

**HB-1192-HD-2**

Submitted on: 3/11/2019 6:55:04 PM

Testimony for LCA on 3/14/2019 3:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Tamara Swift	Individual	Support	No

Comments:

- This language undermines and diltues the newly passed Act 108's protections by placing limits on discussions of pay levels in the workplace
- This language is unfair to employees in human resources, payroll and legal departments who will be prohibited from discussing, inquiring about or disclosing wages of their departmental co-workers
- Act 108 was passed in 2018 and only went into effect on January 1, 2019. We need to give this new law a chance to work.
- Leave Act 108 intact to help achieve equal pay in Hawaii

**HB-1192-HD-2**

Submitted on: 3/11/2019 7:39:02 PM

Testimony for LCA on 3/14/2019 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Caroline Kunitake	Individual	Support	No

Comments:

Aloha Chair Senator Brian Taniguchi and the Senate Committee on Labor, Culture and the Arts,

I am submitting testimony in support of HB1192 HD2.

This Equal Pay Bill (HB1192, HD2) version is very good, **EXCEPT** it includes language that will undo protections allowing free discussion of salaries in the Equal Pay bill passed last year (Act 108). **I am** requesting an amendment to remove the following language:

**"; provided that this subsection shall not apply to discussion of employee wages if knowledge of the wages stems from human resources, payroll, or legal professional responsibilities in the workplace." in Hawaii Revised Statutes Section 378-2.3 (f)**

This language undermines and diltues the newly passed Act 108's protections by placing limits on discussions of pay levels in the workplace. These words make it unfair to employees in human resources, payroll and legal departments who will be prohibited from discussing, inquiring about or disclosing wages of their departmental co-workers. Act 108 was passed in 2018 and only went into effect on January 1, 2019. We need to give this new law a chance to work. Please leave Act 108 intact to help achieve equal pay in Hawaii.

We must do all that we can to promote a fair and equitable work place for all. We need professive state level legislation to protect Equal Pay. Act 108 will positively impact the dependent family members who need money from an employee's income to sustain their basic housing and consumption needs. I advocate on behalf of the young children and frail elderly who are living in single income households. Equal Pay will help to protect these financially vulnerable children and elderly in Hawaii.

Mahalo,

Caroline Kunitake

Hearing Date: Thursday, March 14, 2019, 3L00 pm, Room 224

To: Senate Committee on Labor, Culture and the Arts  
Chair, Senator Brian Taniguchi  
Vice Chair, Les Ihara

From: Jean Evans, MPH (Individual, [jevans9999@yahoo.com](mailto:jevans9999@yahoo.com), 808-728-1152, 99-1669 Hoapono Pl., Aiea, HI 96701)

**Re: TESTIMONY IN SUPPORT OF HB 1192, HD2 WITH AN AMENDMENT –  
RELATING TO EQUAL PAY**

My name is Jean Evans. I retired after 40 years holding executive positions in Hawaii non-profit agencies. In these positions I have interviewed and hired hundreds of applicants. I am also a member of AAUW Hawaii.

**I am strong support of HB 1192, HD2 Relating to Equal Pay with an Amendment.**

This bill is another important step in achieving equal pay in Hawaii. However the addition of language that weakens the protections allowing free discussion of salaries passed just last year in Act 108 is problematic.

**Proposed Amendment: Remove "provided that this subsection shall not apply to discussion of employee wages if knowledge of the wages stems from human resources, payroll, or legal professional responsibilities in the workplace." in Hawaii Revised Statutes Section 378-2.3 (f) from HB 1192, HD2.**

Act 108, which includes the provision allowing employees to discuss their wages only went into on January 1, 2019. I am concerned that adding additional restrictions on workers abilities to openly discuss salaries will significantly weaken the efforts to achieve equal pay. This bill aims to prevent personnel in specific departments form discussing, inquiring about or disclosing wages of others. This is unfair to those employees and their departmental co-workers and can lead to confusion in the way the law is applied. Salary transparency in the workplace is a very important factor in equaling the playing field for all employees. I believe leaving the language intact is the best course and will uphold the purpose of Act 108. We must give this new law a chance to work.

