

Synopsis of Original Bill

The Senate Corporations and Transportation Committee substitute for Senate Bill 402 enacts the Fair Pay for Women Act (the FPWA or the Act), which prohibits wage discrimination based on sex by employers who employ four or more employees when performance requires equal skill, effort and responsibility and performance under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system or a system that measures earnings by quantity or quality of production. An agreement between an employer and an employee for a specific wage in violation of the FPWA shall not prevent the employee from raising a claim based on a violation of the Act. The Act also prohibits an employer from reducing the wage of an employee to comply with the Act.

An employee claiming to be aggrieved by an unlawful discriminatory practice in violation of the FPWA may either: 1) maintain a court action brought within 6 years from the date of the discovery of the violation to recover damages and injunctive relief on behalf of the employee and other employees similarly situated; or 2) seek relief under the Human Rights Act (HRA), pursuant to Sections 28-1-10 through 28-1-13 NMSA 1978 (which sets out a grievance procedure, hearing procedures, steps for enforcement and steps for appeal). In addition to any judgment awarded in a proceeding under the Act, the court shall direct costs of the action and reasonable attorney fees be paid by the employer. A court also may order injunctive relief, including requiring an employer to post a notice describing violations by the court or a copy of a cease and desist order applicable to the employer. An employee does not need to exhaust administrative remedies before filing a court action, but initiation of an administrative process under the HRA tolls the statute of limitations for initiating a claim under the FPWA.

The Act prohibits retaliation by an employer against a person asserting or assisting another person in asserting a claim or right pursuant to the FPWA or for informing another person about employment rights or other rights provided by law.

Under the FPWA, an employer who violates the Act shall be liable to the employee for damages and equitable relief, including employment, reinstatement and promotion. Damages are to be calculated on the basis of the affected employee's unpaid wages, limited to 6 years prior to the date of the last violation of the Act, as well as damages from retaliation, all other actual damages, treble damages, and punitive damages. A court may, in its sound discretion, not award treble damages or award any amount thereof not to exceed the amounts specified in Section 6 if the employer satisfies the court that the act or omission giving rise to the lawsuit was in good faith and the employer had reasonable grounds to believe that that act or omission did not violate the FPWA.

FISCAL IMPLICATIONS

The Risk Management Division (RMD) of the General Services Department (GSD) advises in a related analysis (of this bill's duplicate, HB 216/HLCS) that if this Act applies to the State and its public entities and employees, there will be a significant fiscal impact on the Public Liability Fund to both defend and pay any judgments awarded by the Human Rights Commission (HRC) and/or a district court, especially in light of the potential for awards of attorney fees, treble damages, and punitive damages against an employer. The RMD states that it is impossible to determine what those amounts would be or how to quantify them at this time.

Additionally, the Attorney General’s Office (AGO) reports in a related analysis (of this bill’s duplicate, HB 216/HLCS) that it currently assigns two attorneys to provide counsel to the HRC and one attorney to provide counsel to the Human Rights Bureau (HRB). Enactment of this bill may require additional expenditure of resources, depending on the volume of cases brought to the HRB under the FPWA. The Administrative Office of the Courts (AOC) reports in a related analysis (of this bill’s duplicate, HB 216/HLCS) that the fiscal impact on the judiciary would be proportional to the enforcement of the FPWA and actions and appeals brought under it. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. The Workforce Solutions Department (WSD) advises in a related analysis (of this bill’s duplicate, HB 216/HLCS as amended) that because the HRB already handles sex discrimination cases, including fair compensation claims, the FPWA will not fiscally impact its operations.

SIGNIFICANT ISSUES

This bill may have financial impacts on the State and should be referred to the Senate Finance Committee.

The WSD in its related analysis first notes that wage discrimination based on sex is already covered by the HRA and explains:

The Department’s HRB is a neutral agency that enforces the HRA. The HRB accepts and investigates claims of discrimination based on race, color, national origin, religion, ancestry, sex, age, physical and mental handicap, serious medical condition, spousal affiliation, sexual orientation and gender identity in the areas of employment, housing, credit or public accommodation. As the HRB currently handles sex discrimination claims, the bill does not change the work already being performed by the HRB.

