

Senate Bill No. 397—Senators Spearman, Segerblom, Ford, Parks;
Cancela, Cannizzaro, Denis, Manendo, Ratti and
Woodhouse

Joint Sponsors: Assemblymen Diaz, Araujo,
Swank and Thompson

CHAPTER.....

AN ACT relating to employment; requiring certain penalties and fines imposed by the Nevada Equal Rights Commission for certain unlawful discriminatory practices to be deposited in the State General Fund; requiring civil penalties imposed by the Nevada Equal Rights Commission for certain unlawful employment practices to be deposited in the Nevada Equal Rights Commission Gift Fund for certain purposes; making it an unlawful employment practice for an employer, employment agency or labor organization to discriminate against a person for inquiring about, discussing or disclosing information about wages in certain circumstances; revising provisions relating to unlawful employment practices; revising provisions governing the filing of complaints of employment discrimination with the Nevada Equal Rights Commission; revising the relief that the Commission may order if it determines that an unlawful employment practice has occurred; authorizing a person who has been injured by an unlawful employment practice relating to discussing or disclosing information about wages to file a complaint with the Nevada Equal Rights Commission; revising provisions relating to the time in which an employee may seek relief in district court for a claim of unlawful employment practices; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law prohibits an employer, employment agency, labor organization or joint labor-management committee from discriminating against any person with respect to employment or membership, as applicable, on the basis of race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin. (NRS 613.330) Existing law also requires the Nevada Equal Rights Commission to accept certain complaints alleging unlawful discriminatory practices and, if the Commission determines that an unlawful practice has occurred, order: (1) the person engaging in the practice to cease and desist; and (2) for a case involving an unlawful employment practice, the restoration of all benefits and rights to which the aggrieved person is entitled. (NRS 233.157, 233.160, 233.170)

Section 1.5 of this bill revises provisions governing the filing of complaints alleging a practice of unlawful discrimination in compensation to require that the complaint be filed within 300 days after any date on which: (1) a decision or practice resulting in discriminatory compensation is adopted; (2) a person becomes



subject to such a decision or practice; or (3) a person is affected by an application of such a decision or practice. **Section 1.5** also requires the Commission to notify each party to a complaint of the period of time that a person may apply to a district court for relief. **Sections 2 and 2.5** of this bill revise the powers of the Commission to order remedies for unlawful employment practices. **Section 2** authorizes the Commission to: (1) award back pay for a period beginning 2 years before the date of the filing of a complaint regarding an unlawful employment practice and ending on the date the Commission issues an order regarding the complaint; (2) award costs and reasonable attorney's fees in cases involving an unlawful employment practice; (3) order payment of compensatory damages or, if the employer acted with malice or reckless indifference, punitive damages in cases involving an unlawful employment practice relating to discrimination on the basis of sex; and (4) order a civil penalty, in increasing amounts, for an unlawful employment practice that it determines is willful based on the number of such practices the person has committed in the previous 5 years. **Section 1** of this bill requires, with limited exception, that any penalty or fine imposed by the Commission for certain unlawful discriminatory practices be deposited in the State General Fund and authorizes the Commission to present a claim for recommendation to the Interim Finance Committee if money is required to pay certain costs. **Section 1** requires that any civil penalty imposed by the Commission for willful unlawful employment practices be deposited in the Nevada Equal Rights Commission Gift Fund and used to prevent unlawful employment practices through enforcement, outreach and training.

Section 12 of this bill requires the Commission, if it does not conclude that an unfair employment practice has occurred, to issue a letter to the person who filed the complaint concerning an unfair employment practice. This letter must notify the person of his or her right to apply to the district court for an order relating to the alleged unfair employment practice and any potential punitive damages owed to the person. **Section 13** of this bill provides that a person may apply to a district court for relief pursuant to **section 12** up to 180 days after the date of issuance of the letter described in **section 12**, in addition to the existing authority to apply to a district court for relief up to 180 days after the date of the alleged act.

