

BILL ANALYSIS

C.S.H.B. 290
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Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

According to interested parties, female and male employees are, at times, paid a different wage, despite doing comparable work, and the parties assert that asking for an applicant's wage history may lead to the perpetuation of these discriminatory pay practices. C.S.H.B. 290 seeks to prohibit sex discrimination in compensation.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 290 amends the Labor Code to establish that an employer commits an unlawful employment practice in violation of statutory provisions relating to employment discrimination if the employer discriminates among employees on the basis of sex by paying wages to an employee at a rate less than the rate at which the employer pays wages to another employee of the opposite sex for the same or substantially similar work on jobs, the performance of which requires equal or substantially similar skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made under a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on a bona fide factor other than sex. The bill prohibits such a seniority system from deducting from the employee's service time any leave that the employee took under the federal Family and Medical Leave Act of 1993 or other applicable family or medical leave to which the employee is entitled. The bill establishes that the exception for payment made under a differential based on a bona fide factor other than sex applies only if the employer demonstrates that the factor is not based on or derived from a differential based on sex in compensation, is related to the position in question, and is consistent with business necessity, but that the exception does not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing a wage differential. The bill prohibits an employer from entering into an agreement with an employee that provides that the employer may pay the employee a wage at a rate that is in violation of the bill's provisions prohibiting discrimination in wages on the basis of sex.

C.S.H.B. 290 prohibits an employer from including a question regarding an applicant's wage history information on an employment application form, from inquiring into or considering an applicant's wage history information, and from obtaining an applicant's wage history information from a previous employer of the applicant, unless the wages in that previous employment

position are subject to disclosure under state public information law. The bill conditions an applicant's authority to provide written authorization to a prospective employer to confirm the applicant's wage history, including benefits or other compensation, on the prospective employer making a written offer of employment to the applicant that includes the applicant's wage and benefit information for the position.

C.S.H.B. 290 establishes that an employer commits an unlawful employment practice in violation of provisions relating to employment discrimination if the employer takes an adverse action or otherwise discriminates against a person because the person has opposed an act or practice made unlawful by the bill's provisions, has sought to enforce rights protected under the bill's provisions, or has testified, assisted, or participated in any manner in an investigation, hearing, or other proceeding to enforce the bill's provisions, or if the employer discharges or in any other manner discriminates against, coerces, intimidates, threatens, or interferes with an employee or other person because the person inquired about, disclosed, compared, or otherwise discussed an employee's wages or because the person exercised or enjoyed, or aided or encouraged another person to exercise or enjoy, any right granted or protected by the bill's provisions. The bill expressly does not require an employee to disclose the employee's wages under these provisions.

C.S.H.B. 290 expressly requires each employer to post in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted a notice, prepared or approved by the Texas Workforce Commission (TWC), setting forth the pertinent provisions of the bill and information relating to the enforcement of such provisions. The bill authorizes a person aggrieved by an unlawful employment practice under the bill's provisions to file a complaint with the TWC, subjects such a complaint to statutory provisions relating to administrative review and judicial enforcement of employment discrimination complaints, and requires the TWC to enforce the bill's provisions in accordance with statutory provisions relating to employment discrimination.

C.S.H.B. 290 encourages an employer to periodically perform a self-evaluation of the employer's business practices and compensation to ensure that the employer is in compliance with the bill's provisions. The bill establishes as an affirmative defense to liability for statutory compensatory or punitive damages in a civil employment discrimination action filed by a person aggrieved by an unlawful employment practice described by the bill that the employer performed such a self-evaluation in the three-year period preceding the date of the conduct that is the basis of the complaint and that the employer has in good faith demonstrated that, following the date of such self-evaluation, the employer has made reasonable progress toward eliminating compensation differentials based on sex. The bill expressly does not require an employer to perform a self-evaluation or subject an employer to any penalty for failing to perform a self-evaluation.

C.S.H.B. 290 requires each employer to compile and maintain for a period of at least three years records that contain the wage paid to each employee and the method, system, computations, and other factors used to establish, adjust, and determine the wage rates paid to the employee.

C.S.H.B. 290 establishes that a violation of the bill's provisions is considered to be discrimination on the basis of sex for purposes of statutory provisions relating to employment discrimination.

EFFECTIVE DATE

January 1, 2018.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 290 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and formatted in a manner that indicates the substantial differences

between the introduced and committee substitute versions of the bill.

INTRODUCED

SECTION 1. Subchapter C, Chapter 21, Labor Code, is amended

SECTION 2. Subtitle A, Title 2, Labor Code, is amended by adding Chapter 24 to read as follows:

CHAPTER 24. EMPLOYMENT DISCRIMINATION REGARDING COMPENSATION

Sec. 24.001. DEFINITIONS.

Sec. 24.002. EMPLOYER INQUIRIES INTO AND CONSIDERATION OF WAGE HISTORY INFORMATION. (a)

An employer may not:

(1) include a question regarding an applicant's wage history information on an employment application form;

(2) inquire into or consider an applicant's wage history information; or

(3) obtain an applicant's wage history information from a previous employer of the applicant, unless the wages in that previous employment position are subject to disclosure under Chapter 522, Government Code.

