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SENATE BILL 402

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

INTRODUCED BY

Linda M. Lopez

AN ACT

RELATING TO EMPLOYMENT; ENACTING THE FAIR PAY FOR WOMEN ACT;
PROHIBITING WAGE DISCRIMINATION BASED ON AN EMPLOYEE'S SEX;
PROHIBITING RETALIATION FOR ASSERTING A CLAIM PURSUANT TO THE
FAIR PAY FOR WOMEN ACT; PROVIDING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--Sections 1 through 9 of this act may be cited as the "Fair Pay For Women Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the Fair Pay for Women Act:

- A. "commission" means the human rights commission;
- B. "director" means the chief of the human rights bureau of the labor relations division of the workforce solutions department;

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1 C. "employ" means suffer or permit to work;

2 D. "employee" means any individual employed by an
3 employer;

4 E. "employer" means an individual, partnership,
5 association, corporation, business trust, legal representative
6 or any organized group of persons employing fifteen or more
7 employees who work more than thirty hours per week and act
8 directly or indirectly in the interest of an employer in
9 relation to an employee;

10 F. "unpaid wage" means the difference between the
11 wages paid to the employee and the wages that would have been
12 paid to the employee had the discrimination not occurred; and

13 G. "wage" means compensation for performance of
14 services by an employee for an employer whether paid by the
15 employer or another person, including cash value of all
16 compensation paid in any medium other than cash.

17 SECTION 3. [NEW MATERIAL] PROHIBITION ON PAYING EMPLOYEES
18 LESS FOR SAME WORK.--

19 A. No employer shall discriminate, within any
20 establishment in which such employees are employed, between
21 employees on the basis of sex by paying wages to employees in
22 the establishment at a rate less than the rate that the
23 employer pays wages to employees of the opposite sex in the
24 establishment for equal work on jobs the performance of which
25 requires equal skill, effort and responsibility and that are

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1 performed under similar working conditions, except where the
2 payment is made pursuant to a:

- 3 (1) seniority system;
- 4 (2) merit system;
- 5 (3) system that measures earnings by quantity
6 or quality of production; or
- 7 (4) differential based on any other factor
8 other than sex.

9 B. An employer shall not reduce the wage of an
10 employee to comply with this section.

11 SECTION 4. [NEW MATERIAL] GRIEVANCE PROCEDURE.--

12 A. A person claiming to be aggrieved by an unlawful
13 discriminatory practice in violation of the provisions of the
14 Fair Pay for Women Act may file with the human rights bureau of
15 the labor relations division of the workforce solutions
16 department a written complaint that shall state the name and
17 address of the employer alleged to have engaged in the
18 discriminatory practice, all information relating to the
19 discriminatory practice and any other information that may be
20 required by the commission. All complaints shall be filed with
21 the bureau within one year from the date of discovery of the
22 alleged violation.

23 B. The director shall advise the employer that a
24 complaint has been filed against the employer and shall furnish
25 the employer with a copy of the complaint. The director shall

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1 promptly investigate the alleged act. If the director
2 determines that the complaint lacks probable cause, the
3 director shall dismiss the complaint and notify the employee
4 and employer of the dismissal. The complaint shall be
5 dismissed subject to appeal as in the case of other orders of
6 the commission.

7 C. If the director determines that probable cause
8 exists for the complaint, the director shall attempt to achieve
9 a satisfactory adjustment of the complaint through persuasion
10 and conciliation. The director and staff shall neither
11 disclose what has transpired during the attempted conciliation
12 nor divulge information obtained during any hearing before the
13 commission or a commissioner prior to final action relating to
14 the complaint. An officer or employee of the workforce
15 solutions department who makes public in any manner information
16 in violation of this subsection is guilty of a misdemeanor and
17 upon conviction shall be fined not more than one thousand
18 dollars (\$1,000) or imprisoned not more than one year.

19 D. An employee who has filed a complaint with the
20 human rights bureau may request and shall receive an order of
21 nondetermination from the director without delay after the
22 bureau's receipt of the complaint and in jointly filed cases,
23 after the federal complaint has been closed. The order of
24 nondetermination may be appealed pursuant to the provisions of
25 Section 7 of the Fair Pay for Women Act.

