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S.103

Introduced by Senators Ram Hinsdale, Chittenden, Clarkson, Gulick, Hardy,
Harrison, Perchlik, Vyhovsky, Watson and White

Referred to Committee on

Date:

Subject: Labor; employment practices; public accommodations; fair

employment; discrimination; equal pay; agreements not to compete

Statement of purpose of bill as introduced: This bill proposes to amend the laws prohibiting discrimination in employment and places of public accommodation to provide that harassment need not be severe or pervasive to constitute unlawful discrimination. This bill also proposes to prohibit agreements to settle an employment discrimination claim from prohibiting the employee from working for the employer or an affiliate of the employer and to prohibit pay discrimination based on an employee's race, national origin, or physical or mental condition. In addition, this bill proposes to restrict agreements that prohibit individuals from competing with their former employers following the conclusion of their employment.

An act relating to amending the prohibitions against discrimination

1 It is hereby enacted by the General Assembly of the State of Vermont:

2 Sec. 1. 21 V.S.A. § 495 is amended to read:

3 § 495. UNLAWFUL EMPLOYMENT PRACTICE

4 (a) It shall be unlawful employment practice, except where a bona fide
5 occupational qualification requires persons of a particular race, color, religion,
6 national origin, sex, sexual orientation, gender identity, ancestry, place of birth,
7 age, crime victim status, or physical or mental condition:

8 (1) For any employer, employment agency, or labor organization to
9 harass or discriminate against any individual because of race, color, religion,
10 ancestry, national origin, sex, sexual orientation, gender identity, place of birth,
11 crime victim status, or age or against a qualified individual with a disability;

12 * * *

13 (3) For any employment agency to fail or refuse to classify properly or
14 refer for employment or to otherwise harass or discriminate against any
15 individual because of race, color, religion, ancestry, national origin, sex, sexual
16 orientation, gender identity, place of birth, crime victim status, or age or
17 against a qualified individual with a disability;

18 (4) For any labor organization; to limit, segregate, or qualify its
19 membership with respect to any individual because of race, color, religion,
20 ancestry, national origin, sex, sexual orientation, gender identity, place of birth,
21 crime victim status, or age ~~to discriminate against any individual or against a~~

1 ~~qualified individual with a disability or to limit, segregate, or qualify its~~
2 ~~membership or against a qualified individual with a disability;~~

3 * * *

4 (7) For any employer, employment agency, labor organization, or
5 person seeking employees to discriminate between employees on the basis of
6 sex, race, or national origin or against a qualified individual with a disability
7 by paying wages to employees of one sex, race, or national origin or an
8 employee who is a qualified individual with a disability at a rate less than the
9 rate paid to employees of the other sex or a different race or national origin or
10 without the physical or mental condition of the qualified individual with a
11 disability for equal work that requires equal skill, effort, and responsibility and
12 is performed under similar working conditions. An employer who is paying
13 wages in violation of this section shall not reduce the wage rate of any other
14 employee in order to comply with this subsection.

15 (A) An employer may pay different wage rates under this subsection
16 when the differential wages are made pursuant to:

17 * * *

18 (iv) A bona fide factor other than sex, race, national origin, or
19 physical or mental condition. An employer asserting that differential wages
20 are paid pursuant to this subdivision (7)(A)(iv) shall demonstrate that the factor
21 does not perpetuate a ~~sex-based~~ differential in compensation; based on sex,

1 race, national origin, or physical or mental condition; is job-related with
2 respect to the position in question;; and is based upon a legitimate business
3 consideration.

4 * * *

5 (8) ~~Retaliation prohibited.~~ An employer, employment agency, or labor
6 organization shall not discharge or in any other manner discriminate against
7 any employee because the employee:

8 * * *

9 (i) An agreement to settle a claim of a violation of subsection (a) of this
10 section shall not prohibit, prevent, or otherwise restrict the employee from
11 working for the employer or any parent company, subsidiary, division, or
12 affiliate of the employer. Any provision of an agreement to settle a claim of a
13 violation of subsection (a) of this section that violates this subsection shall be
14 void and unenforceable with respect to the individual who made the claim.

15 (j) An employee shall not be required to demonstrate the existence of
16 another employee or individual to whom the employee's treatment can be
17 compared in determining whether a violation of the provisions of this section
18 occurred.

19 (k) Notwithstanding any State or federal judicial precedent to the contrary:

20 (1) harassment and discrimination need not be severe or pervasive to
21 constitute a violation of this section; and

1 (16) “Harass” means to engage in unwelcome conduct based on an
2 employee’s race, color, religion, national origin, sex, sexual orientation, gender
3 identity, ancestry, place of birth, age, crime victim status, or physical or mental
4 condition that interferes with the employee’s work or creates a work
5 environment that is intimidating, hostile, or offensive. In determining whether
6 conduct constitutes harassment:

7 (A) The determination shall be made on the basis of the record as a
8 whole, according to the totality of the circumstances, and a single incident may
9 constitute unlawful harassment.

