



2019 ASSEMBLY BILL 397

September 5, 2019 - Introduced by Representatives SINICKI, ANDERSON, BILLINGS, BOWEN, BROSTOFF, CABRERA, CONSIDINE, CROWLEY, DOYLE, EMERSON, FIELDS, GOYKE, GRUSZYNSKI, HAYWOOD, HEBL, HESSELBEIN, HINTZ, KOLSTE, MCGUIRE, B. MEYERS, MILROY, L. MYERS, NEUBAUER, OHNSTAD, POPE, RIEMER, SARGENT, SHANKLAND, SPREITZER, STUBBS, STUCK, SUBECK, C. TAYLOR, VINING, VRUWINK and ZAMARRIPA, cosponsored by Senators HANSEN, WIRCH, L. TAYLOR, SMITH, SHILLING, SCHACHTNER, RISSE, RINGHAND, MILLER, LARSON, JOHNSON, ERPENBACH and CARPENTER. Referred to Committee on Labor and Integrated Employment.

AUTHORS SUBJECT TO CHANGE

1 **AN ACT to repeal** 103.36; **to amend** 111.322 (2m) (a), 111.322 (2m) (b) and 814.04
2 (intro.); and **to create** 103.135 of the statutes; **relating to:** prohibiting an
3 employer from relying on information about a prospective employee's
4 compensation when making employment decisions or inquiring about a
5 prospective employee's compensation and from restricting an employee's right
6 to disclose compensation information and allowing actions in circuit court and
7 providing a penalty.

Analysis by the Legislative Reference Bureau

This bill prohibits certain employer conduct related to compensation information of current and prospective employees.

The bill prohibits an employer from doing any of the following with respect to a prospective employee:

1. Soliciting information about the prospective employee's current or prior compensation before making an offer of employment. The bill also repeals a provision that gives employers the right to solicit such information.

2. Relying on information regarding the prospective employee's current or prior compensation when determining whether to make an offer of employment, or setting compensation when making an offer of employment to that prospective employee.

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3. Requiring that the prospective employee's current or prior compensation meet certain criteria in order for the prospective employee to be considered for employment.

4. Refusing to hire the prospective employee for exercising his or her rights relating to compensation information.

The bill also prohibits an employer from discharging or discriminating against a current employee for disclosing the details of the employee's compensation, discussing the compensation of other employees, asking other employees for details regarding their compensation, or taking certain actions to enforce an employee's rights under the bill.

The bill requires employers to post notices, where notices to employees are customarily posted and on any electronic job posting, regarding employees' and prospective employees' rights under the bill and provides a penalty for an employer's failure to do so.

The bill allows the Department of Workforce Development or an individual who is alleged or was found to have been discriminated against on the basis of compensation information to bring an action in circuit court in addition to or in lieu of filing an administrative complaint. The bill does not allow such an action for damages to be brought against a local governmental unit or against an employer that employs fewer than 15 individuals.

Under the bill, if the circuit court finds that a defendant has committed an act of discrimination, the circuit court may award back pay and any other relief that could have been awarded in an administrative proceeding. In addition, the circuit court must order the defendant to pay to the individual discriminated against compensatory and punitive damages that the circuit court finds appropriate, except that the total amount of damage awarded for future economic losses and for pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, and other noneconomic losses and punitive damages is subject to the following limitations:

1. If the defendant employs 100 or fewer employees, no more than \$50,000.
2. If the defendant employs more than 100 but fewer than 201 employees, no more than \$100,000.
3. If the defendant employs more than 200 but fewer than 501 employees, no more than \$200,000.
4. If the defendant employs more than 500 employees, no more than \$300,000.

The bill requires DWD to annually revise these amounts based upon the change in the consumer price index in the previous year, if any positive change has occurred.

Under current fair employment law, an individual who alleges discrimination in employment may file a complaint with DWD seeking action that will effectuate the purpose of the fair employment law, including reinstating the employee, providing back pay, and paying costs and attorney fees.

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For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 103.135 of the statutes is created to read:

2 **103.135 Compensation information of employees and prospective**
3 **employees. (1)** UNLAWFUL EMPLOYER CONDUCT RELATED TO PROSPECTIVE EMPLOYEE
4 COMPENSATION INFORMATION. (a) No employer may directly or indirectly do any of the
5 following:

6 1. Subject to par. (b), solicit from a prospective employee or a prospective
7 employee's current or former employer information about the prospective employee's
8 current or prior compensation before making an offer of employment.

9 2. Require that a prospective employee's current or prior compensation meet
10 certain criteria in order for the prospective employee to be considered for
11 employment.

12 3. Refuse to hire or employ or otherwise discriminate against a prospective
13 employee in compensation or in the terms, conditions, or privileges of employment
14 for opposing a practice prohibited under this paragraph, filing or indicating an intent
15 to file a complaint or otherwise attempting to enforce any right under this paragraph,
16 or testifying, assisting, or participating in any manner in any investigation, action,
17 or proceeding to enforce any right under this paragraph.