**In Support of original wording in HB 1192, HD1:**

It is well documented that there is a large gap in gender pay across the nation and in Hawaii where women earn only 81% of what men earn. This pay gap hits women especially hard here in Hawaii with our notoriously high cost of living often making it very difficult to make ends meet.

Non-profit agencies in Hawaii have historically offered low salaries which did not reflect the level of education, experience and responsibility associated with the positions. These agencies, which were predominately filled by females with a few male top executives, were seen as helping and giving organizations and so perpetuated the idea that the women should work for lower wages for the good of the community. Slowly this mind-set is changing to reflect a more professional attitude toward the non-profit workforce. However, this change has been slow and contributes to the state-wide wage gap.

When I applied for the two executive director positions which I subsequently secured, I had no idea of the salary ranges or even if there were any. When I inquired about the salary I was told only that it was “flexible”. That response did not give me a clue as to what to expect. Only after being in these positions with a salary I thought fair, did I discover that previous Executive Directors were compensated well above me. In one case over twice my salary. Interestingly, one was a female and the other a male. Offered salaries amounts seemed arbitrary and unfair and got me looking for positions elsewhere.

As an executive seeking to hire qualified people, I interviewed many good candidates only to find out that their salary requirements were higher than I could offer. If I had been required to post the ranges I could have saved their time and mine. Based on the budget, I knew what the salary ranges were, but formally posting those was not the customary way recruitment was done. I realize now that compensation transparency would have helped me both as an employer and employee.

In addition to the salary range requirement, this bill includes language making protected classes in the section consistent with other statutes that prohibit employment discrimination. It also clarifies factors that can be used by employers to justify differences in compensation and prohibits reducing another employee’s pay or an agreement by employees to accept a lower wage then that they are entitled as a defense. Finally, this measure uses the more accurate term, “substantially similar work” instead of “equal work”.

Employee turnover continues to be a problem in Hawaii, especially when unemployment is low. This bill is an important step in reducing turnover by ensuring competitive salaries, equal treatment, and assisting employers to control their expenses with set pay ranges.

Let Hawaii become a leader in the area of salary transparency by passing this legislation as another step toward leveling salary discrepancies and retaining talented employees. I see this measure as a win for both employers and employees. **I encourage your support for this bill with the proposed amendment.**

Mahalo for allowing me to submit my testimony today.

*Jean Evans*

**HB-1192-HD-2**

Submitted on: 3/12/2019 11:12:44 AM

Testimony for LCA on 3/14/2019 3:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Laurie Field	Testifying for Planned Parenthood Votes Northwest and Hawaii	Support	No

Comments:



**To:** Committee on Labor, Culture and the Arts  
Senator Brian T. Taniguchi, Chair  
Senator Les Ihara, Jr., Vice Chair

**From:** Jozette Montalvo  
Hawaii Petroleum, LLC-Human Resources Director

**RE: HB1192 HD2-Relating to Equal Pay**

**Date:** March 12, 2109

Thank you for the opportunity to provide testimony. Hawaii Petroleum Company is an independent petroleum marketer operating on the islands of Maui and Hawaii, with approximately 324 employees on two islands. We operate seventeen Minit Stop convenience stores.

Hawaii Petroleum **opposes HB1192 HD2** for the following reasons.

While the intentions of this bill are good, there are already State and Federal laws in place that prohibit discrimination not just based on pay, but on many other protected categories. Employers by law cannot set wages based on gender. An *additional law* will only add another level of complexity and burden to employers already taxed to follow so many other laws. We believe that the laws already in place have protections from gender wage discrimination. In addition, employees are currently allowed by law to discuss their own pay with others promoting pay transparency. Also, when interviewing employees, employers are not allowed to ask an applicant what their current or past pay was deterring the perpetuation of potentially lagging wages.

When it comes to establishing pay, there are several criteria used by employers such as experience, education, training, certifications earned, quality of work, time in service, etc. This bill does not address any of that. The definition of "substantially similar work" is also unclear and will be challenging for employers to define leading to increased litigation in the courts.

If employers are required to disclose pay rates, then this leads to privacy issues and may not be embraced by all employees leading to unintended dissention.

For these reasons, we kindly ask that you vote **NO** on **HB1192 HD2**.

