

**MEMORANDUM**

January 13, 2015

TO: Health and Human Services Committee

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Worksession:** Bill 51-14, Discriminatory Employment Practices – Retaliation for Wage Disclosure – Prohibited

Expended Attendees:

James Stowe, Office of Human Relations Director  
David Dise, Department of General Services (DGS) Director  
Grace Denno, DGS

Bill 51-14, Discriminatory Employment Practices – Retaliation for Wage Disclosure - Prohibited, sponsored by then Vice President Leventhal and Councilmembers Navarro, Elrich, Riemer, and Berliner, was introduced on October 28, 2014. The Council held a public hearing on December 2, 2014.

**Background**

Women continue to earn less pay than men for similar work in the workplace. Although, equal pay for equal work is mandated by Federal, State, and County law, an employee's ability to assert a right to equal pay may be impeded by lack of information. In certain circumstances, an employee may suffer retaliation by an employer for discussing the employee's salary or the salary of another employee.

Bill 51-14 would prohibit an employer from retaliating against an employee for disclosing the wages of the employee or another employee. It would also establish certain exceptions to the prohibition against retaliation for wage disclosures. For example, an employer would still be permitted to discipline a human resources employee who has access to the wages of other employees as part of his or her position for disclosing this information if it was not done for an appropriate business purpose. Bill 51-14 would add this prohibition to the County employment discrimination laws. The County Office of Human Rights would enforce this provision as it does other employment discrimination laws.

## **Public Hearing**

Both speakers at the public hearing, James Stowe, Director of the County Office of Human Rights, speaking on behalf of the Executive (©15) and Mike Mage, speaking for the Montgomery County Chapter of the ACLU of Maryland (©16) supported the Bill as an important step to ending pay discrimination in Montgomery County.

### **Issues**

#### **1. Are there similar laws in other jurisdictions?**

Although the Civil Rights Act of 1964, as amended, and the Equal Pay Act, both prohibit wage discrimination on the basis of race, color, sex, national origin, and religion, these Federal laws do not expressly prohibit retaliation against an employee who discloses wage information. Recognizing this gap in Federal law, President Obama issued Executive Order 13665 on April 8, 2014, prohibiting a Federal contractor from retaliating against an employee who has “inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.” President Obama directed the Department of Labor (DOL) to issue regulations implementing this Executive Order.

On September 14, 2014, DOL issued proposed regulations implementing this Executive Order. DOL explained the purpose of this regulation as follows:

While research has found that many factors contribute to the wage gap, such as occupational preferences, pay discrimination remains a significant problem, especially for the working poor and the middle class. Among the possible contributing factors is the prevalence of workplace prohibitions against discussing compensation. Strictures against revealing compensation can conceal compensation disparities among employees, making it impossible for an employee to know he or she is being underpaid compared to his or her peers. If compensation remains hidden, employees who are being paid less because of their gender or race will remain unaware of the problem. In the absence of this knowledge, these employees will be unable to exercise their rights by filing a discrimination complaint pursuant to the Executive Order. (DOL Fact Sheet at ©17-19)

Vermont enacted a wage disclosure law in 2005 (©20-23) and New Jersey did the same in 2013 (©24-25).

#### **2. What is the fiscal and economic impact of Bill 51-14?**

The OMB Fiscal and Economic Impact Statement concludes that the law can be enforced by the Office of Human Rights with existing staff. Although the Finance Department was unable to estimate the economic impact of the Bill, an additional tool to eliminate pay discrimination in the County would be a positive development for the local economy, if successful.

### 3. Should Bill 51-14 be enacted?

The substance of Bill 51-14 is similar to the prohibition against retaliation for wage disclosure contained in Bill 29-14. However, Bill 51-14 adds this prohibition to the County's anti-discrimination laws and would therefore apply to any employer who employs one or more persons in the County. Bill 29-14 would limit the prohibition to an employer who obtains a service contract with the County. If Bill 51-14 is enacted, it would cover all County service contractors.<sup>1</sup>

Equal pay for equal work is universally accepted today as good policy. Bill 51-14 would help eliminate unlawful wage discrimination by preventing an employer from enforcing a wage secrecy rule in the workplace. If an employee has access to the wages paid to other employees, it will be much more difficult for an employer to practice unlawful wage discrimination. While Bill 51-14 is unlikely to eliminate unlawful wage discrimination in the County, it is likely to help. **Council staff recommendation:** enact Bill 51-14 as introduced.

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<sup>1</sup> Bill 29-14 would also add reporting requirements for County service contractors.

Bill No. 51-14  
Concerning: Discriminatory Employment Practices - Retaliation for Wage Disclosure - Prohibited  
Revised: October 28, 2014 Draft No. 3  
Introduced: October 28, 2014  
Expires: April 28, 2016  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: \_\_\_\_\_  
Ch. \_\_\_\_\_, Laws of Mont. Co. \_\_\_\_\_

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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By: Vice President Leventhal and Councilmembers Navarro, Elrich, Riemer, and Berliner

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**AN ACT** to:

- (1) prohibit an employer from retaliating against an employee for certain disclosures of wages of the employee or another employee;
- (2) establishing certain exceptions to the prohibition against retaliation for wage disclosures; and
- (3) generally amending the law concerning discriminatory employment practices.

