constitute discrimination under this section.

(d) An individual's previous wage or salary history is not a defense under this section.

(e) The employer carries the burden of proof on these defenses.

(4) A person may file a complaint or bring an action under this chapter asserting discrimination based on the person's membership in more than one protected class.

**WAC 296-XXX-XXX Finding- When career advancement limited by gender or membership in other protected class**

(1) An employer may not, on the basis of a person's gender, perceived gender, or membership or perceived membership in a protected class, limit or deprive an employee of career advancement opportunities that would otherwise be available. For the purposes of this section, "career advancement opportunities" means formal or informal occasions for an employee to gather additional skills, knowledge, or experience with the purpose of furthering their career. Career advancement opportunities may include, but are not limited to, promotions, trainings, classes, mentorships, or special projects.

(2) (a) A differential in career advancement does not constitute discrimination within the meaning of this section if the differential is based on a bona fide job-related factor or factors that:

(i) Are consistent with business necessity;

(ii) Are not based on or derived from a gender-based differential; and

(iii) Account for the entire differential. More than one factor may account for the differential.

(b) Such bona fide factors include, but are not limited to:

(i) Education, training, or experience;

(ii) A seniority system;

(iii) A merit system; or

(iv) A system that measures earnings by quantity or quality of production.

(3) Upon complaint by an employee, the director must investigate pursuant to the procedures outlined in WAC 296-XXX-XXX (Complaint by Employee) to determine if there has been compliance with this section.

(4) Subject to subsection (3) of this section, a person may file a complaint or bring an action under this chapter asserting discrimination based on the person's membership in more than one protected class.

(5) (a) If it is determined that an employer committed a pattern of violations of this section as to an employee or committed a violation of this section through application of a formal or informal employer policy or practice, the employee is entitled to the remedies in WAC 296-XXX-XXX (Resolving the Violations) and in RCW 49.58.070.

(b) For the purposes of this section, a "pattern of violations" will consider whether the employer has committed multiple violations of this chapter against one employee or committed violations of this section against multiple employees.

#### **WAC 296-XXX-XXX Certain employer conduct prohibited**

(1) An employer may not:

(a) Require nondisclosure by an employee of their wages as a condition of employment; or

(b) Require an employee to sign a waiver or other document that prevents the employee from disclosing the amount of the employee's wages.

(2) An employer may not discharge or in any other manner retaliate against an employee for:

(a) Inquiring about, disclosing, comparing, or otherwise discussing the employee's wages or the wages of any other employee, which includes, but is not limited to, asking for a raise, asking for payment of agreed or obligated wages, and may also include filing a wage-related complaint with the department.

(b) Asking the employer to provide a reason for the employee's wages or lack of opportunity for advancement; or

(c) Aiding or encouraging an employee to exercise their rights under this section.

(3) An employer may prohibit an employee who has access to compensation information of other employees or applicants as part of such employee's essential job functions from disclosing the wages of the other employees or applicants to individuals who do not otherwise have access to such information, unless the disclosure is in response to a complaint or charge, in furtherance of an investigation, or consistent with the employer's legal duty to provide the information and the disclosure is part of the employee's essential job functions. An employee described in this subsection otherwise has the protections of this section, including to disclose the employee's wages without retaliation.

(4) This section does not require an employee to disclose the employee's compensation.

(5) This section does not permit an employee to violate the requirements in chapter 49.17 RCW and rules adopted under that chapter.

**WAC 296-XXX-XXX Employer seeking wage and salary history**

(1) An employer may not:

(a) Seek or inquire about the wage or salary history of an applicant for employment from the applicant or a current or former employer, even if the question is optional; or

(b) Require that an applicant's prior wage or salary history meet certain criteria such as being above a minimum threshold, except as provided in subsection (2) of this section.

(2) An employer may confirm an applicant's wage or salary history:

(a) If the applicant has voluntarily disclosed the applicant's wage or salary history; or

(b) After the employer has negotiated and made an offer of employment with compensation to the applicant and the offer has been accepted by the applicant.

(3) An employer may not reduce the compensation offered to an applicant after confirming the applicant's wage or salary history.

(4) An individual is entitled to the remedies in RCW [49.58.060](#) and [49.58.070](#) and associated rules for violations of this section. Recovery of any wages and interest must be calculated from the first date wages were owed to the employee.

#### **WAC 296-XXX-XXX Disclosure of wage or salary range by employer**

(1) The employer must disclose in each posting for each job opening the wage scale or salary range, and a general description of all of the benefits and other compensation to be offered to the hired applicant. For the purposes of this section, "posting" means any solicitation intended to recruit job applicants for a specific available position, including recruitment done directly by an employer or indirectly through a third party, and includes any postings done electronically, or with a printed hard copy, that includes qualifications for desired applicants.

(2) Upon request of an employee offered an internal transfer to a new position or promotion, the employer must provide the wage scale or salary range for the employee's new position.

(3) This section only applies to employers with 15 or more employees. For the purposes of this section, the employer's size is based on the number of employees employed at the time the job opening is posted and includes employees who do not have a physical presence in Washington.