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TO:

Committee on Labor, Culture, and the Arts  
Senator Brian T. Taniguchi, Chair  
Senator Les Ihara, Jr., Vice Chair

FROM: HAWAII FOOD INDUSTRY ASSOCIATION  
Lauren Zirbel, Executive Director

DATE: March 14, 2019  
TIME: 3pm  
PLACE: Conference Room 224

RE: HB1192 HD2 Relating to Equal Pay

Position: Comments

The Hawaii Food Industry Association is comprised of two hundred member companies representing retailers, suppliers, producers, and distributors of food and beverage related products in the State of Hawaii.

HFIA has concerns about certain language in this measure. While this measure makes some effort to define the term “substantially similar work” this language is still very open to interpretation. Inserting this type of legally vague terminology into statute will leave employers open to a range of frivolous lawsuits that can be very costly and will not further the goals of this measure.

The section of this measure mandating that employers provide wage ranges may not be feasible under certain circumstances. The hiring process often involves adjusting the exact job specifications based on a number of factors, most importantly the individual eventually hired for the position. It will be impossible for many employers to list an accurate wage range for a position that may change for an employee they haven’t hired yet.

We thank you for the opportunity to testify.





# HAWAI‘I CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 · PHONE: 586-8636 · FAX: 586-8655 · TDD: 568-8692

March 14, 2019  
Rm. 224, 3:00 p.m.

To: Hon. Brian Taniguchi, Chair  
Hon. Les Ihara, Vice Chair  
Members of the Senate Committee on Labor, Culture and the Arts

From: Linda Hamilton Krieger, Chair  
and Commissioners of the Hawai‘i Civil Rights Commission

Re: H.B. No. 1192, H.D. 2

The Hawai‘i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai‘i’s laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state funded services (on the basis of disability). The HCRC carries out the Hawai‘i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

**For the reasons discussed below, the HCRC supports the original intent of H.B. No. 1192, H.D. 2, but opposes the revisions added in H.D. 2, which were imported from H.B. No.1536, H.D.1, that create an exception expressly allowing retaliation or discrimination for discussion of wages by human resources, payroll and legal professional personnel.**

This amendment would eviscerate the Act 108, Leg. 2018, HRS § 378-2.3 prohibition against retaliation or discrimination against an employee for disclosing wages, discussing and inquiring about wages, or aiding or encouraging other employees in exercising their rights under equal pay law. **Act 108 just went into effect January 1, 2019. Our concern can be addressed by deleting the changes made to HRS § 378-2.3 (f), which is currently § 378-2.3(b), in Section 2 of the bill.**

**HCRC also suggests changes to HRS § 378-2.4 for clarification purposes.**

H.B. No.1192, H.D. 2, if enacted, will amend HRS §§ 378-2.3 and 378-2.4, the Hawai‘i state law equal pay law.

In addition to the objectionable exception language discussed above , Section 2 of the bill amends HRS § 378-2.3 in five respects: 1) to prohibit discrimination in compensation on not only sex, but on an expanded number of protected bases, the same protected bases as those protected under HRS § 378-2(a)(1) (race, sex, including gender identity or expression, sexual orientation, age, religion, color,

ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status); 2) to expand equal pay protections to all employees, not just to employees who work in the same “establishment;” 3) to change the HRS 378-2.3 prohibition against discrimination in compensation for “equal work” to a prohibition against discrimination in compensation for “substantially similar work;” 4) to amend HRS § 378-2.3(b), making it expressly clear that the four affirmative defenses to an equal pay claim that employers can establish must be based on *non-discriminatory* factors; and, 5) to amend HRS § 378-2.3 by adding new subsections (d) and (e), which provide that employers cannot cure an equal pay violation by reducing the wage rate of a higher-paid employee, and an employee’s agreement to a lower rate of pay is not a defense to an equal pay claim.

Discussion of the merits of the specific proposed amendments requires understanding the federal Equal Pay Act (EPA) and its relationship to the Title VII prohibition against discrimination with respect to compensation, but it is crucial to recognize the differences between federal law and state equal pay law, HRS §§ 378-2.3 and 378-2.4, and the state fair employment law prohibition against discrimination in compensation, HRS § 378-2(a)(1).. The HCRC offers the following discussion to inform and support the legislature’s consideration of and deliberation over the proposed amendments to the state equal pay law.

### **Federal Law: Differences and Interplay Between EPA and Title VII**

The Equal Pay Act of 1963 predated Title VII of the Civil Rights Act of 1964.