By amending

Montgomery County Code  
Chapter 27, Human Rights and Civil Liberties  
Section 27-19

<b>Boldface</b>	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

*The County Council for Montgomery County, Maryland approves the following Act:*

1           **Sec. 1. Section 27-19 is amended as follows:**

2   **27-19. Discriminatory employment practices.**

3           (a) A person must not because of the race, color, religious creed, ancestry,  
4           national origin, age, sex, marital status, sexual orientation, gender  
5           identity, family responsibilities, or genetic status of any individual or  
6           disability of a qualified individual, or because of any reason that would  
7           not have been asserted but for the race, color, religious creed, ancestry,  
8           national origin, age, sex, marital status, disability, sexual orientation,  
9           gender identity, family responsibilities, or genetic status:

10          (1) For an employer:

11               (A) fail or refuse to hire, fail to accept the services of,  
12               discharge any individual, or otherwise discriminate against  
13               any individual with respect to compensation, terms,  
14               conditions, or privileges of employment; or

15               (B) limit, segregate, or classify employees in any way that  
16               would deprive or tend to affect adversely any individual's  
17               employment opportunities or status as an employee;

18          (2) For an employment agency: fail or refuse to refer for  
19               employment, assign job classifications to, classify or refer for  
20               employment, or otherwise discriminate against, any individual;

21          (3) For a labor organization:

22               (A) exclude or expel from its membership, or otherwise  
23               discriminate against any individual;

24               (B) limit, segregate, or classify its membership or classify, or  
25               fail or refuse to refer for employment, any individual in  
26               any way that would deprive or tend to deprive any  
27               individual of equal employment opportunities, or affect

28                                   adversely the individual's employment opportunities or  
 29                                   status as an employee or as an applicant for employment;  
 30                                   or

31                                   (C) cause or attempt to cause an employer to discriminate  
 32                                   against an individual in violation of this section; or

33                                   (4) For an employer, labor organization, or joint labor-management  
 34                                   committee controlling apprenticeship or other training programs:  
 35                                   discriminate against any individual in admission to, or  
 36                                   employment in, any program established to provide  
 37                                   apprenticeship or other training.

38                                   (b) The term "discriminate" in subsection (a) includes excluding, or  
 39                                   otherwise denying, equal job opportunity or benefits to, a qualified  
 40                                   individual because of the known disability of an individual with whom  
 41                                   the qualified individual is known to have a relationship or association.

42                                   (c) A person must not:

43                                   (1) retaliate against any person for:

44                                   (A) lawfully opposing any discriminatory practice prohibited  
 45                                   under this division; or

46                                   (B) filing a complaint, testifying, assisting, or participating in  
 47                                   any manner in an investigation, proceeding, or hearing  
 48                                   under this division;

49                                   (2) assist in, compel, or coerce any discriminatory practice prohibited  
 50                                   under this division;

51                                   (3) obstruct or prevent enforcement or compliance with this division;  
 52                                   or

53                                   (4) attempt directly or indirectly to commit any discriminatory  
 54                                   practice prohibited under this division.

55 (d) (1) Except as provided in paragraph 2, a person must not print,  
56 publish, or cause to be printed or published, any notice or  
57 advertisement indicating any preference, limitation, or  
58 specification based on race, color, religious creed, ancestry,  
59 national origin, age, sex, marital status, disability, sexual  
60 orientation, gender identity, family responsibilities, or genetic  
61 status relating to:

62 (A) employment by an employer;

63 (B) membership in or any classification or referral for  
64 employment by a labor organization; or

65 (C) any classification or referral for employment by an  
66 employment agency.

67 (2) This subsection does not prohibit a notice or advertisement from  
68 indicating a preference, limitation, or specification that is a bona  
69 fide occupational qualification for employment reasonably  
70 necessary to the normal operation of the particular business or  
71 enterprise.

72 (e) Notwithstanding any other provision of this division, it is not an  
73 unlawful employment practice:

74 (1) for an employer to hire and employ employees, for an  
75 employment agency to classify or refer for employment any  
76 individual, for a labor organization to classify its membership or  
77 to classify or refer for employment any individual, or for an  
78 employer, labor organization or joint labor-management  
79 committee controlling apprenticeship or other training or  
80 retraining programs, to admit or employ any individual in any  
81 program, on the basis of race, color, religious creed, age, sex,

82 marital status, national origin, ancestry, disability, sexual  
83 orientation, gender identity, family responsibilities, or genetic  
84 status based on a bona fide occupational qualification reasonably  
85 necessary to the normal operation of that particular business or  
86 enterprise;

87 (2) for a religious corporation, association, or society to hire and  
88 employ employees of a particular religion; or

89 (3) for an employer to deny employment on the basis of religious  
90 creed if the observance, practice, or belief cannot be reasonably  
91 accommodated by an employer without causing undue hardship  
92 on the conduct of the employer's business.

93 (f) Notwithstanding any other provision of this division, it is not unlawful  
94 for any employer to observe the terms of a bona fide seniority system or  
95 any bona fide employee benefit plan, such as a retirement, pension, or  
96 insurance plan, that is not a subterfuge to evade the provisions and  
97 purposes of this division, except that an employee benefit plan must not  
98 excuse an employer's failure to hire any qualified person.

99 (g) (1) [Reserved] Except as provided in paragraph (2), an employer  
100 must not discharge or in any other manner discriminate or  
101 retaliate against an employee because the employee:

102 (A) has inquired about, discussed, or disclosed the wages of  
103 the employee or another employee; or

104 (B) asserts any right under this subsection.