10 (B) Incidents that may be harassment shall be considered in the
11 aggregate with varying types of conduct and conduct based on multiple
12 characteristics viewed in totality, rather than in isolation.

13 (C) Conduct may constitute harassment, regardless of whether:

14 (i) the complaining employee is the individual being harassed;

15 (ii) the complaining employee acquiesced or otherwise submitted
16 to or participated in the conduct;

17 (iii) the conduct is also experienced by others outside the
18 protected class involved in the conduct;

19 (iv) the complaining employee was able to continue carrying out
20 the employee’s job duties and responsibilities despite the conduct;

21 (v) the conduct resulted in a physical or psychological injury; or

1 provisions of this chapter. In determining whether conduct constitutes
2 unlawful harassment:

3 (i) The determination shall be made on the basis of the record as a
4 whole, according to the totality of the circumstances, and a single incident may
5 constitute unlawful harassment.

6 (ii) Incidents that may be harassment shall be considered in the
7 aggregate with varying types of conduct and conduct based on multiple
8 characteristics viewed in totality, rather than in isolation.

9 (iii) Conduct may constitute unlawful harassment, regardless of
10 whether:

11 (I) the complaining person is the person being harassed;

12 (II) the complaining person acquiesced or otherwise submitted
13 to or participated in the conduct;

14 (III) the conduct is also experienced by others outside the
15 protected class involved in the conduct;

16 (IV) despite the conduct, the complaining person was able to:

17 (aa) use the place of public accommodation or any of the
18 accommodations, advantages, facilities, or privileges of the place of public
19 accommodation; or

20 (bb) enjoy the benefit of applicable terms, conditions,
21 privileges, or protections in the sale or rental of the dwelling or other real

1 estate, or to obtain services or facilities in connection with the dwelling or
2 other real estate;

3 (V) the conduct resulted in a physical or psychological injury;
4 or

5 (VI) the conduct occurred outside the place of public
6 accommodation or the dwelling or other real estate.

7 (C) Behavior that a reasonable person with the same protected
8 characteristic would consider to be a petty slight or trivial inconvenience shall
9 not constitute unlawful harassment or discrimination pursuant to this chapter.

10 (D) The provisions of this subdivision (12) shall not apply to any
11 action brought under this chapter pursuant to the provisions of 16 V.S.A.
12 § 570f.

13 Sec. 4. 9 V.S.A. § 4503 is amended to read:

14 § 4503. UNFAIR HOUSING PRACTICES

15 * * *

16 ~~(d)(1) As used in this section, “harass” means to engage in unwelcome~~
17 ~~conduct that detracts from, undermines, or interferes with the person’s terms,~~
18 ~~conditions, privileges, or protections in the sale or rental of a dwelling or other~~
19 ~~real estate, or in the provision of services or facilities in connection with a~~
20 ~~dwelling or other real estate, because of the person’s race, sex, sexual~~
21 ~~orientation, gender identity, age, marital status, religious creed, color, national~~

1 ~~origin, or disability, or because the person intends to occupy a dwelling with~~
2 ~~one or more minor children, or because the person is a recipient of public~~
3 ~~assistance, or because the person is a victim of abuse, sexual assault, or~~
4 ~~stalking.~~

5 ~~(2) Notwithstanding any judicial precedent to the contrary, harassing~~
6 ~~conduct need not be severe or pervasive to be unlawful pursuant to the~~
7 ~~provisions of this section. In determining whether conduct constitutes~~
8 ~~unlawful harassment:~~

9 ~~(A) The determination shall be made on the basis of the record as a~~
10 ~~whole, according to the totality of the circumstances, and a single incident may~~
11 ~~constitute unlawful harassment.~~

12 ~~(B) Incidents that may be harassment shall be considered in the~~
13 ~~aggregate with varying types of conduct and conduct based on multiple~~
14 ~~characteristics viewed in totality, rather than in isolation.~~

15 ~~(C) Conduct may constitute unlawful harassment, regardless of~~
16 ~~whether:~~

17 ~~(i) the complaining person is the person being harassed;~~

18 ~~(ii) the complaining person acquiesced or otherwise submitted to~~
19 ~~or participated in the conduct;~~

20 ~~(iii) the conduct is also experienced by others outside the~~
21 ~~protected class involved in the conduct;~~

1 ~~(iv) the complaining person was able to enjoy the benefit of~~
2 ~~applicable terms, conditions, privileges, or protections in the sale or rental of~~
3 ~~the dwelling or other real estate, or to obtain services or facilities in connection~~
4 ~~with the dwelling or other real estate, despite the conduct;~~

5 ~~(v) the conduct resulted in a physical or psychological injury; or~~

6 ~~(vi) the conduct occurred outside the dwelling or other real estate.~~

7 ~~(3) behavior that a reasonable person with the same protected~~
8 ~~characteristic would consider to be a petty slight or trivial inconvenience shall~~
9 ~~not constitute unlawful harassment or discrimination pursuant to this section.~~

10 ~~[Repealed.]~~

11 Sec. 5. 21 V.S.A. § 495o is added to read:

12 § 495o. AGREEMENTS NOT TO COMPETE; PROHIBITION;

13 EXCEPTIONS

14 (a) Except as otherwise provided by this section, agreements not to
15 compete are prohibited.

