



## FREQUENTLY ASKED QUESTIONS (FAQ) ABOUT ESSB 5186, ANTIDISCRIMINATION IN PUBLIC CONTRACTING

1. **CONTRACTS SUBJECT TO ESSB 5186.** What contracts are required to include the nondiscrimination provision?

Every state contract and subcontract for goods/services and public works. See [RCW 49.60.530\(2\)](#).

Note: ESSB 5186 does not apply to state contracts for architectural and engineering services governed by RCW 39.80. State agencies contracting for architectural and engineering services under RCW 39.80, may include the nondiscrimination provision.

2. **EFFECTIVE DATE.** When are state contracts and subcontracts for goods/services and public works required to include the nondiscrimination provision?

Beginning January 1, 2024. See [RCW 39.26.245\(3\)](#) (goods/services) and [RCW 39.04.160\(2\)](#) (public works).

Note: ESSB 5186 does NOT apply retroactively. Accordingly, state agencies are NOT required to amend existing state contracts and subcontracts for goods/services and public works to include the nondiscrimination provision.

3. **AMENDMENTS.** Does ESSB 5186 apply to amendments to existing state contracts and subcontracts for goods/services and public works?

Yes. If a state contract or subcontract for goods/services and public works is amended on or after January 1, 2024, the amendment should include the nondiscrimination provision.

4. **PUBLIC WORKS CONTRACTS – SCOPE.** What public works contracts are required to include the nondiscrimination provision?

All contracts entered into under [RCW 39.04](#) by the state on or after January 1, 2024. See [RCW 39.04.160\(2\)](#).

The Washington State Procurement Code for Public Works ([RCW 39.04](#)) defines ‘contract’ to mean “a contract in writing for the execution of public work for a fixed or determinable amount duly awarded after advertisement and competitive bid, or a contract awarded under the small works roster process in RCW 39.04.155.” See [RCW 39.04.010\(2\)](#). Accordingly, the following state public works contracts and subcontracts are required to include the nondiscrimination provision:

- Competitively solicited contracts; and

- Contracts awarded under the small works roster process in [RCW 39.04.155](#).

5. **GOODS/SERVICES CONTRACTS – SCOPE.** What goods/services contracts are required to include the nondiscrimination provision?

All contracts entered into under [RCW 39.26](#) by the state on or after January 1, 2024. See [RCW 39.26.245\(3\)](#).

The Washington State Procurement Code for Goods/Services ([RCW 39.26](#)), does NOT define ‘contract’ or otherwise limit the term (other than to exempt a narrow list of specific contracts from the Procurement Code for Goods/Services [see [RCW 39.26.100](#); and [.102](#)]). Accordingly, the following state goods/services contracts and subcontracts are required to include the nondiscrimination provision:

- Competitively solicited contracts;
- Mandatory use contracts (e.g., Department of Corrections’ Correctional Industries contracts);
- Sole source contracts;
- Emergency contracts;
- Direct buy contracts; and
- Enterprise procurement solutions developed or established by the Washington Department of Enterprise Services, including:
  - Statewide contracts (f/k/a ‘master contracts’);
  - Cooperative purchasing agreements developed by Enterprise Services; and
  - Cooperative purchasing agreements established by Enterprise Services through state participation agreements (e.g., NASPO ValuePoint; MMCAP Infuse; Sourcewell)

6. **GOODS/SERVICES – DIRECT BUY PURCHASES.** How do state agencies comply with ESSB 5186’s nondiscrimination provision in contracts for small purchases in which an agency doesn’t provide any contract language (e.g., contracting for one-time refreshments from a Washington small business)?

ESSB 5186 requires that every state contract and subcontract for goods/services and public works must contain the nondiscrimination provision. See [RCW 49.60.530\(2\)](#).

If state agencies use the [Purchase Order](#) template, the nondiscrimination provision is included as part of the State’s [‘Standard Terms for Purchase of Goods/Services.’](#)

In enacting ESSB 5186, which was passed unanimously, the Legislature made a policy decision as to how state agencies should spend money in contracting for goods/services and public works. That said, state agencies occasionally may need to contract for goods/services but have no opportunity to specify contract terms and conditions other than the item and quantity or where the transactional cost of negotiating specific contract terms is disproportionate to the actual contract cost. Accordingly, although the Legislature’s expectation is clear, as a transactional matter, state agencies occasionally may need to contract for goods/services and be unable to include the required

nondiscrimination provision. In these situations, state agency procurement professionals should discuss options with their assigned counsel from the Attorney General's Office.