105 (2) The prohibition against retaliation for wage disclosure under  
106 paragraph (1) does not apply to an employee who has access to  
107 wage information of other employees or applicants as part of  
108 the employee's essential job functions and discloses the wages

109 of other employees or applicants to individuals who do not  
110 otherwise have access to the information, unless the disclosure  
111 is in response to:

112 (A) a formal complaint or charge;

113 (B) in furtherance of an investigation, proceeding, hearing, or  
114 action, including an investigation conducted by the  
115 contractor; or

116 (C) is consistent with the contractor's legal duty to furnish  
117 information.

118 (h) Notwithstanding any other provision of this division, a physician or  
119 other licensed medical professional may use genetic information about,  
120 and consider the genetic status of, an employee to evaluate whether a  
121 disease, medical condition, or disability that is currently manifest is  
122 preventing the employee from performing the essential functions of the  
123 position if:

124 (1) the genetic information is provided to the employee in writing as  
125 soon as the information is available;

126 (2) the genetic information is not disclosed to any other person  
127 (including the employer) without the employee's voluntary,  
128 written consent;

129 (3) the genetic information is maintained as a medical record  
130 separate from the employee's employment records; and

131 (4) no other law prohibits:

132 (A) the medical professional from collecting or using the  
133 genetic information, or

134 (B) the employer from considering the disease or disability, or  
135 the employee's genetic status.

- 136 (i) This division does not prohibit genetic monitoring of biological effects  
137 of toxic substances in the workplace if:
- 138 (1) the employee has provided prior voluntary, informed consent in  
139 writing to participate in the monitoring;
  - 140 (2) the employee receives the results of the monitoring, including  
141 both aggregate information and any information regarding the  
142 specific employee, as soon as results are available;
  - 143 (3) the monitoring complies with all other laws, such as regulations  
144 protecting human subjects in research; and
  - 145 (4) the employer (other than a licensed medical professional involved  
146 in the genetic monitoring) receives results of the monitoring only  
147 in aggregate terms that do not disclose the identity of any specific  
148 employee.
- 149 (j) An employer must not require an employee to obtain or reveal any  
150 genetic information that the employer is prohibited from considering  
151 under this division.
- 152 (k) An employer may require an employee to adhere to reasonable  
153 workplace appearance, grooming, and dress standards that are  
154 nondiscriminatory and not precluded by any provision of state or federal  
155 law. However, an employer must allow an employee to appear, groom,  
156 and dress consistent with the employer's gender identity.

157 *Approved:*

158

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Craig L. Rice, President, County Council

Date

## LEGISLATIVE REQUEST REPORT

Bill 51-14

*Discriminatory Employment Practices – Retaliation for Wage Disclosure - Prohibited*

**DESCRIPTION:** Bill 51-14 would prohibit an employer from retaliating against an employee for certain disclosures of wages of the employee or another employee. It would also establish certain exceptions to the prohibition against retaliation for wage disclosures.

**PROBLEM:** Women continue to earn less pay than men for similar work. Although, equal pay for equal work is mandated by Federal, State, and County law, an employee's ability to assert a right to equal pay may be impeded by lack of information. In certain circumstances, an employee may suffer retaliation by an employer for discussing the employee's salary or the salary of another employee.

**GOALS AND OBJECTIVES:** The goal of this Bill is to promote equal pay for equal work.

**COORDINATION:** County Attorney, Human Rights Office

**FISCAL IMPACT:** To be requested.

**ECONOMIC IMPACT:** To be requested.

**EVALUATION:** To be requested.

**EXPERIENCE ELSEWHERE:** To be researched.

**SOURCE OF INFORMATION:** Robert H. Drummer, Senior Legislative Attorney

**APPLICATION WITHIN MUNICIPALITIES:** To be researched.

**PENALTIES:** Compensatory damages and equitable relief.



ROCKVILLE, MARYLAND

MEMORANDUM

January 5, 2015

TO: George Leventhal, President, County Council

FROM: Jennifer A. Hughes, Director, Office of Management and Budget  
Joseph F. Beach, Director, Department of Finance

SUBJECT: FEIS for Bill 51-14, Discriminatory Employment Practices - Retaliation for Wage Disclosure - Prohibited

Please find attached the fiscal and economic impact statements for the above-referenced legislation.

JAH:fz

cc: Bonnie Kirkland, Assistant Chief Administrative Officer  
Lisa Austin, Offices of the County Executive  
Joy Nurmi, Special Assistant to the County Executive  
Patrick Lacefield, Director, Public Information Office  
Joseph F. Beach, Director, Department of Finance  
James Stowe, Director, Office of Human Rights  
David Platt, Department of Finance  
Phil Weeda, Office of Management and Budget  
Helen Vallone, Office of Management and Budget  
Alex Espinosa, Office of Management and Budget  
Naeem Mia, Office of Management and Budget

## Fiscal Impact Statement

### Council Bill 51-14, Discriminatory Employment Practices-Retaliation for Wage Disclosure-Prohibited

#### 1. Legislative Summary.

- a. prohibits an employer from retaliating against an employee for disclosing the wages of that employee or any other employee;
- b. establishes exceptions to this general prohibition of retaliation against an employee for disclosure of employee wages; and
- c. generally amends the law concerning discriminatory employment practices.

#### 2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

In most instances where similar legislation is in place in cities, counties and states, significant data does not exist to estimate what the experience may be in Montgomery County. Many of these laws have not had many complaints filed. The state of New Jersey enacted their "Wage Disclosure" statute in 2013 and since that time has received 1-2 complaints. Similarly in the state of Vermont which enacted its first wage disclosure statute in 2005 and strengthened it in 2013 have had minimal complaint activity.