The EPA prohibits wage discrimination on the basis of sex between employees within any “establishment,” by paying employees of one sex at a lower rate than is paid to employees of the opposite sex for equal work, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

The EPA provides for four affirmative defenses, permitting differences in wages if the differential is caused by: (i) a seniority system; (ii) a merit system; (iii) a system that measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

Title VII prohibits discrimination in compensation, terms, conditions, or privileges of employment, based on race, color, religion, sex, or national origin.

### **Key differences between the EPA and Title VII**

**Scope of protection.** The EPA is limited to sex-based differentials in wages. It does not prohibit discrimination in other aspects of employment, nor prohibit discrimination on bases other than sex, as prohibited under Title VII.

**Scope of coverage.** EPA coverage is limited to employers who are subject to the Fair Labor Standards Act, so the EPA covers employers who have annual sales exceeding \$500,000 or are engaged in interstate commerce, regardless of the number of employees, but excludes certain industries. Title VII covers employers of 15 or more employees.

**“Equal work” requirement.** The EPA prohibits wage discrimination based on sex for equal work, the performance of which requires equal skill, effort, and responsibility. Restrictive federal court interpretations of this “equal work” requirement have made it nigh near impossible for most complainants and plaintiffs to establish prima facie EPA claims. Title VII analysis does not require “equal work,” but looks at how similarly situated employees are treated.

**Affirmative defenses.** The EPA provides for four affirmative defenses, including the defense that a challenged wage differential is based on “any factor other than sex.” There has been disagreement between the federal circuits as to whether this catch-all defense recognizes only legitimate business-related factors other than sex, or literally and any factor other than sex. The broad catch-all defense has been interpreted to rule out mixed-motive claims.

A June 12, 1964, amendment to Title VII, known as the Bennett Amendment, imported the EPA defenses into Title VII’s framework for analysis of sex-based discrimination in compensation. There has been no similar amendment to our state fair employment statute.

**EPA does not require proof of discriminatory intent.** The EPA only requires proof of pay differential between employees of opposite sexes in the same establishment for equal work. Once this is proven, employer has the opportunity to establish one of the four affirmative defenses. If no affirmative defense, an EPA violation has been established. In most Title VII discrimination cases, discriminatory intent is proved by inference, using the basic *McDonnell Douglas* analytical framework that is applied in employment discrimination cases based on circumstantial evidence.

**Remedies.** The EPA and Title VII have different remedies, with EPA remedies set forth in the Fair Labor Standards Act, not in Title VII.

#### **State Law: Differences and Interplay Between EPA and HRS § 378-2**

Hawai‘i enacted its fair employment law in 1963, prohibiting discrimination in hiring, employment, barring or discharging from employment, or otherwise discriminating in compensation, terms, conditions, or privileges of employment. That protection, as subsequently amended, is found at HRS § 378-2(a)(1):

**§378-2 Discriminatory practices made unlawful; offenses defined.** (a) It shall be an unlawful discriminatory practice:

(1) Because of race, **sex including gender identity or expression**, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status if the domestic or sexual violence victim provides notice to the victim's employer of such status or the employer has actual knowledge of such status:

(A) For any employer to refuse to hire or employ or to bar or discharge from employment, **or otherwise to discriminate against any individual in compensation** or in the terms, conditions, or privileges of employment;

\* \* \* \* \*

In contrast to the development of federal law, our state equal pay law, modeled on the federal EPA, did not pre-date the enactment of this comprehensive fair employment law prohibiting discrimination on numerous bases in all aspects of employment, including compensation. The state equal pay law was first enacted in 2005, 2005 Haw. Sess. Laws Act 35, and amended in 2018, 2018 Haw. Sess. Laws Act 108, to add protection against retaliation and a prohibition against employer inquiries into salary history.

It is important to note that Section 1 of the 2005 Act 35 expressly states, “*It is not the intent of the legislature to affect or diminish the existing, broader protections provided under part I of chapter 378, Hawaii Revised Statutes.*”

The state equal pay law, as amended, is codified at HRS §§ 378-2.3 and 378-2.4:

**§378-2.3 Equal pay; sex discrimination.** (a) No employer shall discriminate between employees because of sex, by paying wages to employees in an establishment at a rate less than the rate at which the employer pays wages to employees of the opposite sex in the establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions. Payment differentials resulting from:

- (1) A seniority system;
- (2) A merit system;
- (3) A system that measures earnings by quantity or quality of production;
- (4) A bona fide occupational qualification; or
- (5) A differential based on any other permissible factor other than sex[.]

do not violate this section.

