



# INTERNATIONAL LAWYERS NETWORK



## SEXUAL HARASSMENT IN THE WORKPLACE



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## SEXUAL HARASSMENT IN THE WORKPLACE: WHAT US: WASHINGTON STATE COMPANIES NEED TO KNOW



Below are summaries of recent laws adopted in Washington State that could be interpreted as relating to the #MeToo movement. Some of them directly address sexual harassment and sexual assault; others are directed at providing a more equitable workplace. Washington's legislature is currently in session; this paper does not address any laws that may be adopted in the current session.

### [RCW 49.44.210 \(2018\) regarding nondisclosure agreements that prevent disclosure of sexual assault or sexual harassment, with an exception for settlement agreements](#)

This new statute has three primary components:

First, it prohibits employers, as a condition of employment, from requiring an employee "to sign a nondisclosure agreement, waiver, or other document that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises."

Second, it provides that "any nondisclosure agreement, waiver, or other document signed by an employee as a condition of employment that has the purpose or effect of preventing the employee from disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises is against public policy and is void and unenforceable."

Third, it states that it "is an unfair practice under chapter 49.60 RCW for an employer to discharge or otherwise retaliate against an employee for disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises."

However, RCW 49.44.210 does not prohibit settlement agreements between an employee or former employee alleging sexual harassment and an employer from containing confidentiality provisions. It also does not apply to human resources staff, supervisors, or managers when they are expected to maintain confidentiality as part of their assigned job duties. In addition, it does not include individuals who are notified and asked to participate in an open and ongoing investigation into alleged sexual harassment and requested to maintain confidentiality during the pendency of that investigation.

When applying RCW 49.44.210, keep in mind that federal law is unclear on confidentiality as it relates to workplace investigations of sexual harassment claims. The Equal Employment Opportunity Commission (EEOC) recommends that employers provide "[a]ssurance that the employer will protect the confidentiality of harassment complaints to the extent possible."<sup>i</sup> However, the National Labor Relations Board (NLRB) does not allow employers to have a blanket prohibition against employees discussing sexual harassment investigations.<sup>ii</sup> Also, be aware that federal tax law provides a disincentive



to employers who include a confidentiality provision in a settlement or payment related to sexual harassment or sexual abuse, as such payments are not deductible as business expenses.<sup>iii</sup>

[RCW 49.44.085 \(2018\) prohibiting employers from requiring employees to waive their right to publicly pursue a lawsuit or complaint with an agency](#)

This new statute states as follows:

**RCW 49.44.085**

**Provision requiring an employee to waive right to publicly pursue cause of action is unenforceable.**

A provision of an employment contract or agreement is against public policy and is void and unenforceable if it requires an employee to waive the employee's right to publicly pursue a cause of action arising under chapter 49.60 RCW or federal antidiscrimination laws or to publicly file a complaint with the appropriate state or federal agencies, or if it requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential.

RCW 49.44.085 does not expressly address settlement agreements. Presumably, it was not intended to prevent an employer from entering into a settlement agreement with an employee after a claim has been made that prohibits the employee from filing suit for damages arising from existing claims. However, there is no court guidance on this issue yet.

[SB 6471 \(2018\) regarding development of a model sexual harassment policy and best practices](#)

This bill required the Human Rights Commission (HRC) to convene a work group to develop model sexual harassment policies and best practices and post it on the HRC website by January 1, 2019. The work group produced three documents that are posted on the HRC website:<sup>iv</sup> “Introduction and Best Practices,” “Sexual Harassment Model Policy,” and “Sexual Harassment Model Procedures.” They are not mandatory, but they are available for employer use. Additionally, as noted in the Introduction, “The adoption of these Practices, Policy, and Procedures does not create an affirmative defense or safe harbor to a complaint of sexual harassment.”

[RCW 49.60.510 \(2018\) regarding disclosure of medical and psychiatric records](#)

RCW 49.60.510 protects claimants who seek noneconomic damages arising from sexual harassment (and other forms of discrimination) from having to disclose their medical or psychiatric records unless the claimant:

- (a) Alleges a specific diagnosable physical or psychiatric injury as a proximate result of the respondents' conduct;
- (b) Relies on the records or testimony of a health care provider or expert witness to seek general damages; or



(c) Alleges failure to accommodate a disability or alleges discrimination on the basis of a disability.