The research suggests that Montgomery County may see a minimal number of complaints filed once the law has been established. If this proves true, then the number of cases could be processed by existing staff and would present no major expenditures or adverse impact on current services and staff.

#### 3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

Expenditures over the next 6 fiscal years are estimated to be flat and consistent with current budget projections. There may be some minimum cost required for educational and outreach materials which would be limited to the first year of the bill, and could be absorbed within current funding levels.

#### 4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.

Not applicable

#### 5. An estimate of expenditures related to County's information technology (IT) systems, including Enterprise Resource Planning (ERP) systems.

Not applicable

6. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

Not applicable

7. An estimate of the staff time needed to implement the bill.

Based on the current data available from other agencies throughout the region, the Office of Human Rights (HRC) will utilize existing staff resources to absorb the additional workload at least in the short term. Further knowledge is necessary upon implementation of the law in order to evaluate if additional staff time is needed.

8. An explanation of how the addition of new staff responsibilities would affect other duties.

See answer to number 2.

9. An estimate of costs when an additional appropriation is needed.

Not applicable

10. A description of any variable that could affect revenue and cost estimates.

Variables that could affect cost estimates include the cost and scope of community education and outreach and possible increase in staff which cannot be estimated at this time. The number of enforcement actions in any given year is also subject to wide variability.

11. Ranges of revenue or expenditures that are uncertain or difficult to project.

Although the bill allows for damages and other equitable relief consistent with the prescribed remedies provided in the code, actual relief or revenue cannot be estimated at this time. Furthermore, not all enforcement activity results in complaints. In addition the cost of any needed educational outreach cannot be estimated with any accuracy at this time.

HRC cannot estimate with certainty the number of enforcement actions performed and actual cases filed in a given year.

12. If a bill is likely to have no fiscal impact, why that is the case.

See answer to number 2.

13. Other fiscal impacts or comments.

Not applicable

14. The following contributed to and concurred with this analysis:

Jim Stowe, Director, Office of Human Rights

Helen P. Vallone, Senior Management and Budget Specialist, Office of Management and Budget

Jennifer A. Hughes  
Jennifer A. Hughes, Director  
Office of Management and Budget

1/5/14  
Date

**Economic Impact Statement**  
**Bill 51-14, Discriminatory Employment Practices – Retaliation for Wage Disclosure**  
**- Prohibited**

**Background:**

This legislation would prohibit an employer from retaliating against an employee for certain disclosures of wages of the employee or another employee. Bill 51-14 would establish certain exceptions to the prohibition against retaliation for wage disclosure.

The exception under Bill 51-14 is that the prohibition against retaliation does not apply to an employee who has access to wage information of other employees or applicants as part of the employee's essential job functions. The exception also applies to an employee who discloses the wages of other employees or applicants to individuals who do not otherwise have access to the information unless the disclosure is in response to: 1) a formal complaint or charge; 2) as part of an ongoing investigation, proceeding, hearing, or action, including an investigation conducted by the contractor, or 3) is consistent with the contractor's legal duty to furnish information.

**1. The sources of information, assumptions, and methodologies used.**

The sources of information are the Montgomery County Office of Human Rights; Institute for Women's Policy Research (IWPR); and Office of Federal Contract Compliance Programs (OFCCP), U.S Department of Labor.

According to an IWPR/Rockefeller survey conducted in 2011, about one-half of all workers surveyed (51 percent of women and 47 percent of men) "report that the discussion of wage and salary information is either discouraged or prohibited and/or could lead to punishment." According to survey respondents, private sector employers are more likely to "try to control access to this information: 62 percent of women and 60 percent of men working for private employers report that wage and salary information is secret." According to the IWPR report dated January 2014, "while there may be no direct link between pay secrecy and pay inequality, pay secrecy appears to contribute to the gender gap in earnings."

On September 15, 2014, OFCCP announced a Notice of Proposed Rulemaking (NPRM) to prohibit pay secrecy policies and actions by covered Federal contractors and subcontractors. The NPRM seeks to implement Executive Order (EO) 13665 "by proposing to prohibit Federal contractors from discharging or discriminating in any other way against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant." This proposed rule "seeks to level the playing field by increasing transparency and giving these workers a much needed tool to fight pay discrimination." According to the OFCCP Fact Sheet, research has found that many factors contribute to the wage gap between men and women and among those possible factors is the prevalence of workplace prohibitions against discussing compensation.

**Economic Impact Statement**  
**Bill 51-14, Discriminatory Employment Practices – Retaliation for Wage Disclosure**  
**- Prohibited**

While EO 13665 addresses prohibition exhibited by Federal contractors, Bill 51-14 extends this prohibition to all employers in Montgomery County.

**2. A description of any variable that could affect the economic impact estimates.**

The variable that could affect the economic impact is the prohibition could create a level playing field among employees in the private sector and thereby reducing pay discrimination. Such a reduction in pay discrimination could result in higher earnings amount specific employees. However, without specific data on the difference in pay among workers, it is difficult to quantify the economic benefit.

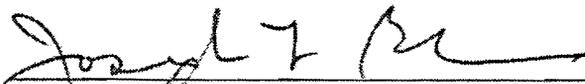
**3. The Bill's positive or negative effect, if any on employment, spending, saving, investment, incomes, and property values in the County.**

By prohibiting retaliation against an employee for certain disclosures of wages, Bill 51-14 could have a positive economic impact employees' wages by reducing the wage gap.

