



August 12, 2022

Washington State Department of Labor & Industries
ATTN: Bridget Osborne – Policy Analyst
PO Box 44510
Olympia, WA 98504-4510

RE: Comments ES.E.1 – Equal Pay and Opportunities Act

Dear Ms. Osborne,

Thank you for accepting comments on the above-referenced policy document.

Wafla is a non-profit 501(c)(6) membership organization comprised of nearly 800 agricultural and seasonal employers. Wafla was formed to make labor stability a reality for all agricultural employers and for farmers and farmworkers to be treated with dignity and respect. We offer ways for our members to access several federal visa programs and receive assistance complying with state and federal labor standards.

In 2021, wafla filed H-2A applications for more than 200 member employers who collectively employed more than 16,000 individual H-2A workers. In addition, wafla employer members employed more than 20,000 domestic workers.

We have comments on several sections of this proposed policy.

Page 2, Section 1.4 Protections from discrimination and retaliation

- The last bullet in the “protected rights” section reads, “Inquiring about, disclosing, comparing, or otherwise discussing the employee’s wages or the wages of any other employee.” An individual employee may not wish to reveal their pay rate to other employees in the workplace. If one employee obtains information about a second employee’s pay rate, is it L&I’s position that employee one may legally disclose the second employee’s pay rate to others? May employee one legally disclose the second employee’s home address, birth date, age, marital status, or social security number to others?

Page 4, Section 4. Who is considered an applicant under the Equal Pay and Opportunities Act?

- The text reads, “All applicants seeking employment...are protected by the law.” The policy explains that an employer is defined broadly and that the employer need not have a physical presence or employee in the state to be covered by the law. What about “applicants”? There is no definition for the term “applicant.” Is an out-of-state applicant protected by the law? Presumably the answer is yes. How about an applicant who lacks legal employment authorization? Are they protected by the law? Is someone

who cannot legally be hired and employed for the position be considered an “applicant” and sue an employer for violating the Equal Pay and Opportunities Act? Similarly, on page 3, Section 2 (Pay Transparency Requirements), there is a reference to a “hired applicant,” but there is no definition of that term. How does a “hired applicant” differ from an “applicant” or an “employee”?

Page 4, Section 5.1 Wage Scale or Salary Range

- Can an employer and potential employee negotiate outside the wage range listed on the job announcement? For example, during the interview and hiring process, a potential employee may ask for more compensation than is listed in the job announcement. Is negotiating and accepting compensation outside of the listed wage range allowed?
- Is it acceptable for an employer to rely on a single rate (whether per hour or piece-rate)? In the H-2A program, the U.S. Department of Labor requires wages to be fully disclosed to workers. DOL has accepted ETA 790s that have a single rate listed. For example, an employer may list the federally mandated adverse effect wage rate per hour. This rate serves as both the minimum and maximum hourly wage rate. In this case, is a single rate acceptable for fulfilling the requirements of the state statute and policy?

Page 5, Example 5.1-3

- There is a typographical error in the example. “\$.075” should be changed to “\$0.75.”
- If an agricultural employer provides bonuses to workers, must the range of bonus pay also be disclosed? If so, would this apply to discretionary and non-discretionary bonuses alike? Agricultural seasonal bonus structures can vary dramatically because of the numerous factors that can affect bonuses such as weather, crop size, crop quality, and market conditions. These factors are usually not known until crops are harvested. So at the time of a job announcement, the employer may not know how much an end-of-season bonus would be. How are such future variables properly accounted for in posting the minimum and maximum compensation?

Page 6, Section 7 Job Posting Examples

- The text reads, “Job postings must include wage and salary information when the posting includes qualifications for desired applicants for a specific position.” Does this statement mean that the mandate for job postings to include a range of pay and benefits only applies to job postings that include qualifications or references? Based on this language, it appears that a job announcement for a position that does not have any experience requirement or qualification is not covered by the law. Is this a correct interpretation, or does this language need to be revised?

Additional Comments

- What penalties exist for not following this policy? Perhaps the policy should list the enforcement actions and penalties that may apply so that readers of this policy have a fuller understanding of the applicable statutes, rules, and processes.

Thank you again for the opportunity to comment on this draft policy. If you have questions or need clarification about these comments, feel free to contact me. We are always available to collaborate and ensure that state policies are appropriate and easily understood by agricultural employers, employees, and the department.

Sincerely,

A handwritten signature in blue ink, appearing to read "Enrique Gastelum".

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