(4) A job applicant or an employee is entitled to the remedies in RCW [49.58.060](#) and [49.58.070](#) and WAC 296-XXX-XXX (Complaint by Employee) for violations of this section.

(5) A job applicant or an employee must demonstrate that compensation or any other damages have been denied or lost by reason of a violation of subsections (1) or (2) of this section to be entitled to damages under WAC 296-XXX-XXX (Resolving the Violation).

(6) Recovery of any wages and interest must be calculated from the first date wages were owed to the employee.

#### **WAC 296-XXX-XXX Employer retaliation prohibited**

(1) An employer may not retaliate, discharge, or otherwise discriminate against an employee because the employee has filed any complaint, or instituted or caused to be instituted any proceeding

under this chapter, or has testified or is about to testify in any such proceeding, or because of the exercise by such employee on behalf of themselves or others of any right afforded by this chapter.

(2) An employer may not interfere with, restrain, or deny the exercise of any employee right provided under or in connection with chapter 49.58 RCW or associated rules. An employer may not use an employee's exercise of any of the rights provided under chapter 49.58 RCW or associated rules as a negative factor in any employment action such as evaluation, promotion, or termination, or otherwise subject an employee to discipline for the exercise of any rights provided under chapter 49.58 RCW or associated rules.

**WAC 296-XXX-XXX Violation of chapter**

(1) A violation of this chapter occurs when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

**WAC 296-XXX-XXX Complaint by employee - investigation by director**

(1) (a) An employee or applicant may file a complaint with the department alleging a violation under chapter 49.58 RCW or this chapter within four years of the date of the alleged violation.

(b) Former employees may file a complaint with the department for alleged violations that occurred while working for the employer, even if the employee is not currently employed by the employer.

(2) Upon complaint by an employee or applicant, the director must investigate to determine if there has been compliance with chapter 49.58 RCW and this chapter. The director, upon complaint, may also initiate an investigation on behalf of one or more employees or applicants for a violation of chapter 49.58 RCW and this chapter. The director may require the testimony of witnesses and production of documents as part of an investigation.

(3) The director or their designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as they may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter.

(4) An employer who fails to allow adequate inspection of records in an inspection by the department within a reasonable time period may not use such records in any appeal to challenge the correctness of any citation and notice issued by the department.

(5) The department may request an employer perform a self-audit of any records relating to chapter 49.58 RCW and associated rules which must be provided within a reasonable time. Reasonable timelines will be specified in the self-audit request. The department must determine reasonable time based on the number of affected employees and the period of time covered by the self-audit. The records examined by the employer in order to perform the self-audit must be made available to the department upon request.

(6) The department may conduct a consolidated investigation for any alleged violation identified under chapter 49.58 RCW, or associated rules, when there are common questions of law or fact. If the department consolidates such matters into a single investigation, it will provide notice to the employer.

**WAC 296-XXX-XXX Resolving the violation**

(1) (a) If, following an investigation, the director determines that a violation occurred, the director shall attempt to resolve the violation by conference and conciliation.

(b) If no agreement is reached to resolve the violation, the director may issue a citation and notice of assessment and order:

(i) The employer to pay to the complainant actual damages

(ii) The employer to pay to the complainant statutory damages equal to the actual damages or five thousand dollars, whichever is greater;

(iii) Interest of one percent per month on all compensation owed until the balance is paid in full;

(iv) Payment to the department of the costs of investigation and enforcement; and

(v) Any other appropriate relief, including but not limited to:

(A) Ordering an employer to correct, revise, or update a policy or practice.

(B) Order the employer to restore the employee to the position of employment held by the employee when the retaliation occurred, or restore the employee to an equivalent position with equivalent employment hours, work schedule, benefits, pay, and other terms and conditions of employment for violations of WAC 296-XXX-XXX (Employer Retaliation Prohibited).

(2) Any wages and interest owed must be calculated from the last violation before the complaint.

(3) In addition to the citation and notice of assessment, the director may order payment to the department of a civil penalty. For



purposes of a civil penalty for violation of RCW 49.58.020, 49.58.050, 49.58.100, 49.58.110, and related rules, the violation as to each affected employee constitutes a separate violation.

(i) For a first violation, the civil penalty may not exceed five hundred dollars.

(ii) For a repeat violation, the civil penalty may not exceed one thousand dollars or ten percent of the damages, whichever is greater.

(4) For enforcement actions under this section, if any person fails to pay an assessment under this chapter, or under any rule under this chapter, after it has become a final and unappealable order, or after the court has entered final judgment in favor of the agency, the director may initiate collection procedures in accordance with the collection procedures under RCW 49.48.086.

(5) The department must deposit civil penalties paid under this section in the supplemental pension fund established under RCW 51.44.033.

#### **WAC 296-XXX-XXX Appeals**

(1) An appeal from the director's determination received within 30 days may be taken in accordance with chapter 34.05 RCW. An employee who prevails is entitled to costs and reasonable attorneys' fees from the employer.