**4. If a Bill is likely to have no economic impact, why is that the case?**

Bill 51-14 could have an economic impact but without specific data, it is uncertain the value of such an impact on employees' wages.

**5. The following contributed to or concurred with this analysis:** David Platt and Rob Hagedoorn, Finance; James Stowe, Director, Office of Human Rights; and Helen P. Vallone, OMB.

  
\_\_\_\_\_  
Joseph F. Beach, Director  
Department of Finance

1/5/15  
Date



OFFICE OF HUMAN RIGHTS

Isiah Leggett  
County Executive

James L. Stowe  
Director

**TESTIMONY ON BEHALF OF THE COUNTY EXECUTIVE ISIAH LEGGETT  
ON BILL 51-14, DISCRIMINATORY EMPLOYMENT PRACTICES-  
RETALIATION FOR WAGE DISCLOSURE-PROHIBITED**

**December 2, 2014**

Good afternoon. My name is Jim Stowe, Director of the Montgomery County Office of Human Rights, and I am here on behalf of County Executive Isiah Leggett to urge the Council's favorable consideration of Bill 51-14 which would prohibit, with certain exceptions, employers from retaliating against employees for certain disclosures of wages of the employee or other employees.

Montgomery County is home to a diverse, vibrant, majority-minority population. The County's employer and employee base reflects this diversity. The County has always been a leader among local governments in promulgating responsible and inclusive laws as it relates to the protections provided in our Civil Rights Code. The County has aggressively enforced such laws, including those laws that prohibit discriminatory employment practices with respect to compensation. Laws that pertain to Minimum Wage, the Living and Prevailing Wage, Minority, Female and Disabled-owned Business Programs all focus on making available fair and equal access to the economic vitality of our county and pay equity for workers. The provisions of Bill 51-14 are modeled after the provisions of Bill 29-14, Contracts and Procurement – Wage Requirements- Reporting, introduced on behalf of County Executive Leggett in May of this year. That Bill requires County contractors to report certain wage information and similarly prohibits contractors from retaliating against employees for certain disclosures of wages of the employee or other employees.

Under current law, the Office of Human Rights has enforcement authority to investigate complaints of alleged discriminatory employment practices which may be a violation of Chapter 27, Human Rights and Civil Liberties. This bill would add to the current law the additional responsibility to the Office of Human Rights to investigate complaints and carry out other enforcement measures codified by this legislation. County Executive Leggett believes that women and minority employees who work in Montgomery County deserve to make the same pay as their colleagues, and passing this Bill would continue the County's efforts toward pay equity. Thank you for the opportunity to testify in support of Bill 51-14.



Montgomery County Chapter, ACLU of MD. Mike Mage and Darian Unger, Co-Chairs.

DECEMBER 2, 2014

**WE SUPPORT MONTGOMERY COUNTY BILL 51-14 DISCRIMINATORY  
EMPLOYMENT PRACTICES - RETALIATION FOR WAGE DISCLOSURE  
- PROHIBITED.**

Testimony of Mike Mage, Co-Chair, Montgomery County Chapter, ACLU of Maryland  
301-402-5537W, 301-229-0470H, 240-899-3312C, [magem65@hotmail.com](mailto:magem65@hotmail.com)

Good Afternoon. Thank you for holding this important hearing on bill 51-14.

- In 2009, the Supreme Court of the United States recognized in *Crawford v. Metro. Gov't of Nashville & Davidson County*, that "fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination".
- Workers often don't know about pay discrimination because employers have rules that punish employees for sharing wage information with their colleagues. Allowing workers to discuss their salaries without fear for their jobs, will help them learn if they are being treated equally.
- Unfortunately, pay discrimination is still a fact of life. For example, women still earn, on average, only 77 cents for every dollar earned by a man. It's even more dismal for women of color – in 2012, African American women only earned about 64 cents and Latinas only 54 cents for each dollar earned by white men.
- Moreover, nearly half of all workers are either forbidden or strongly discouraged from discussing their pay with colleagues. Pay secrecy means that there is no way for many women to even know they receive less than their male co-workers. This injustice is especially troubling in today's difficult economy, where 40% of women are acting as primary breadwinners, and 65% are breadwinners or co-breadwinners. Pay equity is crucial, not only to families' economic security, but also to the nation's economic recovery.
- There is some progress. President Obama has issued an executive order that protects the 26 million workers employed by federal contractors, when they try to find out if they are being paid fairly.
- Bill 51-14 takes an important step toward ending pay discrimination in Montgomery County, by forbidding retaliation against workers who ask about their employers' wage practices or disclose their own wages. It continues Montgomery County's long tradition of protecting civil rights and civil liberties. We urge it's prompt passage.



**FACT SHEET**  
**Notice of Proposed Rulemaking**  
**Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions**

**Background**

On September 15, 2014, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced a Notice of Proposed Rulemaking (NPRM) to prohibit pay secrecy policies and actions by covered Federal contractors and subcontractors.

This NPRM seeks to implement Executive Order (EO) 13665, signed by President Obama on April 8, 2014, by proposing to prohibit Federal contractors from discharging or discriminating in any other way against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. Enabling the more than 28 million employees of Federal contractors and subcontractors to discuss their compensation without fear of adverse action can contribute to reducing pay discrimination and ensuring that qualified and productive employees receive fair compensation. This proposed rule, like the Paycheck Fairness Act, seeks to level the playing field by increasing transparency and giving these workers a much needed tool to fight pay discrimination.