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1 E. If conciliation fails or if, in the opinion of
2 the director, informal conference cannot result in conciliation
3 and the employee has not requested a waiver of right to hearing
4 pursuant to the provisions of Subsection H of this section, the
5 commission shall issue a written complaint in its own name
6 against the respondent. The complaint shall set forth the
7 alleged discriminatory practice and the relief requested. The
8 complaint shall require the employer to answer the allegations
9 of the complaint at a hearing before the commission or hearing
10 officer and shall specify the date, time and place of the
11 hearing. The hearing date shall not be more than fifteen or
12 less than ten days after service of the complaint. The
13 complaint shall be served on the employer personally or by
14 registered mail, return receipt requested. The hearing shall
15 be held in the county where the employer is doing business or
16 the alleged discriminatory practice occurred.

17 F. Within one year of the filing of a complaint by
18 an allegedly aggrieved employee, the commission or its director
19 shall:

20 (1) dismiss the complaint for lack of probable
21 cause;

22 (2) achieve satisfactory adjustment of the
23 complaint as evidenced by order of the commission; or

24 (3) provide the allegedly aggrieved employee a
25 written order and written notice that the employee may initiate

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1 an action in the district court of the county where the
2 employer is doing business or where the alleged violation
3 occurred.

4 G. Upon the filing of the employee's action, the
5 district court of the county where the employer is doing
6 business or where the alleged discriminatory practice occurred
7 may grant injunctive relief pending hearing by the commission
8 or pending judicial review of an order of the commission so as
9 to preserve the status quo or to ensure that the commission's
10 order as issued will be effective. The employee shall not be
11 required to post a bond.

12 H. The employee may seek a trial de novo in the
13 district court in lieu of a hearing before the commission,
14 provided the employee requests from the director, in writing, a
15 waiver of the employee's right to hearing within sixty days of
16 service of written notice of a probable cause determination by
17 the director. The director shall approve the waiver request
18 and shall serve notice of the waiver upon the employee and
19 employer. The employee may request a trial de novo pursuant to
20 Section 7 of the Fair Pay for Women Act within ninety days from
21 the date of service of the waiver. Issuance of the notice
22 shall be deemed a final order of the commission for the purpose
23 of appeal pursuant to that section.

24 SECTION 5. [NEW MATERIAL] HEARING PROCEDURES.--

25 A. The respondent to a complaint made pursuant to

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1 Section 4 of the Fair Pay for Women Act may file a written
2 answer to the complaint, appear at the hearing, give testimony
3 and be represented by counsel and may obtain from the
4 commission subpoenas for any person or for the production of
5 any evidence pertinent to the proceeding. The complainant
6 shall be present at the hearing and may be represented by
7 counsel. Each party shall have the right to amend the party's
8 complaint or answer.

9 B. A panel of three members of the commission
10 designated by the chair shall sit, and a decision agreed upon
11 by two members of the panel shall be the decision of the
12 commission. Hearings also may be conducted by a hearing
13 officer employed by the human rights bureau of the labor
14 relations division of the workforce solutions department or, if
15 the hearing officer is unavailable, one member of the
16 commission may be designated by the chair to act as a hearing
17 officer. A hearing officer shall have the same powers and
18 duties as a commissioner as set forth in Paragraph (2) of
19 Subsection A of Section 28-1-4 NMSA 1978.

20 C. The complainant or the complainant's
21 representative shall present to the commission or the hearing
22 officer the case supporting the complaint. No evidence
23 concerning prior attempts at conciliation shall be received.
24 The director shall not participate in the hearing, except as a
25 witness.

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1 D. The commission and the hearing officer shall not
2 be bound by the formal rules of evidence governing courts of
3 law or equity but shall permit reasonable direct examination
4 and cross-examination and the submission of briefs. Testimony
5 at the hearing shall be taken under oath and recorded by tape
6 or otherwise. Upon the request of any party, testimony shall
7 be transcribed, provided that all costs of transcribing shall
8 be paid by the party so requesting. Each commissioner and
9 hearing officer may administer oaths.

