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Bill Analysis

Version: As Introduced

Primary Sponsor: Sen. Maharath

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Summary

- Enacts the “Fair and Acceptable Income Required (FAIR) Act.”
- Adds sexual orientation and gender identity to the continuing law list of classifications on which basis an employer may not discriminate in the payment of wages.
- Modifies a current law exclusion that allows employers to pay different wages to different employees for the performance of equal work under similar conditions on jobs requiring equal skill, effort, and responsibility.
- Modifies the retaliation protections currently available to employees under the Equal Pay Law.
- Eliminates the criminal penalty for a violation of the Equal Pay Law.
- Subjects claims under the Equal Pay Law to current statutory caps on recovery that apply to tort actions.
- Transfers from the Director of Commerce to the Civil Rights Commission the authority to administer and enforce Ohio’s Equal Pay Law.

Detailed Analysis

Scope of the Equal Pay Law

Additional classifications

The bill adds sexual orientation and gender identity to the continuing law list of classifications on which basis an employer may not discriminate in the payment of wages to employees. Under continuing law, unless an exception applies, an employer violates this prohibition if the employer pays wages to an employee at a rate less than the rate at which the

employer pays wages to another employee for equal work on a job that requires equal skill, effort, and responsibility and that is performed under similar conditions.¹

Small employers excluded

Because the bill moves the Equal Pay Law into the Civil Rights Law (see “**Administration**,” below), it appears that the Equal Pay Law, as amended by the bill, does not apply to private parties employing fewer than four persons. An “employer” for purposes of Ohio’s Civil Rights Law includes the state, any political subdivision, any person employing four or more persons within Ohio, and any person acting directly or indirectly in the interest of an employer.²

Administration

The bill moves the Ohio Equal Pay Law from Ohio’s Minimum Fair Wage Standard Law³ (MFWSL) to Ohio’s Civil Rights Law.⁴ The bill also transfers from the Director of Commerce to the Ohio Civil Rights Commission the authority to carry out, administer, and enforce the Equal Pay Law. Under the bill, an individual may assign the individual’s claim for a violation of the Equal Pay Law to the Commission, rather than to the Director as under current law, so that the Commission may sue on behalf of the individual assigning the claim.⁵

Also, under the bill, the following provisions of the MFWSL no longer apply to the Equal Pay Law:

- The rules that the Director adopts to carry out the purposes of the MFWSL;
- The rules that the Director adopts permitting employment of individuals whose earning capacity is impaired by physical or mental deficiencies or injuries in any occupation at lower than the wage rates applicable under the MFWSL;
- Any rules the Director adopts to permit apprentices to be paid at a wage rate not less than 85% of the minimum wage rate applicable under the MFWSL;
- The provision specifying that nothing in the MFWSL interferes with the right of employees to collectively bargain to establish working conditions more favorable than those applicable under the MFWSL;
- The criminal prohibition against an employer hindering or delaying the Director in performing the Director’s enforcement duties under the MFWSL.⁶

¹ R.C.4112.17(A).

² R.C. 4112.01(A)(2) and 4112.17(A).

³ R.C. Chapter 4111.

⁴ R.C. Chapter 4112; R.C. 4112.17, with conforming changes in R.C. 3314.03, 3326.11, 4111.11, 4111.13, and 4112.01.

⁵ R.C. 4112.17(E).

⁶ R.C. 4111.05, 4111.06, 4111.07, 4111.12, and 4111.13(A).

The Director retains the current law ability to enter and inspect the place of business or employment of any employer, to inspect the employer's records that relate to wages, hours, and other conditions of employment, and to question employees for the purpose of ascertaining whether the Equal Pay Law is being obeyed.⁷ Additionally, the Director retains the responsibility to include a summary of the Equal Pay Law in the summary of wage laws required under continuing law. That summary must be approved by the Director. Every employer subject to the MFWSL or Equal Pay Law is required under continuing law to post the summary in a conspicuous and accessible place in or about the premises where persons subject to the laws are employed.⁸

Permissible wage rate differentiation

The bill modifies a current law exception that allows employers to pay different wages to different employees for the performance of equal work under similar conditions on jobs requiring equal skill, effort, and responsibility. Under current law, an employer may pay employees differently for equal work when the payment is made pursuant to a wage rate differential determined by any factor other than the continuing law list of protected classifications. Under the bill, an employer may utilize such a wage rate differential only if the differential is based on a bona fide factor, such as education, training, or experience, and the employer can demonstrate all of the following:

- That the difference is not related to one of the classifications protected under continuing law and the bill;
- That the difference is based on a factor substantially related to the employee's position and performance, such as education, training, or experience;
- That the difference is consistent with business necessity.

Under the bill, the employer's claim of a wage differential based on a bona fide factor is rebutted if the employee who made the allegation or the Commission (see "**Administration**," above) demonstrates that an alternative employment practice exists that would serve the same business purpose without producing the wage-rate differential and that the employer has refused to adopt the alternative practice.