The rule will be published in the Sept. 17 issue of the *Federal Register* and open for public comment for a period of 90 days, thereafter. To read and learn more about the proposed rule, please visit [www.dol.gov/ofccp/PayTransparencyNPRM](http://www.dol.gov/ofccp/PayTransparencyNPRM).

**Need for the Proposed Rule**

Despite the existence of laws protecting workers from gender-based compensation discrimination for more than five decades, a pay gap between men and women persists today. Consider that:

- A comparison of average annual wage data reveals that women make 77 cents for every dollar that men make.<sup>1</sup> Recent data on average weekly wages from the Bureau of Labor Statistics (BLS) show a similar gap, with women making 82 cents for every dollar that men make.<sup>2</sup> The gap in wages is even greater for some women of color.

<sup>1</sup> U.S. Bureau of the Census, Income, Poverty and Health Insurance Coverage in the United States, Current Population Reports 2011 (Sept. 2012), available at <http://www.census.gov/prod/2012pubs/p60-243.pdf>. Calculation of the pay gap using average weekly wages has the advantage of accounting for differences in hours worked, which is not captured in calculations using annual wage data. However, calculations using weekly wage data do not account for forms of compensation other than those paid as weekly wages, unlike annual wage calculations. While neither method is perfect, analyses that account for factors like occupation and qualifications further support the existence of a significant gender-based pay disparity.

<sup>2</sup> Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey, Labor Force Statistics from Current Population Survey, Median Weekly Earnings of Full-Time Wage and Salary Workers by Selected Characteristics, available at <http://www.bls.gov/cps/cpsaat37.htm>; Updated quarterly CPS earnings figures by

- BLS data show that African American women earn 68 cents and Latina women earn 59 cents for every dollar earned by a non-Hispanic white man.<sup>3</sup> Census data show similar disparities, with African American women making 64 cents, Latina women making 56 cents, and Asian women making 86 cents per dollar earned by a non-Hispanic white man.<sup>4</sup>

While research has found that many factors contribute to the wage gap, such as occupational preferences, pay discrimination remains a significant problem, especially for the working poor and the middle class. Among the possible contributing factors is the prevalence of workplace prohibitions against discussing compensation. Strictures against revealing compensation can conceal compensation disparities among employees, making it impossible for an employee to know he or she is being underpaid compared to his or her peers. If compensation remains hidden, employees who are being paid less because of their gender or race will remain unaware of the problem. In the absence of this knowledge, these employees will be unable to exercise their rights by filing a discrimination complaint pursuant to the Executive Order.

### **Highlights of the Proposed Rule**

The NPRM proposes the following changes to the existing regulations:

- Amends the Equal Opportunity Clause of Executive Order 11246 that requires certain information be included in Federal contracts and subcontracts. The amendment mandates inclusion of the requirement that Federal contractors and subcontractors refrain from discharging, or otherwise discriminating against, employees or applicants who inquire about, discuss, or disclose their compensation or the compensation of other employees or applicants. An exception exists where the employee or applicant makes the disclosure based on information obtained in the course of performing his or her essential job functions.
- Requires that Federal contractors incorporate the nondiscrimination provision into their existing employee manuals or handbooks, and disseminate the nondiscrimination provision to employees and to job applicants.

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demographics by quarter for sex through the end of 2013, available at <http://www.bls.gov/news.release/wkyeng.t01.htm>.

<sup>3</sup> Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey, Labor Force Statistics from Current Population Survey, available at <http://www.bls.gov/cps/earnings.htm#demographics>.

<sup>4</sup> 2012 Person Income Table PINC-10. Wage and Salary Workers—People 15 Years Old and Over, by Total Wage and Salary Income in 2012, Work Experience in 2012, Race, Hispanic Origin, and Sex, available at [https://www.census.gov/hhes/www/cpstable/032013/perinc/pinc10\\_000.htm](https://www.census.gov/hhes/www/cpstable/032013/perinc/pinc10_000.htm) (comparison of median wage for workers working 50 or more weeks).

- Defines key words or terms such as compensation, compensation information, and essential job functions as used in the Executive Order.
- Provides employers with two defenses to an allegation of discrimination: one based on enforcing rules against disruptive behavior; and the other based on the essential functions of the person's job.

For more information, please go to [www.dol.gov/ofccp](http://www.dol.gov/ofccp).

# Important Workplace Laws

## VERMONT WORKERS SHOULD KNOW



### **FLEXIBLE WORKING ARRANGEMENTS**

***As of January 2014, Vermont employees have the right to request flexible working arrangements and employers must discuss and consider these requests.***

The new law applies to all Vermont employees and gives them the **right to request** a flexible working arrangement for any reason and requires employers to discuss and consider such requests at least twice per calendar year.

The law does not dictate which requests must be granted, but instead **provides a framework for a meaningful workplace dialogue**. Importantly, the law also protects employees who seek such arrangements from retaliation or discrimination.

The law defines “flexible working arrangement” as **“intermediate or long-term changes in the employee’s regular working arrangements, including changes in the number of days or hours worked, changes in the time the employee arrives at or departs from work, work from home, or job-sharing.”**

This new law doesn’t apply to other forms of leave that may already be required by Vermont or federal law, such as parental or family leave, accommodations for disabilities, or workers’ compensation injuries. The law does not diminish rights set forth in labor contracts. It also doesn’t apply to routine shift scheduling or vacation requests.