10 E. Upon the conclusion of a hearing conducted by a
11 hearing officer, the hearing officer shall prepare a written
12 report setting forth proposed findings of fact and conclusions
13 of law and recommending the action to be taken by the
14 commission. The hearing officer shall submit the report to a
15 review panel consisting of no more than three members of the
16 commission designated by the chair. A decision by a majority
17 of the members of the review panel shall be the decision of the
18 commission. If the commission finds from the evidence
19 presented at any hearing held pursuant to this section that the
20 employer has engaged in a discriminatory practice, it shall
21 make written findings of fact, conclusions of law and its
22 decision based upon the findings of fact and conclusions of
23 law. The commission may adopt, modify or reject the proposed
24 findings of fact and conclusions of law and the action
25 recommended by the hearing officer. Within five days after any

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1 order is rendered by the commission following a hearing, the
2 commission shall serve upon each party of record and the
3 party's attorney, if any, a written copy of the order by
4 certified mail to the party's address of record. All parties
5 shall be deemed to have been served on the tenth day following
6 the mailing. As part of its order, the commission may require
7 the employer to pay actual damages to the complainant and to
8 pay reasonable attorney fees, if the employee was represented
9 by private counsel, and to take such affirmative action as the
10 commission considers necessary, including a requirement for
11 reports of the manner of compliance.

12 F. If the commission finds from the evidence that
13 the employer has not engaged in a discriminatory practice, it
14 shall make written findings of fact and serve the employee and
15 employer with a copy of the findings of fact and with an order
16 dismissing the complaint.

17 SECTION 6. [NEW MATERIAL] ENFORCEMENT--PENALTIES--
18 REMEDIES.--

19 A. An employer who violates a provision of the Fair
20 Pay for Women Act shall be liable to the employee affected in
21 an amount not to exceed:

22 (1) the affected employee's unpaid wages from
23 the date of the violation to the date of the filing of the
24 claim;

25 (2) actual damages; and

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1 (3) punitive damages.

2 B. An action to establish liability and recover
3 damages may be maintained in any court of competent
4 jurisdiction by any one or more employees for and on behalf of
5 the employee or employees and for other employees similarly
6 situated, or such employee or employees may designate an agent
7 or representative to maintain such action on behalf of all
8 employees similarly situated.

9 C. The court in any action brought under this
10 section shall, in addition to any judgment awarded to the
11 plaintiff or plaintiffs, allow costs of the action and
12 reasonable attorney fees to be paid by the defendant. In any
13 proceedings brought pursuant to the provisions of this section,
14 the employee shall not be required to pay any filing fee or
15 other court costs necessarily incurred in such proceedings.

16 D. The court in any action brought under this
17 section may order appropriate injunctive relief, including
18 requiring an employer to post in the place of business a notice
19 describing violations by the employer as found by the court or
20 a copy of a cease and desist order applicable to the employer.

21 E. An action arising under the Fair Pay for Women
22 Act shall be initiated within one year from the date of the
23 discovery of the violation.

24 SECTION 7. [NEW MATERIAL] APPEAL.--

25 A. A person aggrieved by an order of the commission

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1 may obtain a trial de novo by filing a notice of appeal in the
2 district court of the county where the alleged discriminatory
3 practice occurred or where the employer does business. The
4 notice of appeal must be filed within ninety days from the date
5 of service of the commission's order. A copy of the notice of
6 appeal shall be served personally or by certified mail, return
7 receipt requested, on all parties who appeared before the
8 commission at their last known addresses. A copy of the notice
9 of appeal shall also be served at the human rights bureau of
10 the labor relations division of the workforce solutions
11 department in Santa Fe. An order of the commission shall not
12 be superseded or stayed during the appeal unless the district
13 court so directs after notice to the commission and a hearing.

14 B. If testimony at the hearing was transcribed, the
15 bureau shall, upon receipt of the notice of appeal, file so
16 much of the transcript of the record as the parties requesting
17 the transcript designate as necessary for the appeal with the
18 district court.