Note: Pursuant to ESSB 5186, as of January 1, 2024, all contractors and subcontractors with the state for public works and goods/services are subject to the nondiscrimination requirements in the Act. See [RCW 49.60.530\(1\)](#). These nondiscrimination requirements are the same as the Legislature directed to be included in state contracts for public works and goods/services.

7. **SUBCONTRACTS.** Are subcontracts required to include the nondiscrimination provision?

Yes. Every state contract and subcontract for goods/services and public works must contain the nondiscrimination provision. See [RCW 49.60.530\(2\)](#).

8. **CONTRACTORS & SUBCONTRACTORS.** Are contractors and subcontractors subject to ESSB 5186's nondiscrimination requirements?

Yes. After January 1, 2024, any contractor, including subcontractors, with the state for public works or for goods or services is subject to ESSB 5186's nondiscrimination requirements and any rules and regulations to implement ESSB 5186. See [RCW 49.60.530\(1\)](#).

9. **RULES & REGULATIONS.** What are the rules and regulations to implement ESSB 5186 that are referred to in the Act?

The rules and regulations to implement ESSB 5186's nondiscrimination requirements would be promulgated by the Human Rights Commission pursuant to its authority under the Washington Law Against Discrimination ([RCW 49.60](#)). See [RCW 49.60.530\(1\)](#) and [RCW 49.60.120\(3\)](#).

10. **ESSB 5186's NONDISCRIMINATION REQUIREMENTS.** What are ESSB 5186's nondiscrimination requirements?

"The antidiscrimination clauses required by this section must prohibit any covered contractor or subcontractor from:

- (a) Refusing to hire any person because of age, sex, marital status, sexual orientation, gender identity, race, creed, color, national origin, citizenship or immigration status, honorably discharged veteran or military status, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation;
- (b) Discharging or barring any person from employment because of age, sex, marital status, sexual orientation, gender identity, race, creed,

color, national origin, citizenship or immigration status, honorably discharged veteran or military status, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability;

- (c) Discriminating against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, gender identity, race, creed, color, national origin, citizenship or immigration status, honorably discharged veteran or military status, the presence of any sensory, mental, or physical disability, the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes; or
- (d) Printing or circulating, or causing to be printed or circulated, any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, sexual orientation, gender identity, race, creed, color, national origin, citizenship or immigration status, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, the use of a trained dog guide or service animal by a person with a disability, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: PROVIDED, That nothing contained herein shall prohibit advertising in a foreign language.”

See [RCW 49.60.530\(3\)](#).

**11. OTHER CONTRACT REQUIREMENTS.** Does ESSB 5186 include any other contract requirements?

Yes. “The nondiscrimination clause must contain a provision requiring contractors and subcontractors to give written notice of their obligations under that clause to labor organizations with which they have a collective bargaining or other agreement.” See [RCW 49.60.530\(2\)](#).

**12. LABOR ORGANIZATION NOTICE.** How will agency contracting professionals know whether their contractor or subcontractors have collective bargaining or other labor agreements?

Agency contracting professionals likely will not know this information at the time of contracting. Accordingly, the recommended nondiscrimination contract provision is designed to incorporate ESSB 5186’s requirement for contractors and subcontractors to give written notice of their obligations under that clause to labor organizations with which they have a collective bargaining or other agreement.

**13. INVESTIGATING DISCRIMINATION ALLEGATIONS.** Are state agency contracting professionals required to investigate discrimination allegations and enforce the Washington Law Against Discrimination?

No. State agencies who receive discrimination allegations pertaining to state contracts and subcontracts for goods/services and public works should forward such allegations to the Human Rights Commission (HRC) at the following: <https://www.hum.wa.gov/file-complaint>

**14. LOCAL GOVERNMENT CONTRACTS.** Does ESSB 5186 apply to local government contracts?

No. ESSB 5186 plainly applies by its terms only to “state” contracts for goods and services and public works. See [RCW 49.60.530\(2\)](#).

**15. INTERAGENCY AGREEMENTS (IAAs).** Does ESSB 5186 apply to Interagency Agreements?

No. ESSB 5186 applies by its terms to state contracts for goods and services and public works. See [RCW 49.60.530\(2\)](#).