Employees may make the request verbally or in writing. The request should be as specific as possible, and employees should be prepared to discuss how the arrangement would still allow the employer to meet business needs.

The employer must then discuss the request in good faith. The discussion can take place in person or over the telephone. During the discussion, either party may propose alternatives to the arrangement requested.

**The employer has the duty to consider in good faith whether the requested arrangement could be granted in a manner that is not inconsistent with its business operations or its legal or contractual obligations.** The law identifies several factors the employer may consider: (1) the burden of additional costs; (2) the effect on aggregate employee morale; (3) the effect on ability to meet consumer demand; (4) an inability to reorganize work among existing staff; (5) an inability to recruit additional staff; (6) a detrimental impact on business quality or performance; (7) an insufficiency of work during periods the employee proposes to work; and (8) planned structural changes to the business.

The law **requires employers to notify employees of their decision**. If the request was submitted in writing, the employer must state any complete or partial denial of the request in writing.

The law does not change existing legal rights of employers and employees to create, terminate, or modify flexible working arrangements. Instead it provides the framework for meaningful dialogue about whether such arrangements would work for both parties.



## EQUAL PAY

**Vermont employees have the right to equal pay for equal work.**

In 2002 Vermont adopted the Equal Pay Act, and strengthened its provisions in 2013. The law applies to any employer, employment agency, labor organization, or any person hiring Vermont employees.

The law says **it is illegal to pay wages to employees of one sex at a rate less than the rate paid to employees of the other sex for equal work that requires equal, but not identical, skill, effort, and responsibility, and is performed under similar working conditions.**

Employees can be paid different wages when the difference is a result of: (1) a seniority system; (2) a merit system; (3) a system in which earnings are based on quantity or quality of production; or (4) a bona fide factor other than sex, provided: (a) it does not perpetuate a sex-based differential in compensation; (b) it is job related with respect to the position in question; and (c) is based upon a legitimate business consideration.



## WAGE DISCLOSURE

**Vermont employees have the right to disclose and discuss their wages and inquire about and discuss the wages of others.**

In 2005 Vermont adopted a Wage Disclosure Law and strengthened it in 2013. The law says **employees can**

**disclose their own wages and inquire about and discuss others' wages without fear of discipline, discharge, or retaliation.**

**Employers cannot require employees to sign a wage non-disclosure agreement** or otherwise prevent them from disclosing their own wages, inquiring about others' wages, or discussing wages in general.

Unless otherwise required by law, Human Resources managers may be prohibited from disclosing the wages of other employees.

## What To Do If You Suspect Pay Discrimination

**Write Down What Happened.** Were you offered a lower starting salary, or did you discover that you are being paid less than a co-worker? Were you disciplined or discharged because you disclosed your wage to a co-worker?

**Find Out How Others Have Been Treated at Your Workplace.** Share information with co-workers on ways to improve pay, benefits, promotion opportunities, work schedules and other working conditions.

**Talk to Your Employer.** Check your employee handbook for procedures for filing a grievance or resolving a problem. Put your complaint in writing.

**Decide Whether to File a Charge.** The Vermont Attorney General has the authority to investigate complaints of wage discrimination and to seek civil penalties and damages from employers who violate the equal pay law. The Human Rights Commission has the same authority for state government employees. See Resources section for more information.



## **FAIR TREATMENT FOR PREGNANT WORKERS**

***Pregnant employees have federal and state protections.***

Protections for pregnant workers may arise under several federal laws, including the Pregnancy Discrimination Act (PDA), the Family and Medical Leave Act (FMLA), and in some instances, the Americans with Disabilities Act (ADA). Protections may also arise under state laws, including Vermont's Parental and Family Leave Act (PFLA) and Vermont's Fair Employment Practices Act (FEPA).

**Both the PDA and FEPA forbid employers from acting upon mere assumptions about what types of jobs a pregnant woman is capable of performing. In addition, they cannot refuse to hire a pregnant woman and cannot fire a pregnant woman who is able to perform the major functions**

**of her job.** Both laws provide that if a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the **employer must make accommodations for her if it has done so with other temporarily disabled employees.** For example, the employer may have to provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant employees if it does so for other temporarily disabled employees.

Under the FMLA and PFLA, **covered employers must provide 12 weeks of unpaid leave and job protection** for certain workers for pregnancy, the birth or adoption of a child, and some medical appointments.

Finally, although pregnancy itself is not a covered "disability" within the meaning of the ADA or FEPA, **certain pregnancy-related conditions, such as gestational diabetes or preeclampsia, may be so serious that they are considered protected disabilities.** In such cases, employees cannot face discrimination for having such disabilities, and employers may have to provide a reasonable accommodation (such as leave or modifications that enable an employee to perform her job) for the disabilities, absent undue hardship for the business.

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## **LACTATION ACCOMMODATION**

***Vermont employees have the right to request time and space to express breast milk at work.***

Both Vermont state labor law and the federal Fair Labor Standards Act (FLSA) provide protections for working mothers and their nursing children, **including time, either paid or unpaid, throughout the day for the employee to express breast milk, and a private space that is not a bathroom in which to do so.**

An employer may be exempted from provisions of this law if providing the time or space would substantially disrupt the employer's operations.