(b) An employer shall not retaliate or discriminate against an employee for, nor prohibit an employee from, disclosing the employee's wages, discussing and inquiring about the wages of other employees, or aiding or encouraging other employees to exercise their rights under this section. [L 2005, c 35, §2; am L 2018, c 108, §3]

And,

**[§378-2.4] Employer inquiries into and consideration of salary or wage**

**history.** (a) No employer, employment agency, or employee or agent thereof shall:

- (1) Inquire about the salary history of an applicant for employment; or

(2) Rely on the salary history of an applicant in determining the salary, benefits, or other compensation for the applicant during the hiring process, including the negotiation of an employment contract.

(b) Notwithstanding subsection (a), an employer, employment agency, or employee or agent thereof, without inquiring about salary history, may engage in discussions with an applicant for employment about the applicant's expectations with respect to salary, benefits, and other compensation; provided that if an applicant voluntarily and without prompting discloses salary history to an employer, employment agency, or employee or agent thereof, the employer, employment agency, or employee or agent thereof, may consider salary history in determining salary, benefits, and other compensation for the applicant, and may verify the applicant's salary history.

(c) This section shall not apply to:

- (1) Applicants for internal transfer or promotion with their current employer;
- (2) Any attempt by an employer, employment agency, or employee or agent thereof, to verify an applicant's disclosure of non-salary related information or conduct a background check; provided that if a verification or background check discloses the applicant's salary history, that disclosure shall not be relied upon during the hiring process for purposes of determining the salary, benefits, or other compensation of the applicant, including the negotiation of an employment contract; and
- (3) Public employee positions for which salary, benefits, or other compensation are determined pursuant to collective bargaining.

(d) For purposes of this section:

"Inquire" means to:

- (1) Communicate any question or statement to an applicant for employment, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer, in writing, verbally, or otherwise, for the purpose of obtaining an applicant's salary history; or
- (2) Conduct a search of publicly available records or reports for the purpose of obtaining an applicant's salary history; provided that this shall not include informing an applicant, in writing or otherwise, about the proposed or anticipated salary or salary range for the position.

"Salary history" includes an applicant for employment's current or prior wage, benefits, or other compensation, but shall not include any objective measure of the

applicant's productivity, such as revenue, sales, or other production reports. [L 2018, c 108 §2]

**Differences between the HRS § 378-2 prohibition against discrimination in employment, including compensation, and the equal pay protections of HRS § 378-2.3 and the HRS § 378-2.4 prohibition against employer inquiries into salary history**

**Scope of protection.** The protections of HRS §§ 378-2.3 and 378-2.4 are limited to sex-based differentials in wages and prohibited inquiries into salary history, respectively. They do not prohibit discrimination in other aspects of employment, nor prohibit discrimination on bases other than sex, as prohibited under HRS § 378-2.

**Scope of coverage.** There is no difference in coverage, as HRS chapter 378, part I, covers employers of one or more employees.

**“Equal work” requirement.** HRS § 378-2.3, like the federal EPA, prohibits wage discrimination based on sex for equal work, the performance of which requires equal skill, effort, and responsibility. It is unfortunate that the state law is modeled after the EPA in this respect. While restrictive federal court interpretations of the EPA “equal work” requirement are not binding on state courts’ interpretation of state law, they can be considered persuasive guidance, particularly where the state statute does not differ from the federal law in relevant detail. *Furukawa v. Honolulu Zoological Soc.*, 85 Hawai’i 7, 13 (1997).

HRS § 378-2 analysis does not require “equal work,” but looks at how similarly situated employees are treated.

**Affirmative defenses.** HRS § 378-2.3, like the federal EPA, provides for four affirmative defenses, including the defense that a challenged wage differential is based on “any factor other than sex.” It is unfortunate that the state law is modeled after the EPA in this respect. While restrictive federal court interpretations of the EPA affirmative defenses are not binding on state courts’ interpretation of state law, they can be considered persuasive guidance, particularly where the state statute does not differ from the federal law in relevant detail. *Furukawa v. Honolulu Zoological Soc.*, 85 Hawai’i 7, 13 (1997).