19 C. Upon appeal, either party may request a jury.
20 The jurisdiction of the district court is exclusive and its
21 judgment is final, subject to further appeal to the court of
22 appeals.

23 D. If the employee prevails in an action or
24 proceeding under this section, the court in its discretion may
25 allow reasonable attorney fees, and the state shall be liable

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1 the same as a private person.

2 SECTION 8. [NEW MATERIAL] RETALIATION PROHIBITED.--It is
3 a violation of the Fair Pay for Women Act for an employer or
4 any other person to discharge, demote, deny promotion to or in
5 any other way discriminate against a person in the terms or
6 conditions of employment in retaliation for the person
7 asserting a claim or right pursuant to the Fair Pay for Women
8 Act or assisting another person to do so, or for informing
9 another person about employment rights or other rights provided
10 by law.

11 SECTION 9. [NEW MATERIAL] PENALTY FOR RETALIATION.--An
12 employer who willfully violates a provision of Section 8 of the
13 Fair Pay for Women Act shall be liable to the person affected
14 in the amount of up to fifty thousand dollars (\$50,000).

15 SECTION 10. Section 28-1-7 NMSA 1978 (being Laws 1969,
16 Chapter 196, Section 7, as amended) is amended to read:

17 "28-1-7. UNLAWFUL DISCRIMINATORY PRACTICE.--It is an
18 unlawful discriminatory practice for:

19 A. an employer, unless based on a bona fide
20 occupational qualification or other statutory prohibition, to
21 refuse to hire, to discharge, to promote or demote or to
22 discriminate in matters of compensation, terms, conditions or
23 privileges of employment against any person otherwise qualified
24 because of race; age; religion; color; national origin;
25 ancestry; sex, other than as provided in the Fair Pay for Women

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1 Act; physical or mental handicap or serious medical condition;
2 or, if the employer has fifty or more employees, spousal
3 affiliation; provided, however, that 29 U.S.C. Section
4 631(c)(1) and (2) shall apply to discrimination based on age;
5 or, if the employer has fifteen or more employees, to
6 discriminate against an employee based upon the employee's
7 sexual orientation or gender identity;

8 B. a labor organization to exclude a person or to
9 expel or otherwise discriminate against any of its members or
10 against any employer or employee because of race, religion,
11 color, national origin, ancestry, sex, sexual orientation,
12 gender identity, spousal affiliation, physical or mental
13 handicap or serious medical condition;

14 C. any employer, labor organization or joint
15 apprenticeship committee to refuse to admit or employ any
16 person in any program established to provide an apprenticeship
17 or other training or retraining because of race, religion,
18 color, national origin, ancestry, sex, sexual orientation,
19 gender identity, physical or mental handicap or serious medical
20 condition, or, if the employer has fifty or more employees,
21 spousal affiliation;

22 D. any person, employer, employment agency or labor
23 organization to print or circulate or cause to be printed or
24 circulated any statement, advertisement or publication, to use
25 any form of application for employment or membership or to make

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1 any inquiry regarding prospective membership or employment that
2 expresses, directly or indirectly, any limitation,
3 specification or discrimination as to race, color, religion,
4 national origin, ancestry, sex, sexual orientation, gender
5 identity, physical or mental handicap or serious medical
6 condition, or, if the employer has fifty or more employees,
7 spousal affiliation, unless based on a bona fide occupational
8 qualification;

9 E. an employment agency to refuse to list and
10 properly classify for employment or refer a person for
11 employment in a known available job, for which the person is
12 otherwise qualified, because of race, religion, color, national
13 origin, ancestry, sex, sexual orientation, gender identity,
14 spousal affiliation, physical or mental handicap or serious
15 medical condition, unless based on a bona fide occupational
16 qualification, or to comply with a request from an employer for
17 referral of applicants for employment if the request indicates
18 either directly or indirectly that the employer discriminates
19 in employment on the basis of race, religion, color, national
20 origin, ancestry, sex, sexual orientation, gender identity,
21 spousal affiliation, physical or mental handicap or serious
22 medical condition, unless based on a bona fide occupational
23 qualification;