## **ANTI-RETALIATION**

***Vermont employees now have stronger protections against employer discipline, discharge, or retaliation when exercising these fair employment and leave rights.***

Employees may not face retaliation for exercising, or attempting to exercise, their rights (such as disclosing their wages or asking for statutory leave) opposing unlawful employment practices, lodging complaints of unlawful practices, or cooperating in investigations of such complaints. In addition, employees may not face retaliation merely because the employer believes they are about to engage in any of these legally-protected activities.



## **FAMILY/ MEDICAL LEAVE**

**Many Vermont employees are entitled to take up to 12 weeks of job-protected unpaid leave to care for a new child (parental leave) or when a serious health condition affects them or a family member (family/medical leave).**

These protections are provided by Vermont's Parental and Family Leave Act (PFLA) and, for those working for larger employers, the federal Family and Medical Leave Act (FMLA).

The PFLA's parental leave provisions apply to employers with 10 or more employees who average at least 30 hours' work per week; its family/medical leave provisions apply to employers with 15 or more employees who

average at least 30 hours' work per week. To be eligible, these employees must have worked continuously at least one year at an average of 30 hours per week.

The federal FMLA's provisions apply to government employers and to businesses with 50 or more workers within a 75 mile radius.

Employees may take leave intermittently in some cases. They are entitled to maintain existing level of benefits, but may be required to contribute to those costs. They are not entitled to earn vacation time while on leave. Employees may choose to use up to six weeks of sick leave, vacation time or any other accrued paid time during the leave. Use of paid leave does not extend overall leave entitlement.

With few exceptions, employees returning from leave must be offered their former position or a comparable job with equal pay, benefits, seniority, etc.

Employees should provide advance written notice of their request for leave when possible and should indicate how long they think the leave will last. Employers may seek certification regarding medical leave from a health care provider.

## **SHORT TERM FAMILY LEAVE**

**Vermont employees covered by the PFLA's family and medical leave provisions are entitled to take short term family leave of up to 4 hours of unpaid leave in any 30-day period (but not more than 24 hours in any 12-month period).**

This leave is: (1) for participation in preschool or school activities related to the academic advancement of your child; (2) to accompany a family member to: (a) routine medical/dental appointments, or (b) other appointments for professional services related to their care and well-being. In most cases, employees should give at least 7 days' advance written notice.

### **Leave Fact Sheets:**

**From the Vermont Department of Labor**

<http://labor.vermont.gov/wordpress/wp-content/uploads/WH-14-Parental-Family-Leave-Poster.pdf>

**From the U.S. Department of Labor**

<http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>

## **Resources Learn More or Get Help**

**Vermont Attorney General's Civil Rights Unit**  
888-745-9195 / Enforces state laws prohibiting discrimination in employment.

**Equal Employment Opportunity Commission**  
800-669-4000 / Enforces federal laws prohibiting employment discrimination.

**Vermont Human Rights Commission**  
800-416-2010 / Enforces civil rights laws relating to housing, public accommodations and state government employment.

### **Vermont Commission on Women**

800-881-1561 / Provides publications on topics like nursing mothers, family leave, employment rights, and provides information and referrals to Vermonters.

### **Vermont Department of Labor, Wage and Hour Division**

802-828-0267 / Provides information on wage and employment related issues and attempts to settle employer/employee wage disputes to the satisfaction of all parties.

### **United States Department of Labor's Women's Bureau**

617-565-1988 / Empowers all working women to achieve economic security.



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# State Law Update

## **New Jersey Passes a Law Banning "Salary Secrecy"**

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### **Executive Summary**

New Jersey has passed a law banning retaliation against employees who discuss their jobs and compensation with their colleagues if the purpose of the discussion is to assist in investigating potential discriminatory treatment concerning "pay, compensation, bonuses, other compensation, or benefits." The new legislation (P.L.2013, c.154) prohibiting "salary secrecy" is designed to combat the obstacles to uncovering wage discrimination created by discouraging employees from discussing their wages and benefits with others. The new pay equity protection is effective immediately

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### **Prohibitions**

It is illegal for any New Jersey employer to take retaliatory action against an employee simply because that employee disclosed to or requested of another employee or former employee information regarding his or her job titles, occupational categories, rates of compensation, benefits, gender, race, ethnicity, national origin or military status. However, the disclosure or request must be made for the purpose of assisting in investigating potential discrimination in the employer's payment of wages, bonuses or other employee benefits.

### **Federal Law Must Also Be Considered**

While the new law does not protect employees from adverse employment action unless the inquiry or disclosure is related to gathering information about discrimination, employers nonetheless should be cautious. In addition to the difficulty of being certain of an employee's motives for making the inquiry or disclosure, the initiation of discussions concerning wages and other terms of employment often is protected activity under the National Labor Relations Act. In fact, the National Labor Relations Board

considers any policy or practice that prevents or discourages employees from discussing the terms and conditions of their employment to be a violation of law.

### **Practical Impact**

The new law, which is now an official part of New Jersey's Law Against Discrimination, in many ways mirrors federal legislation. As a matter of employee relations, publicity around the law may result in an increase in employee awareness and discussions both inside and outside the workplace. Employers therefore should take this opportunity to educate their managers and supervisors regarding the new state legislation and remind them of their obligations and rights under federal law.

As always please contact your Human Resource Business Partner if you have questions.

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*Produced in cooperation with Jackson Lewis LLP. This content provides practical information concerning the subject matter covered and is provided with the understanding that ADP is not rendering legal advice.*

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