But the FPWA differs from the HRA in several ways. Most notably, the FPWA provides for both treble and punitive damages, which are not available under the HRA. The New Mexico Corrections Department (NMCD) and the WSD in their analyses of a related bill (HB 216/HLCS as amended, which duplicates this bill) share the concern that, since the State and its agencies are employers under the Act, in the event of a finding of wage discrimination under the FPWA, they might be liable for treble damages or a punitive damage award, unlike any award under the Tort Claims Act (which expressly bars punitive damages) or Title VII. However, the RMD points out the FPWA does not contain a specific waiver of immunity for damage claims against the State, and the FPWA does not state whether the punitive damage provisions are applicable to the State.

Another significant difference between the FPWA and the HRA is the time in which an action or grievance may be brought. The period for filing a complaint under the FPWA is six years from the date of discovery of the alleged violation; under the HRA it is 300 days after the alleged act was committed. The substitute bill also allows back wages to be recovered up to six years prior to the date of the last violation of the FPWA, either in an action in district court or it appears in a proceeding under the HRA process as well.

The State Personnel Office (SPO) in its related analysis comments:

the most significant difference between actions brought under the substitute bill and other civil actions is the apparent shifting of the burden of proof. Section 3(A) prohibits discrimination based on sex. The section goes on to define “discrimination” as paying an employee at a rate less than members of the opposite sex for equal work under similar conditions requiring equal skill, effort, and responsibility. There are three exceptions where pay differential is acceptable, pursuant to: 1) a seniority system; 2) a merit system; or 3) a system that measures earnings by quantity or quality of production. By defining “discrimination” the way it does, the substitute bill requires only the showing of a pay differential in order to bring suit. The employer would then be required to prove one of the three exceptions, rather than a plaintiff having to prove discriminatory intent. By shifting this burden, bringing a lawsuit would be easier and the cost of defending could go up, which could result in an increase in “strike suits”. The purpose of “strike suits” is to obtain a settlement prior to trial that is less than the cost of defending the case. This would result in a negative fiscal impact to the state.

DUPLICATION

SB 402/SCORCS duplicates HB 216/HLCS as amended.

TECHNICAL ISSUES

Page 3, line 24 allows “costs of the action” to be awarded to a prevailing plaintiff, but page 4, lines 2-3 excuses an employee from paying filing fees or other court costs, so it is unclear what other costs could be awarded.

Page 5, lines 12 and 13 authorizes a court to award any amount of treble damages “not to exceed the amount specified in this section”: it may clarify legislative intent to better define what that amount is.

OTHER SUBSTANTIVE ISSUES

This substitute bill allows recovery of back wages for a period of six years prior to the date of the last violation of FPWA. As to that recovery period, the rationale behind and provisions governing filing claims wage discrimination under recent federal law may be of interest. In enacting The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, S. 181 (the LLFPA), the U.S. Congress found that the limitation imposed by the U.S. Supreme Court in 2007 on the filing of discriminatory compensation claims under Title VII of the Civil Rights Act—that the time for filing an equal-pay lawsuit begins on the date that the employer makes the initial discriminatory wage decision rather than the date of the most recent paycheck—“ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.” As a result, the LLFPA specifies that an unlawful employment practice occurs each time wages, benefits or other compensation is paid, and allows recovery of back pay for up to two years preceding the filing of a charge alleging wage discrimination.

The SPO in its related analysis of HB 216/HLCS advises that it uses the Hay Guide-Chart Profile Method of Job Evaluation (Hay), which is based on valuing work content on three non-gender

related compensable factors common to all jobs: knowledge, problem-solving and accountability. An advantage of using Hay is that it places an emphasis on job content and minimizes any negative impact on employees in a protected class. The SPO advises that the Hay system has been upheld in the nation's highest courts, which have stressed its impartiality on workers in protected classes.

MD:GAC/blm:svb