As noted above, a June 12, 1964, amendment to Title VII, known as the Bennett Amendment, imported the EPA defenses into Title VII’s framework for analysis of sex-based discrimination in compensation. There has been no similar amendment to our state fair employment statute and, more so, the original 2005 equal pay act, 2005 Haw. Sess. Laws Act 35, § 1, expressly states that it was not the intent of the legislature to diminish existing, broader protections provided under part I of chapter 378 (including § 378-2) HRS, so the affirmative defenses provided for HRS § 378-2.3 claims *are not* imported or applicable to HRS § 378-2 claims of discrimination in compensation.

**HRS § 378-2.3 and the HRS § 378-2.4 do not require proof of discriminatory intent.** HRS § 378-2.3, like the federal EPA, only requires proof of pay differential between employees of opposite sexes in the same establishment for equal work. Once this is proven, employer has the opportunity to establish one of the four affirmative defenses. If no affirmative defense is proven, an HRS § 378-2.3 violation has been established.

Similarly, an HRS § 378-2.4 violation is established by evidence of an unlawful inquiry about or consideration of salary history, without proof of discriminatory intent, except that an employer can consider salary history that is disclosed by an applicant voluntarily and without prompting.

In most HRS § 378-2 cases, discriminatory intent is proved by inference, using the basic *McDonnell Douglas* analytical framework that is applied in employment discrimination cases based on circumstantial evidence.

**Remedies.** There is no difference in remedies for violations of HRS §§ 378-2, 378-2.3, and 378-2.4, as provided in HRS §§ 378-5 and 368-17.

## **DISCUSSION AND RECOMMENDATIONS**

HRS § 378-2(a)(1) already prohibits discrimination in compensation based on race, sex, including gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status. If the legislature amends § 378-2.3 to add the protected bases in addition to “sex,” **the HCRC requests an amendment to Section 1 of the bill, to add language identical to that included in Section 1 of the 2005 Act 35, expressly stating: “It is not the intent of the legislature to affect or diminish the existing, broader protections provided under part I of chapter 378, Hawaii Revised Statutes.”**

The other proposed amendments to HRS § 378-2.3, if enacted, will create relevant differences between the state equal pay statute and the federal EPA. Those differences and the legislature’s statement of its legislative intent will effectively preclude the importation and adoption of restrictive interpretations of the federal EPA.

Enactment of the existing HRS § 378-2.3(b) prohibition against retaliation against employees for disclosing, discussing, or inquiring, or aiding or abetting or encouraging the exercise of rights under the statute, was an important step toward the kind of transparency that will serve to facilitate achievement of pay equity. The proposed amendment of HRS § 378-2.4 to require employer posting and disclosure of pay information and ranges is intended to provide additional transparency. In the absence of such transparency, it is difficult for applicants and employees to have knowledge and evidence of equal pay violations.

## SUGGESTED AMENDMENTS

The purpose language of Section 1 of the bill should be amended by adding this language at page 2, paragraph 1, to read:

Hawaii has led the way in civil rights. This Act proposes to establish Hawaii as a leader in the area of pay equity and clarifies that Hawaii's law is more protective of pay equity rights than the federal Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964. It is not the intent of the legislature to affect or diminish the existing, broader protections provided under part I of chapter 378, Hawaii Revised Statutes.

Section 2 of the bill amends the HRS § 278-2.3 (b) by moving it to (f) and adding language from H.B. No. 1536, H.D. 1 allowing retaliation against human resources, payroll, or legal professionals for discussing employee wages. The new language should be deleted.

(f) An employer shall not retaliate or discriminate against an employee for, nor prohibit an employee from, disclosing the employee's wages, discussing and inquiring about the wages of other employees, or aiding or encouraging other employees to exercise their rights under this section[-]; provided that this subsection shall not apply to discussion of employee wages if knowledge of the wages stems from human resources, payroll, or legal professional responsibilities in the workplace.