Any such waiver is limited to health care records and communication between a claimant and his or her provider or providers:

(a) Created or occurring in the period beginning two years immediately preceding the first alleged unlawful act for which the claimant seeks damages and ending at the last date for which the claimant seeks damages, unless the court finds exceptional circumstances to order a longer period of time; and

(b) Relating specifically to the diagnosable injury, to the health care provider or providers on which the claimant relies in the action, or to the disability specifically at issue in the allegation.

[HB 2661 \(2018\) protecting survivors of domestic violence, sexual assault, and stalking from employment discrimination](#)

This bill amended several existing state statutes (RCW 49.76.010, 49.76.040, 49.76.060, 49.76.100, and 49.76.120) and it added a new section to chapter 49.76 RCW. The key substantive additions are in RCW 49.76.115:

**49.76.115**

**Employer conduct—Actual or perceived victim of domestic violence, sexual assault, or stalking.**

An employer may not:

- (1) Refuse to hire an otherwise qualified individual because the individual is an actual or perceived victim of domestic violence, sexual assault, or stalking;
- (2) Discharge, threaten to discharge, demote, suspend or in any manner discriminate or retaliate against an individual with regard to promotion, compensation, or other terms, conditions, or privileges of employment because the individual is an actual or perceived victim of domestic violence, sexual assault, or stalking;
- (3) Refuse to make a reasonable safety accommodation requested by an individual who is a victim of domestic violence, sexual assault, or stalking, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer. For the purposes of this section, an "undue hardship" means an action requiring significant difficulty or expense. A reasonable safety accommodation may include, but is not limited to, a transfer, reassignment, modified schedule, changed work telephone number, changed work email address, changed workstation, installed lock, implemented safety procedure, or any other adjustment to a job structure, workplace facility, or work requirement in response to actual or threatened domestic violence, sexual assault, or stalking.



Another new section, codified in RCW 49.76.120, prohibits employers from retaliation for exercising their rights or assisting others in exercising their rights, or filing or communicating to the employer an intent to file a complaint.

### [SHHB 1506 \(2018\) regarding gender wage and advancement parity](#)

This bill amended RCW 49.12.175, added a new chapter to Title 49 RCW, recodified RCW 49.12.175, and prescribed penalties. RCW 49.12.175 already prohibited paying women less than men who were similarly employed. SHHB 1506, which was codified as chapter 49.58 RCW, broadened prior law to apply to discrimination in compensation based on gender and defined “similarly employed.” See RCW 49.58.020. SHHB 1506 also added a section prohibiting employers from limiting or depriving an employee of career advancement opportunities that would otherwise be available unless the differential in career advancement was based on a bona fide job-related factor or factors, which are defined in the new law. See RCW 49.58.030. In addition, RCW 49.58.030 prohibits employers from the following conduct:

- (1) An employer may not:
  - (a) Require nondisclosure by an employee of his or her 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;
  - (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 his or her 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.



SHHB 1506 also contains a prohibition against retaliation and includes enforcement mechanisms, which are codified in chapter 49.58 RCW.

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<sup>i</sup> EEOC's *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 1999); see also *Report of the Co-Chairs of the Select Task Force on Harassment in the Workplace* (June 2016); and EEOC's *Proposed Guidance on Unlawful Harassment* (January 2017).

<sup>ii</sup> *Banner Health System d/b/a Banner Estrella Medical Center*, 362 NLRB No. 137 (June 26, 2015); *affirmed in part and reversed in part, Banner Health System v. NLRB*, 851 F.3d 35 (2017). It may be possible under *Banner Health* to require confidentiality during an investigation if the employer makes a case-by-case determination that there is a legitimate business justification for it based on the individual features of a sensitive investigation. 851 F.3d at 44.

<sup>iii</sup> See Section 13307 of the Tax Cuts and Jobs Act of 2017 (TCJA).

<sup>iv</sup> <https://www.hum.wa.gov/publications>.