(b) Notwithstanding Subsection (a), an applicant may provide written authorization to a prospective employer to confirm the applicant's wage history, including benefits or other compensation, only after the prospective employer has made a written offer of employment to the applicant that includes the applicant's wage and benefit information for the position.

Sec. 24.003. PROHIBITION AGAINST DISCRIMINATION IN WAGES. (a) For purposes of this section, "business necessity" means an overriding legitimate business purpose such that the factor relied upon in determining wage differential effectively fulfills the business purpose the factor is intended to serve.

(b) An employer commits an unlawful employment practice in violation of this chapter and Chapter 21 if the employer discriminates among employees on the basis of sex by paying wages to an employee at a rate less than the rate at which the employer pays wages to another employee of the opposite sex for the same or substantially

HOUSE COMMITTEE SUBSTITUTE

SECTION 1. Same as introduced version.

SECTION 2. Subtitle A, Title 2, Labor Code, is amended by adding Chapter 24 to read as follows:

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Sec. 24.001. DEFINITIONS.

Sec. 24.002. EMPLOYER INQUIRIES INTO AND CONSIDERATION OF WAGE HISTORY INFORMATION. (a)

An employer may not:

(1) include a question regarding an applicant's wage history information on an employment application form;

(2) inquire into or consider an applicant's wage history information; or

(3) obtain an applicant's wage history information from a previous employer of the applicant, unless the wages in that previous employment position are subject to disclosure under Chapter 552, Government Code.

(b) Notwithstanding Subsection (a), an applicant may provide written authorization to a prospective employer to confirm the applicant's wage history, including benefits or other compensation, only after the prospective employer has made a written offer of employment to the applicant that includes the applicant's wage and benefit information for the position.

Sec. 24.003. PROHIBITION AGAINST DISCRIMINATION IN WAGES. (a) For purposes of this section, "business necessity" means an overriding legitimate business purpose such that the factor relied upon in determining wage differential effectively fulfills the business purpose the factor is intended to serve.

(b) An employer commits an unlawful employment practice in violation of this chapter and Chapter 21 if the employer discriminates among employees on the basis of sex by paying wages to an employee at a rate less than the rate at which the employer pays wages to another employee of the opposite sex for the same or substantially

similar work on jobs, the performance of which requires equal or substantially similar skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made under one of the following factors:

- (1) a seniority system;
- (2) a merit system;
- (3) a system that measures earnings by quantity or quality of production; or
- (4) a differential based on a bona fide factor other than sex.

(c) A seniority system described by Subsection (b)(1) may not deduct from the employee's service time any leave that the employee took under the Family and Medical Leave Act (29 U.S.C. Section 2601 et seq.) or other applicable family or medical leave to which the employee is entitled.

(d) The exception provided by Subsection (b)(4) applies only if the employer demonstrates that the factor:

- (1) is not based on or derived from a differential based on sex in compensation;
- (2) is related to the position in question; and
- (3) is consistent with business necessity.

(e) Notwithstanding Subsection (d), the exception provided by Subsection (b)(4) does not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing a wage differential.

(f) An employer may not enter into an agreement with an employee that provides that the employer may pay the employee a wage at a rate that is in violation of this section.

Sec. 24.004. OTHER PROHIBITED ACTS.

Sec. 24.005. NOTICE BY EMPLOYER REQUIRED.

Sec. 24.006. COMPLAINT; ENFORCEMENT.

Sec. 24.007. EMPLOYER SELF-EVALUATION; AFFIRMATIVE DEFENSE.

Sec. 24.008. WAGE RECORDS REQUIREMENT.

SECTION 3. The changes in law made by this Act apply only to an unlawful employment practice with regard to discrimination in payment of compensation

similar work on jobs, the performance of which requires equal or substantially similar skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made under one of the following factors:

- (1) a seniority system;
- (2) a merit system;
- (3) a system that measures earnings by quantity or quality of production; or
- (4) a differential based on a bona fide factor other than sex.

(c) A seniority system described by Subsection (b)(1) may not deduct from the employee's service time any leave that the employee took under the Family and Medical Leave Act of 1993 (29 U.S.C. Section 2601 et seq.) or other applicable family or medical leave to which the employee is entitled.

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Sec. 24.004. OTHER PROHIBITED ACTS.

Sec. 24.005. NOTICE BY EMPLOYER REQUIRED.

Sec. 24.006. COMPLAINT; ENFORCEMENT.

Sec. 24.007. EMPLOYER SELF-EVALUATION; AFFIRMATIVE DEFENSE.

Sec. 24.008. WAGE RECORDS REQUIREMENT.

SECTION 3. Same as introduced version.

that occurs on or after January 1, 2018.

SECTION 4. This Act takes effect January 1, 2018.

SECTION 4. Same as introduced version.