This bill also enacts several provisions contained in the federal Paycheck Fairness Act, which was most recently introduced in the United States Senate on March 25, 2015, but has not been enacted to date. (S. 862 (114th)) Specifically, **section 3** of this bill prohibits an employer, employment agency or labor organization from discriminating against any person with respect to employment or membership, as applicable, for inquiring about, discussing or disclosing information about wages unless the person has access to information about the wages of other persons as part of his or her essential job functions and discloses the information to a person who does not have access to that information. Under **section 11** of this bill, any person injured by such an unlawful employment practice may file a complaint with the Commission. **Section 7** of this bill provides that it is an unlawful employment practice to use a qualification which is based upon or derived from a difference on the basis of sex or a qualification that an employer, employment agency, labor organization or joint labor-management committee has refused to change after being presented by an affected person with an alternative practice that would serve the same purpose in a manner that is less discriminatory on the basis of sex.



THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 233 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Except as otherwise provided in subsection 3, all penalties and fines imposed by the Commission pursuant to NRS 233.170 and 233.210 must be deposited with the State Treasurer for credit to the State General Fund.

2. If the money collected from the imposition of any penalty and fine is deposited in the State General Fund pursuant to subsection 1, the Commission may present a claim to the State Board of Examiners for recommendation to the Interim Finance Committee if money is required to pay attorney's fees or the costs of an investigation, or both.

3. A civil penalty imposed by the Commission pursuant to subparagraph (5) of paragraph (b) of subsection 3 of NRS 233.170 must be deposited in the Nevada Equal Rights Commission Gift Fund created by NRS 233.155. The money described in this subsection must be accounted for separately in the Fund and used only for the purpose of preventing unlawful employment practices in this State through enforcement of this chapter, outreach and training.

Sec. 1.5. NRS 233.160 is hereby amended to read as follows:

233.160 1. A complaint which alleges unlawful discriminatory practices in:

(a) Housing must be filed with the Commission not later than 1 year after the date of the occurrence of the alleged practice or the date on which the practice terminated.

(b) Employment or public accommodations must be filed with the Commission not later than 300 days after the date of the occurrence of the alleged practice.

➔ A complaint is timely if it is filed with an appropriate federal agency within that period. A complainant shall not file a complaint with the Commission if any other state or federal administrative body or officer which has comparable jurisdiction to adjudicate complaints of discriminatory practices has made a decision upon a complaint based upon the same facts and legal theory.

2. The complainant shall specify in the complaint the alleged unlawful practice and sign it under oath.



3. The Commission shall send to the party against whom an unlawful discriminatory practice is alleged:

- (a) A copy of the complaint;
- (b) An explanation of the rights which are available to that party; and
- (c) A copy of the Commission's procedures.

4. The Commission shall notify each party to the complaint of the limitation on the period of time that a person may apply to the district court for relief pursuant to NRS 613.430.

5. For the purposes of paragraph (b) of subsection 1, an unlawful discriminatory practice in employment which relates to compensation occurs on each date on which:

(a) A decision or other practice resulting in discriminatory compensation is adopted;

(b) A person becomes subject to a decision or other practice resulting in discriminatory compensation; or

(c) A person is affected by an application of a decision or other practice resulting in discriminatory compensation, including, without limitation, each payment of wages, benefits or other compensation that is affected by the decision or practice.

Sec. 2. NRS 233.170 is hereby amended to read as follows:

233.170 1. When a complaint is filed whose allegations if true would support a finding of unlawful practice, the Commission shall determine whether to hold an informal meeting to attempt a settlement of the dispute in accordance with the regulations adopted pursuant to NRS 233.157. If the Commission determines to hold an informal meeting, the Administrator may, to prepare for the meeting, request from each party any information which is reasonably relevant to the complaint. No further action may be taken if the parties agree to a settlement.

2. If an agreement is not reached at the informal meeting, the Administrator shall determine whether to conduct an investigation into the alleged unlawful practice in accordance with the regulations adopted pursuant to NRS 233.157. After the investigation, if the Administrator determines that an unlawful practice has occurred, the Administrator shall attempt to mediate between or reconcile the parties. The party against whom a complaint was filed may agree to cease the unlawful practice. If an agreement is reached, no further action may be taken by the complainant or by the Commission.

3. If the attempts at mediation or conciliation fail, the Commission may hold a public hearing on the matter. After the hearing, if the Commission determines that an unlawful practice has occurred, it may:



(a) Serve a copy of its findings of fact within 10 calendar days upon any person found to have engaged in the unlawful practice; and

(b) Order the person to:

(1) Cease and desist from the unlawful practice.