18 4. Subject to par. (b), notwithstanding the provisions of subch. II of ch. 230
19 regarding state civil service, rely on information obtained from any source regarding
20 a prospective employee's current or prior compensation when determining whether

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1 to make an offer of employment, or setting compensation when making an offer of
2 employment to that prospective employee.

3 (b) After an employer has offered employment to a prospective employee and
4 the details of compensation have been agreed upon, the employer may obtain the
5 prospective employee's written consent for the employer to solicit information about,
6 or take action to confirm, the prospective employee's current or prior compensation.

7 **(2) DISCLOSURE OF COMPENSATION INFORMATION BY EMPLOYEES.** (a) An employee
8 may disclose the details of the employee's compensation to anyone and, subject to par.
9 (d), may discuss the compensation of other employees of the same employer and may
10 ask other employees of the same employer for details regarding their compensation.

11 (b) Except as provided in par. (d), no employer may interfere with, restrain, or
12 deny the exercise of the right of an employee to disclose, discuss, or inquire about
13 compensation as provided in par. (a).

14 (c) An employer may not discharge or discriminate against an employee in
15 promotion, in compensation, or in the terms, conditions, or privileges of employment
16 for disclosing, discussing, or inquiring about compensation as provided in par. (a),
17 opposing a practice prohibited under par. (b), filing or indicating an intent to file a
18 complaint or otherwise attempting to enforce any right under par. (a), or testifying,
19 assisting, or participating in any manner in any investigation, action, or proceeding
20 to enforce any right under par. (a).

21 (d) Subject to s. 19.35, an employer may prohibit a human resources or payroll
22 employee, a supervisor, or any other employee whose job responsibilities require or
23 allow the employee access to other employees' compensation information from
24 disclosing information about any other employee's compensation without that
25 employee's prior written consent.

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1 **(3) ENFORCEMENT.** Any employee or prospective employee who is refused
2 employment, terminated, discharged, or otherwise discriminated against in
3 violation of sub. (1) (a) or (2) (a) to (c) may do any of the following:

4 (a) File a complaint with the department, and the department shall process the
5 complaint in the same manner that employment discrimination complaints are
6 processed under s. 111.39. If the department finds that a violation has occurred, the
7 department may order the employer to take action to remedy the violation, including
8 reinstating the employee, providing compensation in lieu of reinstatement,
9 providing back pay accrued not more than 2 years before the complaint was filed, and
10 paying reasonable actual costs and, notwithstanding s. 814.04 (1), reasonable
11 attorney fees to the complainant.

12 (b) Bring an action in circuit court under sub. (4).

13 **(4) CIVIL ACTION.** (a) Except as provided in this paragraph, the department or
14 an individual alleged or found to have been discriminated against under sub. (1) or
15 (2) may bring an action in circuit court requesting the relief described in par. (d)
16 against an employer that is alleged or found to have engaged in that discrimination.
17 The department or an individual alleged or found to have been discriminated against
18 may not bring an action under this paragraph against a local governmental unit, as
19 defined in s. 19.42 (7u), or against an employer that employs fewer than 15
20 individuals for each working day in each of 20 or more calendar weeks in the current
21 or preceding year.

22 (b) If a petition for judicial review of the findings and order of the department
23 concerning the same violation as the violation giving rise to the action under par. (a)
24 is filed, the circuit court shall consolidate the proceeding for judicial review and the
25 action under par. (a).

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1 (c) An individual alleged or found to have been discriminated against under
2 sub. (1) or (2) is not required to file a complaint under sub. (3) (a) or seek review under
3 s. 111.395 in order for the department or the individual to bring an action under par.
4 (a).

5 (d) Subject to pars. (e) and (f), in an action under par. (a), if the circuit court finds
6 that discrimination has occurred, or if such a finding has been made by an examiner
7 and not been further appealed, the circuit court may order any relief that an
8 examiner would be empowered to order under s. 111.39 (4) (c) after a hearing on a
9 complaint filed under s. 111.39. In addition, the circuit court shall order the
10 defendant to pay to the individual discriminated against any other compensatory
11 damages, and punitive damages under s. 895.043 that the circuit court or jury finds
12 appropriate, plus reasonable costs and attorney fees incurred in the action. If any
13 relief was ordered under sub. (3) (a) or s. 111.395, the circuit court shall specify
14 whether the relief ordered under this paragraph is in addition to or replaces the relief
15 ordered under sub. (3) (a) or s. 111.395. The sum of the amount of compensatory
16 damages for future economic losses and for pain and suffering, emotional distress,
17 mental anguish, loss of enjoyment of life, and other noneconomic losses and the
18 amount of punitive damages that a circuit court may order may not exceed the
19 following:

20 1. In the case of a defendant that employs 100 or fewer employees for each
21 working day in each of 20 or more calendar weeks in the current or preceding year,
22 \$50,000.

23 2. In the case of a defendant that employs more than 100 but fewer than 201
24 employees for each working day in each of 20 or more calendar weeks in the current
25 or preceding year, \$100,000.