24 F. any person in any public accommodation to make a
25 distinction, directly or indirectly, in offering or refusing to

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1 offer its services, facilities, accommodations or goods to any
2 person because of race, religion, color, national origin,
3 ancestry, sex, sexual orientation, gender identity, spousal
4 affiliation or physical or mental handicap, provided that the
5 physical or mental handicap is unrelated to a person's ability
6 to acquire or rent and maintain particular real property or
7 housing accommodation;

8 G. any person to:

9 (1) refuse to sell, rent, assign, lease or
10 sublease or offer for sale, rental, lease, assignment or
11 sublease any housing accommodation or real property to any
12 person or to refuse to negotiate for the sale, rental, lease,
13 assignment or sublease of any housing accommodation or real
14 property to any person because of race, religion, color,
15 national origin, ancestry, sex, sexual orientation, gender
16 identity, spousal affiliation or physical or mental handicap,
17 provided that the physical or mental handicap is unrelated to a
18 person's ability to acquire or rent and maintain particular
19 real property or housing accommodation;

20 (2) discriminate against any person in the
21 terms, conditions or privileges of the sale, rental,
22 assignment, lease or sublease of any housing accommodation or
23 real property or in the provision of facilities or services in
24 connection therewith because of race, religion, color, national
25 origin, ancestry, sex, sexual orientation, gender identity,

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1 spousal affiliation or physical or mental handicap, provided
2 that the physical or mental handicap is unrelated to a person's
3 ability to acquire or rent and maintain particular real
4 property or housing accommodation; or

5 (3) print, circulate, display or mail or cause
6 to be printed, circulated, displayed or mailed any statement,
7 advertisement, publication or sign or use any form of
8 application for the purchase, rental, lease, assignment or
9 sublease of any housing accommodation or real property or to
10 make any record or inquiry regarding the prospective purchase,
11 rental, lease, assignment or sublease of any housing
12 accommodation or real property that expresses any preference,
13 limitation or discrimination as to race, religion, color,
14 national origin, ancestry, sex, sexual orientation, gender
15 identity, spousal affiliation or physical or mental handicap,
16 provided that the physical or mental handicap is unrelated to a
17 person's ability to acquire or rent and maintain particular
18 real property or housing accommodation;

19 H. any person to whom application is made either
20 for financial assistance for the acquisition, construction,
21 rehabilitation, repair or maintenance of any housing
22 accommodation or real property or for any type of consumer
23 credit, including financial assistance for the acquisition of
24 any consumer good as defined by Section 55-9-102 NMSA 1978, to:

25 (1) consider the race, religion, color,

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1 national origin, ancestry, sex, sexual orientation, gender
2 identity, spousal affiliation or physical or mental handicap of
3 any individual in the granting, withholding, extending,
4 modifying or renewing or in the fixing of the rates, terms,
5 conditions or provisions of any financial assistance or in the
6 extension of services in connection with the request for
7 financial assistance; or

8 (2) use any form of application for financial
9 assistance or to make any record or inquiry in connection with
10 applications for financial assistance that expresses, directly
11 or indirectly, any limitation, specification or discrimination
12 as to race, religion, color, national origin, ancestry, sex,
13 sexual orientation, gender identity, spousal affiliation or
14 physical or mental handicap;

15 I. any person or employer to:

16 (1) aid, abet, incite, compel or coerce the
17 doing of any unlawful discriminatory practice or to attempt to
18 do so;

19 (2) engage in any form of threats, reprisal or
20 discrimination against any person who has opposed any unlawful
21 discriminatory practice or has filed a complaint, testified or
22 participated in any proceeding under the Human Rights Act; or

23 (3) willfully obstruct or prevent any person
24 from complying with the provisions of the Human Rights Act or
25 to resist, prevent, impede or interfere with the commission or

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1 any of its members, staff or representatives in the performance
2 of their duties under the Human Rights Act; or

3 J. any employer to refuse or fail to accommodate a
4 person's physical or mental handicap or serious medical
5 condition, unless such accommodation is unreasonable or an
6 undue hardship."

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