(2) In cases involving an unlawful employment practice, restore all benefits and rights to which the aggrieved person is entitled, including, but not limited to, rehiring, back pay for a period ~~[not to exceed 2 years after the date of the most recent unlawful practice.]~~ *described in subsection 4*, annual leave time, sick leave time or pay, other fringe benefits and seniority, with interest thereon from the date of the Commission's decision at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1 or July 1, as the case may be, immediately preceding the date of the Commission's decision, plus 2 percent. The rate of interest must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

(3) In cases involving an unlawful employment practice, pay the costs and reasonable attorney's fees incurred by the aggrieved person to pursue the claim.

(4) In cases involving an unlawful employment practice relating to discrimination on the basis of sex, pay an amount determined to be appropriate by the Commission as compensatory damages which, upon submission of proof by the aggrieved party, may include, without limitation, compensation that would have been earned in the absence of discrimination for overtime, shift differential, commissions, tips, cost of living adjustments, merit increases or promotions, or for other fringe benefits, including, without limitation, vacation pay, pension or retirement benefits, stock options or bonus plans, contributions to a savings plan, profit sharing or benefits for medical or life insurance.

(5) In cases involving an unlawful employment practice that the Commission determines was willful, pay a civil penalty of:

(I) For the first unlawful employment practice that the person has engaged in during the immediately preceding 5 years which the Commission determines was willful, not more than \$10,000.

(II) For the second unlawful employment practice that the person has engaged in during the immediately preceding 5 years which the Commission determines was willful, not more than \$15,000.



(III) For the third and any subsequent unlawful employment practice that the person has engaged in during the immediately preceding 5 years which the Commission determines was willful, not more than \$25,000.

4. *For the purposes of subparagraph (2) of paragraph (b) of subsection 3, the period for back pay must not exceed a period beginning 2 years before the date on which the complaint was filed and ending on the date the Commission issues an order pursuant to paragraph (b) of subsection 3 addressing all unlawful practices which occur during that period and which are similar or related to an unlawful practice in the complaint.*

5. *The Commission shall adopt regulations setting forth the manner in which the Commission will determine whether an unlawful employment practice was willful.*

6. The order of the Commission is a final decision in a contested case for the purpose of judicial review. If the person fails to comply with the Commission's order, the Commission shall apply to the district court for an order compelling such compliance, but failure or delay on the part of the Commission does not prejudice the right of an aggrieved party to judicial review. The court shall issue the order unless it finds that the Commission's findings or order are not supported by substantial evidence or are otherwise arbitrary or capricious. If the court upholds the Commission's order and finds that the person has violated the order by failing to cease and desist from the unlawful practice or to make the payment ordered, the court ~~shall~~:

(a) Shall award the aggrieved party actual damages for any economic loss ; and ~~no more.~~

~~5.1~~ *(b) May, if the court determines that the employer's act or failure to act was the result of malice or reckless indifference, impose an amount determined to be appropriate by the court as punitive damages.*

7. After the Commission has held a public hearing and rendered a decision, the complainant is barred from proceeding on the same facts and legal theory before any other administrative body or officer.

Sec. 2.5. NRS 233.210 is hereby amended to read as follows:

233.210 Any person who willfully resists, prevents, impedes or interferes with the Commission, its members, the Administrator or agents in the performance of duties pursuant to this chapter shall be fined not more than \$500. *In such an action, the Commission may recover any reasonable costs or expenses incurred by the*



Commission, its members, the Administrator or agents in the performance of duties pursuant to this chapter.

Sec. 3. Chapter 613 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Except as otherwise provided in subsection 2, it is an unlawful employment practice for an employer to discriminate against any of his or her employees or applicants for employment, for an employment agency to discriminate against any person, or for a labor organization to discriminate against any member thereof or an applicant for membership, because the employee, applicant, person or member, as applicable, has inquired about, discussed or disclosed his or her wages or the wages of another employee, applicant, person or member.

2. The provisions of subsection 1 do not apply to an employee, applicant, person or member who has access to information about the wages of other employees, applicants, persons or members as part of his or her essential job functions and discloses that information to a person who does not have access to that information unless the disclosure is in response to a charge, complaint or investigation for a violation of NRS 613.330.