Section 3 of the bill amends HRS § 378-2.4 to add new subsection (d) – (h) , amending HRS § 378-2.4 to provide clarification of when an equal pay law violation occurs, and to broadly define “compensation.” The proposed amendments are as follows:

Delete “upon reasonable request” in subsection (d) because there is no definition, and the proposed bill requires disclosure of amounts.

Subsection (f) calls for pay transparency, but would also require job reposting, and should be deleted, after the word “job listing.”

In subsections (g) and (h) The reference to “this section” should be amended to apply to “this section and section 378-2.3.” (but not to the entirety of chapter 378, part I).

Types of compensation is already very broad, and a suggested amendment is to add “housing,” to subsection (h).

The changes are shown below.



(d) An employer [~~, upon reasonable request,~~] shall provide the pay scale for a position to an applicant applying for employment and disclose the factors the employer considers in setting salary levels.

....

(f) An employer shall disclose an hourly rate or salary range in all job listings [~~and shall select a salary within the posted range or, if necessary, republish each job listing with an adjusted range before selecting an hourly pay rate or salary for a prospective employee~~].

(g) An unlawful employment practice is in violation of this section and section 378-2.3 when:

- (1) a discriminatory compensation decision or other practice is adopted;
- (2) an individual becomes subject to the decision or practice; or
- (3) an individual is affected by application of the decision or practice, including each time wages, benefits, or other compensation is paid.

(h) For the purposes of this section and section 378-2.3, the meaning of “compensation” is to be construed broadly, to include such items as, but not limited to, employee expense accounts, use of a vehicle, housing, travel budgets, other cost reimbursements, paid vacation or sick leave, sabbatical benefits, endowed chairs, insurance, stock options, pension contributions, and other employee benefits.

**HB-1192-HD-2**

Submitted on: 3/12/2019 6:12:53 PM

Testimony for LCA on 3/14/2019 3:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Pride Work HI	Testifying for Pride at Work Hawaii	Support	No

Comments:

Dear Senators,

Pride@Work Hawaii supports the passage of HB 1192 HD2.

Mahalo for the opportunity to testify.

Pride@Work Hawaii

To: Senator Brian T. Taniguchi, Chair  
Senator Les Ihara, Jr., Vice Chair  
Members of the Senate Committee on  
Labor, Culture and the Arts

March 14, 2019  
Rm. 224 3:00 p.m.

From: Elizabeth Jubin Fujiwara, Senior Partner,  
Fujiwara & Rosenbaum, LLLC

Re: **H.B. 1192 H.D.2**

I have specialized in civil rights and employment law as a plaintiff's attorney since 1986 and have done several discrimination cases for women regarding equal pay. Women of every race are paid less than men, at all education levels — and it only gets worse as women's careers progress. Despite the fact that women have made enormous gains in educational attainment and labor force involvement in the last several decades, unequal pay remains pervasive in 97 percent of occupations, showing that no matter what their job, women are paid less than men doing the same job in nearly every sector of work.

H.B. No. 1192 H.D.2 would amend H.R.S. § 378-2.3 and 378-2.4, the Hawai'i state law equal pay law.

**Our law firm strongly supports H.B. No. 1192 H.D.2** for several reasons:

1. it is well-documented that women, and especially women of color, face overt discrimination and unconscious biases in the workplace, including in pay. A study conducted by labor economists Francine Blau and Lawrence Kahn found that 38 percent of the wage gap remains unexplained even when accounting for factors like race, region, unionization status, education, occupation, industry, and work experience.

Discrimination is thought to be a major cause of this unexplained gap.

2. The lifetime wage gap per woman in Hawai'i is c.\$305,600 over a 40-year career. The problem of this gender wage gap is definitely compounded in Hawai'i by our high cost of living. These burdens make it very difficult for women to, for example, start a business, buy a home, pursue further education or even save for retirement. As importantly economic insecurity also makes it more difficult for women in

[Addressee - Header]

March 13, 2019

Page 2

Hawai'i to leave situations of domestic violence.

3. While passage of Act 108 in 2018, effective January 1, 2019 was a step towards ensuring pay equity, this bill would provide stronger equal pay protection, addressing the gender pay gap in Hawaii in the following ways:

A. Amend the list of protected classes under Hawaii's equal pay statute to make the protections afforded by this section consistent;

B. Provide pay transparency by requiring employers to make salary range information available to employees and job candidates;

C. Prohibit using an agreement to a lesser wage as a defense;

D. Clarify the factors that can be used by employers to justify differences in compensation based on seniority, merit, or other non-discriminatory purposes; and

E. Use the term "substantially similar work" instead of "equal work", because the term of "equal work" which has defeated the public policy of obtaining "equal pay".