16 (b) Notwithstanding subsection (a) of this section, a key employee may
17 enter into an agreement not to compete with an employer at the
18 commencement of employment or in relation to a promotion or a substantial
19 change in the employee's job responsibilities if the agreement satisfies all of
20 the following requirements:

1 (1)(A) If the agreement is in relation to a promotion or a substantial
2 change in the employee's job responsibilities:

3 (i) the employee receives additional compensation in relation to
4 the promotion or substantial change in the employee's job responsibilities; and

5 (ii) the agreement not to compete is supported by substantial
6 consideration that is specified in the agreement and is commensurate with the
7 burden imposed on the employee by the agreement.

8 (B) If the agreement is in relation to the commencement of
9 employment, the agreement not to compete is supported by substantial
10 consideration that is specified in the agreement and is commensurate with the
11 burden imposed on the employee by the agreement.

12 (2) The agreement is in writing and signed by the employer and the
13 employee.

14 (3)(A) If the agreement is entered into in relation to the commencement
15 of employment, it is provided to the employee with the formal offer of
16 employment or 10 calendar days before the commencement of employment,
17 whichever is earlier.

18 (B) If the agreement is entered into in relation to a promotion or a
19 substantial change in the employee's job responsibilities, it is provided to the
20 employee at least 10 calendar days before it will take effect.

1 (4)(A) The agreement states that the employee has the right to consult
2 with an attorney prior to signing the agreement and that the employer shall
3 reimburse the employee for the cost of consulting with an attorney for the
4 purpose of reviewing the agreement and obtaining legal advice.

5 (B) The agreement shall, at a minimum, provide that the employer
6 shall reimburse the employee for up to two hours of attorney time.

7 (5) The limitations set forth in the agreement are reasonable in time,
8 geographical area, and the scope of activity to be restrained.

9 (c) Nothing in this section shall be construed to prohibit:

10 (1) an agreement that prohibits the disclosure of trade secrets as defined
11 in 9 V.S.A. § 4601 or a nondisclosure agreement that protects confidential
12 business information that does not constitute a trade secret;

13 (2) a nonsolicitation agreement between an employer and an employee,
14 provided that the limitations set forth in the agreement are reasonable in time,
15 geographical area, and the scope of activity to be restrained; or

16 (3) an individual from entering into an agreement not to compete in
17 relation to:

18 (A) the sale of all or substantially all of the individual's ownership
19 interest in:

20 (i) a business or its operating assets; or

1 (ii) a subsidiary or division of a business or the operating assets of
2 a subsidiary or division of a business;

3 (B) the dissolution of a partnership in which the individual is a
4 partner or the dissociation of the individual from a partnership; or

5 (C) the dissolution of a limited liability company in which the
6 individual is a member or the termination of the individual's interest in a
7 limited liability company.

8 (d) Any provision of an employment contract or other agreement entered
9 into on or after July 1, 2023 that violates the provisions of this section shall be
10 void and unenforceable.

11 (e) As used in this section:

12 (1) "Agreement not to compete" means any agreement between an
13 individual and a business that restrains the individual from engaging in a
14 lawful profession, trade, or business.

15 (2) "Executive, administrative, or professional employee" means an
16 employee who is exempt from the wage and hour provisions of the Fair Labor
17 Standards Act pursuant to 29 U.S.C. § 213(a)(1) and is employed in a bona
18 fide executive, administrative, or professional capacity, as defined pursuant to
19 29 C.F.R. Part 541.

20 (3) "Key employee" means an individual who:

21 (A) is an executive, administrative, or professional employee; and

1 (B) earns wages or a salary equal to at least one and one-half times
2 the Vermont average annual wage.

3 (4) “Nonsolicitation agreement” means an agreement between an
4 employer and an employee pursuant to which the employee agrees not to:

5 (A) solicit or recruit the employer’s employees; or

6 (B) solicit or transact business with customers or clients of the
7 employer who were customers or clients while the employee was employed by
8 the employer.

9 (5) “Vermont average annual wage” means the most recent annual mean
10 wage for Vermont published by the U.S. Bureau of Labor Statistics.

11 Sec. 6. EDUCATION AND OUTREACH

12 The Secretary of Commerce and Community Development, the Attorney
13 General, and the Commissioner of Labor shall, on or before October 15, 2023,
14 jointly develop and make available on the Agency of Commerce and
15 Community Development’s, the Attorney General’s, and the Department of
16 Labor’s websites information and materials to educate and inform employers
17 and employees about the provisions of 21 V.S.A. § 495o.

18 Sec. 7. EFFECTIVE DATE

19 (a) This act shall take effect on July 1, 2023.

1 (b) Sec. 5 of this act shall apply to all employment agreements and other
2 contracts between employers and employees that are entered into on or after
3 July 1, 2023.