Sec. 4. NRS 613.310 is hereby amended to read as follows:

613.310 As used in NRS 613.310 to 613.435, inclusive, *and section 3 of this act*, unless the context otherwise requires:

1. "Disability" means, with respect to a person:

(a) A physical or mental impairment that substantially limits one or more of the major life activities of the person, including, without limitation, the human immunodeficiency virus;

(b) A record of such an impairment; or

(c) Being regarded as having such an impairment.

2. "Employer" means any person who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, but does not include:

(a) The United States or any corporation wholly owned by the United States.

(b) Any Indian tribe.

(c) Any private membership club exempt from taxation pursuant to 26 U.S.C. § 501(c).

3. "Employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer, but does not include any agency of the United States.



4. “Gender identity or expression” means a gender-related identity, appearance, expression or behavior of a person, regardless of the person’s assigned sex at birth.

5. “Labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment.

6. “Person” includes the State of Nevada and any of its political subdivisions.

7. “Sexual orientation” means having or being perceived as having an orientation for heterosexuality, homosexuality or bisexuality.

Sec. 5. NRS 613.320 is hereby amended to read as follows:

613.320 1. The provisions of NRS 613.310 to 613.435, inclusive, *and section 3 of this act* do not apply to:

(a) Any employer with respect to employment outside this state.

(b) Any religious corporation, association or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of its religious activities.

2. The provisions of NRS 613.310 to 613.435, inclusive, *and section 3 of this act* concerning unlawful employment practices related to sexual orientation and gender identity or expression do not apply to an organization that is exempt from taxation pursuant to 26 U.S.C. § 501(c)(3).

Sec. 6. NRS 613.340 is hereby amended to read as follows:

613.340 1. It is an unlawful employment practice for an employer to discriminate against any of his or her employees or applicants for employment, for an employment agency to discriminate against any person, or for a labor organization to discriminate against any member thereof or applicant for membership, because the employee, applicant, person or member, as applicable, has opposed any practice made an unlawful employment practice by NRS 613.310 to 613.435, inclusive, *and section 3 of this act*, or because he or she has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under NRS 613.310 to 613.435, inclusive ~~H~~, *and section 3 of this act*.

2. It is an unlawful employment practice for an employer, labor organization or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to



employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification or discrimination, based on race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification or discrimination based on religion, sex, sexual orientation, gender identity or expression, age, physical, mental or visual condition or national origin when religion, sex, sexual orientation, gender identity or expression, age, physical, mental or visual condition or national origin is a bona fide occupational qualification for employment.

Sec. 7. NRS 613.350 is hereby amended to read as follows:

613.350 1. It is not an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify or refer for employment any person, for a labor organization to classify its membership or to classify or refer for employment any person, or for an employer, labor organization or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any person in any such program, on the basis of his or her religion, sex, sexual orientation, gender identity or expression, age, disability or national origin in those instances where religion, sex, sexual orientation, gender identity or expression, age, physical, mental or visual condition or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

2. It is not an unlawful employment practice for an employer to fail or refuse to hire and employ employees, for an employment agency to fail to classify or refer any person for employment, for a labor organization to fail to classify its membership or to fail to classify or refer any person for employment, or for an employer, labor organization or joint labor-management committee controlling apprenticeship or other training or retraining programs to fail to admit or employ any person in any such program, on the basis of a disability in those instances where physical, mental or visual condition is a bona fide and relevant occupational qualification necessary to the normal operation of that particular business or enterprise, if it is shown that the particular disability would prevent proper performance of the work for which the person with a



disability would otherwise have been hired, classified, referred or prepared under a training or retraining program.

3. It is not an unlawful employment practice for an employer to fail or refuse to hire or to discharge a person, for an employment agency to fail to classify or refer any person for employment, for a labor organization to fail to classify its membership or to fail to classify or refer any person for employment, or for an employer, labor organization or joint labor-management committee controlling apprenticeship or other training or retraining programs to fail to admit or employ any person in any such program, on the basis of his or her age if the person is less than 40 years of age.

4. It is not an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if the school or institution is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association or society, or if the curriculum of the school or institution is directed toward the propagation of a particular religion.