Continuing law allows employers to pay employees at different rates for the performance of equal work under similar conditions on jobs requiring equal skill, effort, and responsibility, when the payments are made pursuant to a seniority system, a merit system, or a system that measures earnings by the quantity or quality of products.⁹

⁷ R.C. 4111.04.

⁸ R.C. 4111.09.

⁹ R.C. 4112.17(A), (B), and (C) (currently, R.C. 4111.17(A) and (B)).

Remedies

Civil actions

Continuing law allows for an employee discriminated against in violation of the Equal Pay Law to sue to recover two times the amount of the difference between the wages actually received by the employee and the wages received by a person performing equal work for the employer as well as costs and attorney fees.¹⁰ The bill allows for an employee to additionally recover punitive and exemplary damages for discrimination in violation of the Law.¹¹ However, punitive damages may not be awarded in a tort action against a political subdivision.¹² Likewise, a tort action against the state may be restricted to the jurisdiction and liability determinations of the Ohio Court of Claims.¹³

Limitations on recovery

Under the bill, a lawsuit under the Equal Pay Law is a tort action that is subject to the continuing law procedural and monetary limits on compensatory damages for noneconomic losses, punitive damages, and exemplary damages. Continuing law provides that compensatory damages for noneconomic losses in tort actions are limited to \$250,000 or an amount that is equal to three times the economic loss up to a maximum of \$350,000 for each plaintiff in a tort action or a maximum of \$500,000 for each occurrence that is the basis of that tort action. Continuing law also provides for a cap on punitive and exemplary damages for tort actions against small employers (employers who employ not more than 100 employees or certain manufacturing employers who employ not more than 500 employees) and individuals of 10% of the employer's or individual's net worth when the tort was committed up to \$350,000, or two times the amount of compensatory damages, whichever is less.¹⁴

Alternative cause of action

The Civil Rights Law provides that whoever violates the Civil Rights Law is subject to a lawsuit for damages, injunctive relief, or any other appropriate relief. It appears that, by moving the Equal Pay Law into the Civil Rights Law, an employee who is discriminated against in violation of the Equal Pay Law may also be able to bring a lawsuit under the continuing law provisions of the Civil Rights Law.¹⁵

Criminal penalties

The bill eliminates the current law criminal penalty for a violation of the Equal Pay Law, which is a minor misdemeanor.¹⁶ Under the bill, a person is not subject to criminal penalties for violating the Law.

¹⁰ R.C. 4112.17(E) (currently R.C. 4111.17(D)).

¹¹ R.C. 4112.17(H).

¹² R.C. 2744.05, not in the bill.

¹³ R.C. 2743.02, not in the bill.

¹⁴ R.C. 4112.17(E), by reference to R.C. 2315.18 to 2315.21, not in the bill.

¹⁵ R.C. 4112.99, not in the bill.

¹⁶ R.C. 4111.99(C).

Retaliation

The bill modifies the retaliation protections available to employees under the Equal Pay Law. The bill, as in current law, prohibits an employer from discriminating against any employee because the employee makes a complaint, or institutes or testifies in any proceeding under the Equal Pay Law. The bill also prohibits an employer from discriminating against an employee for inquiring about, discussing, or disclosing the wages of the employee or another employee in response to a complaint or charge, or in furtherance of a discrimination investigation, proceeding, hearing, or action, or an investigation conducted by the employer. A person discriminated against under these provisions may sue to recover damages, for an injunction, or for other appropriate relief, including punitive and exemplary damages in accordance with continuing law concerning awarding those types of damages and in an amount sufficient to deter future violations. The bill eliminates the current law criminal penalty for a violation of the prohibition against retaliation under the Equal Pay Law, which is a third degree misdemeanor.¹⁷

Definitions

The bill defines the following terms, as used in the Equal Pay Law:

“Sexual orientation” means heterosexuality, homosexuality, or bisexuality, whether actual or perceived.

“Gender identity” means an individual’s self-perception, or perception of that person by another, of the individual’s identity as male or female as realized through the person’s appearance, behavior, or physical characteristics, regardless of whether that appearance, behavior, or physical characteristics are in accord with or opposed to the person’s physical anatomy, chromosomal sex, or sex at birth.¹⁸

Title and intent

The bill is titled the “Fair and Acceptable Income Required (FAIR) Act.” The stated intent of the bill is to ensure equal pay for women in Ohio and to correct the historical wage disparity that has occurred between the sexes.¹⁹

History

Action	Date
Introduced	03-07-19

S0092-I-133/ar

¹⁷ R.C. 4112.17(G) and (H), 4111.13(B), and 4111.99(B).

¹⁸ R.C. 4112.17(I).

¹⁹ R.C. 4112.17(J) and Section 3.