Note, nomenclature aside, an IAA that involves an agency’s procurement of goods/services for its own direct programmatic use and benefit would be subject to the State’s Procurement Code for Goods/Services (RCW 39.26) and, accordingly, would be subject to ESSB 5186’s requirements.

**16. GRANT AGREEMENTS.** Does ESSB 5186 apply to grant agreements?

No. ESSB 5186 applies by its terms to state contracts for goods and services and public works. See [RCW 49.60.530\(2\)](#).

**17. SMALL EMPLOYERS/CONTRACTORS.** Does ESSB 5186 apply to contractors who have fewer than 8 employees?

Yes. ESSB 5186 applies to “any contractor, including subcontractors, with the state for public works or for goods or services.” See [RCW 49.60.530\(1\)](#).

**18. APPLICATION OF THE ‘MINISTERIAL EXCEPTION.’** Does the ‘ministerial exception’ apply to religious organizations who contract for public goods/services?

The U.S. Supreme Court has recognized that the First Amendment establishes a “ministerial exception” from employment discrimination laws. The ministerial exception prohibits the government from interfering with the ability of certain religious organizations to make employment decisions about its “ministers”—a category that includes, but is not limited to, clergy. See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). The “ministerial exception” is an affirmative defense for employers in employment discrimination claims brought by ministers or other employees “holding certain important positions” within religious institutions. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020). The Washington Supreme Court has interpreted the WLAD to have a parallel defense for employment discrimination claims. See *Woods v. Seattle’s Union Gospel Mission*, 197 Wn.2d 231, 481 P.3d 1060 (2021). The ministerial exception is a position-specific, fact-specific inquiry.

State agencies contracting for goods/services with a contractor who asserts the ministerial exception to a claim of discrimination implicating ESSB 5186 should review the particular facts and circumstances with their assigned counsel with the Attorney General's Office.

**19. ADDITIONAL RESOURCES.** Where can agency contracting professionals access the nondiscrimination contract provisions required by ESSB 5186?

ESSB 5186 required the Washington Department of Enterprise Services, in collaboration with the Office of Minority and Women's Business Enterprises, the Office of Equity, and the Human Rights Commission, to develop standard template contract provisions for public works and goods and services contracts to meet the provisions of the Act. See [ESSB 5186 at § 1\(4\)](#). The specific terms of the standard template contract provisions comply with ESSB 5186.

Enterprise Services, in collaboration with the statutorily designated collaborating agencies and the Office of the Attorney General, have developed the following tools for state agencies to utilize in their contracts:

- Nondiscrimination template contract provision: This provision can be used in state contracts and subcontracts for goods/services and public works.
- A bidder certification provision: This optional provision can be used in competitive solicitations to assist state agencies with determining responsive bids.
- Updated 'standard terms for purchases of goods/services' (which is linked to the Purchase Order template): The Purchase Order template, for example, can be used, for example, for direct buy purchases.
- Training resources to implement ESSB 5186.

These tools are available on [DES' website](#).

The nondiscrimination template contract provisions are not mandatory. ESSB 5186 does not require state agencies to use the template contract provisions. State agencies may edit the template contract provisions to meet an agency's needs; provided, however, that the agency complies with ESSB 5186. See [RCW 49.60.530\(2\)](#).

**20. ADDITIONAL RESOURCES.** Where can I find the applicable law?

ESSB 5186 along with committee reports and other related information is available on the Washington State Legislature's [website](#) (bill information).

ESSB 5186 has been codified to amend the following three state statutes:

- **WLAD**. The Washington Law Against Discrimination ([RCW 49.60](#)), adding new section [RCW 49.60.530](#).
- **Goods/Services**. The Washington State Procurement Code for Goods/Services ([RCW 39.26](#)), amending [RCW 39.26.245](#) (to add subsection 3). See [RCW 39.26.245\(3\)](#) ("All contracts with the state for goods or services entered into under this chapter on or after

January 1, 2024, are subject to the requirements established under RCW 49.60.530.”).

- **Public Works.** The Washington State Procurement Code for Public Works ([RCW 39.04](#)), amending [RCW 39.04.160](#) (to add subsection 2). See [RCW 39.04.160\(2\)](#) (“All contracts entered into under this chapter by the state on or after January 1, 2024, are subject to the requirements established under RCW 49.60.530.”).