5. It is not an unlawful employment practice for an employer to observe the terms of any bona fide plan for employees' benefits, such as a retirement, pension or insurance plan, which is not a subterfuge to evade the provisions of NRS 613.310 to 613.435, inclusive, *and section 3 of this act* as they relate to discrimination against a person because of age, except that no such plan excuses the failure to hire any person who is at least 40 years of age.

6. It is not an unlawful employment practice for an employer to require employees to adhere to reasonable workplace appearance, grooming and dress standards so long as such requirements are not precluded by law, except that an employer shall allow an employee to appear, groom and dress consistent with the employee's gender identity or expression.

7. For the purpose of subsection 1, the term "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" does not include:

(a) A qualification which is based upon or derived from a difference on the basis of sex; or

(b) A qualification which the employer, employment agency, labor organization or joint labor-management committee has refused to change after an affected person has presented an alternative practice that would serve the same purpose without



producing the same amount of differential treatment on the basis of sex.

Sec. 8. NRS 613.380 is hereby amended to read as follows:

613.380 Notwithstanding any other provision of NRS 613.310 to 613.435, inclusive, *and section 3 of this act*, it is not an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, if those differences are not the result of an intention to discriminate because of race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin, nor is it an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test, if the test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin.

Sec. 9. NRS 613.390 is hereby amended to read as follows:

613.390 Nothing contained in NRS 613.310 to 613.435, inclusive, *and section 3 of this act* applies to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because the individual is an Indian living on or near a reservation.

Sec. 10. NRS 613.400 is hereby amended to read as follows:

613.400 Nothing contained in NRS 613.310 to 613.435, inclusive, *and section 3 of this act* requires any employer, employment agency, labor organization or joint labor-management committee subject to NRS 613.310 to 613.435, inclusive, *and section 3 of this act* to grant preferential treatment to any person or to any group because of the race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin of the individual or group on account of an imbalance which exists with respect to the total number or percentage of persons of any race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the



total number or percentage of persons of that race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin in any community, section or other area, or in the available workforce in any community, section or other area.

Sec. 11. NRS 613.405 is hereby amended to read as follows:

613.405 ~~Any~~

1. Except as otherwise provided in subsection 2, any person injured by an unlawful employment practice within the scope of NRS 613.310 to 613.435, inclusive, and section 3 of this act may file a complaint to that effect with the Nevada Equal Rights Commission if the complaint is based on discrimination because of race, color, sex, sexual orientation, gender identity or expression, age, disability, religion or national origin.

2. Any person injured by an unlawful employment practice within the scope of section 3 of this act may file a complaint to that effect with the Nevada Equal Rights Commission regardless of whether the complaint is based on discrimination because of race, color, sex, sexual orientation, gender identity or expression, age, disability, religion or national origin.

Sec. 12. NRS 613.420 is hereby amended to read as follows:

613.420 If the Nevada Equal Rights Commission does not conclude that an unfair employment practice within the scope of NRS 613.310 to 613.435, inclusive, *and section 3 of this act* has occurred ~~any~~:

1. Any person alleging such a practice may apply to the district court for an order granting or restoring to that person the rights to which the person is entitled under those sections ~~and~~ and, if the court determines that the employer's act or failure to act was the result of malice or reckless indifference, imposing an amount determined to be appropriate by the court as punitive damages; and

2. The Commission shall issue a letter to the person who filed the complaint pursuant to NRS 613.405 notifying the person of his or her rights pursuant to subsection 1.

Sec. 13. NRS 613.430 is hereby amended to read as follows:

613.430 No action authorized by NRS 613.420 may be brought more than 180 days after the date of the act complained of ~~and~~ *or more than 180 days after the date of the issuance of the letter described in subsection 2 of NRS 613.420, whichever is later.* When a complaint is filed with the Nevada Equal Rights Commission the limitation provided by this section is tolled as to any action authorized by NRS 613.420 during the pendency of the complaint before the Commission.



Sec. 14. This act becomes effective:

1. Upon passage and approval for the purpose of adopting regulations and performing any other preparatory administrative tasks that are necessary to carry out the provisions of this act; and
2. On January 1, 2018, for all other purposes.