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1 3. In the case of a defendant that employs more than 200 but fewer than 501
2 employees for each working day in each of 20 or more calendar weeks in the current
3 or preceding year, \$200,000.

4 4. In the case of a defendant that employs more than 500 employees for each
5 working day in each of 20 or more calendar weeks in the current or preceding year,
6 \$300,000.

7 (e) If the circuit court orders a payment under par. (a) because of a violation of
8 sub. (1) or (2) by an individual employed by an employer, the employer of that
9 individual is liable for the payment.

10 (f) 1. In this paragraph, "consumer price index" means the average of the
11 consumer price index for all urban consumers, U.S. city average, as determined by
12 the bureau of labor statistics of the federal department of labor.

13 2. Except as provided in this subdivision, beginning on July 1, 2021, and on
14 each July 1 after that, the department shall adjust the amounts specified in par. (a)
15 1., 2., 3., and 4. by calculating the percentage difference between the consumer price
16 index for the 12-month period ending on December 31 of the preceding year and the
17 consumer price index for the 12-month period ending on December 31 of the year
18 before the preceding year and adjusting those amounts by that percentage
19 difference. The department shall publish the adjusted amounts calculated under
20 this subdivision in the Wisconsin Administrative Register, and the adjusted amounts
21 shall apply to actions commenced under sub. (1) (a) beginning on July 1 of the year
22 of publication. This subdivision does not apply if the consumer price index for the
23 12-month period ending on December 31 of the preceding year did not increase over
24 the consumer price index for the 12-month period ending on December 31 of the year
25 before the preceding year.

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1 **(5) NOTICE POSTED.** (a) Each employer shall provide notice to employees and
2 prospective employees of their rights under this section by doing all of the following:

3 1. Posting, in one or more conspicuous places where notices to employees are
4 customarily posted, a notice in a form approved by the department setting forth
5 employees' and prospective employees' rights under this section.

6 2. Including, on each listing for a job vacancy or other employment opportunity
7 that is advertised by electronic mail, posting on an Internet site, or other electronic
8 means, a notice that includes all of the following information:

9 a. A statement that the employer is prohibited from relying on a prospective
10 employee's current or former compensation when determining whether to make an
11 offer of employment or setting compensation or when making an offer of
12 employment.

13 b. A statement that the employer is prohibited from asking about a prospective
14 employee's compensation until after the employer has offered the prospective
15 employee employment and they have agreed upon the details of compensation.

16 c. A statement that the employer is prohibited from requiring that a
17 prospective employee's current or prior compensation meet certain criteria in order
18 for the prospective employee to be considered for employment.

19 d. Information, or a hyperlink to information, regarding prohibited bases of
20 discrimination under subch. II of ch. 111.

21 (b) Any employer that violates par. (a) shall forfeit not more than \$100 for each
22 offense.

23 **SECTION 2.** 103.36 of the statutes is repealed.

24 **SECTION 3.** 111.322 (2m) (a) of the statutes is amended to read:

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1 111.322 (2m) (a) The individual files a complaint or attempts to enforce any
2 right under s. 103.02, 103.10, 103.11, 103.13, 103.135, 103.28, 103.32, 103.34,
3 103.455, 104.12, 109.03, 109.07, 109.075, 146.997, or 995.55, or ss. 101.58 to 101.599
4 or 103.64 to 103.82.

5 **SECTION 4.** 111.322 (2m) (b) of the statutes is amended to read:

6 111.322 (2m) (b) The individual testifies or assists in any action or proceeding
7 held under or to enforce any right under s. 103.02, 103.10, 103.11, 103.13, 103.135,
8 103.28, 103.32, 103.34, 103.455, 104.12, 109.03, 109.07, 109.075, 146.997, or 995.55,
9 or ss. 101.58 to 101.599 or 103.64 to 103.82.

10 **SECTION 5.** 814.04 (intro.) of the statutes is amended to read:

11 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.195 (5m)
12 (b), 100.30 (5m), 103.135 (4) (d), 106.50 (6) (i) and (6m) (a), 115.80 (9), 767.553 (4) (d),
13 769.313, 802.05, 814.245, 895.035 (4), 895.044, 895.443 (3), 895.444 (2), 895.445 (3),
14 895.446 (3), 895.506, 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b), and 995.10 (3),
15 when allowed costs shall be as follows:

16 **SECTION 6. Initial applicability.**

17 (1) EMPLOYMENT DISCRIMINATION DAMAGES. This act first applies to acts of
18 employment discrimination under s. 103.135 committed on the effective date of this
19 subsection.

20 (2) COLLECTIVE BARGAINING AGREEMENT. This act first applies to an employee
21 who is affected by a collective bargaining agreement that contains provisions
22 inconsistent with this act on the day on which the collective bargaining agreement
23 expires or is extended, modified, or renewed, whichever occurs first.

24 **SECTION 7. Effective date.**

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SECTION 7

1 (1) This act takes effect on the first day of the 6th month beginning after
2 publication.

3 (END)