4. Moreover, it would help businesses recruit and retain employees, and potentially improve employee morale: workers would stay longer and be more productive, when working for companies which treat them with dignity. Whereas pay inequality decreases worker attendance, cooperation, and output.

I would be present for this important hearing. However, I am on the mainland at this time. If you need to reach me, please call my office. Thank you.

**HB-1192-HD-2**

Submitted on: 3/12/2019 8:50:36 PM

Testimony for LCA on 3/14/2019 3:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Anthony Makana Paris	Individual	Support	No

Comments:

*Aloha* Senators,

I support the passage of HB 1192 HD 2. *Mahalo nui loa* for the opportunity to testify on this measure.

*Me ke aloha,*

Makana Paris

Papakā• lea, O'ahu



# HAWAII APPLESEED

## CENTER FOR LAW & ECONOMIC JUSTICE

Testimony of Hawai'i Appleseed Center for Law and Economic Justice  
Supporting with amendments HB 1192 HD2 – Relating to Equal Pay  
Senate Committee on Labor, Culture and the Arts  
Thursday, March 14, 2019, 3:00 PM, conference room 224

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Dear Chair Taniguchi, Vice Chair Ihara, and members of the Committee:

Thank you for the opportunity to provide testimony in **SUPPORT with amendments of HB 1192 HD2**. We commend you for passing SB 2351 in 2018, which took strides to reduce the gender wage gap in Hawai'i. We urge you to continue making improvements by passing HB 1192 HD2 with the exception of the language described in the paragraph below.

We are concerned by the language in this bill that exempts of human resources staff from protection against retaliation or discrimination if they discuss wages with other employees. If an employee were to attempt to find out if she was being paid less than her male colleagues, this exemption could prevent human resources from disclosing her colleagues' wages to her, forcing her to have to directly ask her colleagues for their wage levels instead. This seems to undermine the intent of this section of our equal pay law. **We respectfully request that the committee remove this language from the bill.**

According to the U.S. Bureau of Labor Statistics, Hawai'i women had median usual weekly earnings of \$734 or 80.0 percent of the \$918 median usual weekly earnings of their male counterparts in 2017. That's lower than the national ratio of 81.8 percent. After reaching its peak of 92.8 percent in 2014, this ratio has decreased in in Hawai'i in each of the past three years.

Three out of ten Hawai'i single mothers with children under the age of 18 live in poverty. When their children are all under the age of five, one-third of single mothers are poor. Meanwhile, research from the Institute for Women's Policy Research estimates that eliminating the gender wage gap would reduce the poverty rate among single mothers at the national level by almost half.

We can and should find ways to better ensure that our women and their children can find economic security in the Aloha State. The modest and common-sense proposals contained within this bill, other than the language causing concern as detailed above, would move us closer towards that goal.

We appreciate your consideration of this testimony.

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*The Hawai'i Appleseed Center for Law and Economic Justice is committed to a more socially just Hawai'i, where everyone has genuine opportunities to achieve economic security and fulfill their potential. We change systems that perpetuate inequality and injustice through policy development, advocacy, and coalition building.*



**of Hawaii**

March 12, 2019

From: Younghee Overly, Public Policy Chair, AAUW Hawaii

To: Hawaii State Senate Committee on Labor, Culture and the Arts

Hearing Date/Time: Thursday March 14, 2019 3:00PM

Place: Hawaii State Capitol, Rm. 224

Re: Testimony in SUPPORT of HB1192 HD2

Dear Chair Taniguchi, Vice-Chair Ihara, and members of the committee,

Thank you for the opportunity to submit a testimony in strong support for HB1192 HD2 with a request for following amendments.

1. One of the amendments introduced in HD2 adds "provided that this subsection shall not apply to discussion of employee wages if knowledge of the wages stems from human resources, payroll, or legal professional responsibilities in the workplace." to Section 2 of HB1192 HD2, page 5 lines 16 to 19. AAUW of Hawaii recommends the following provision in lieu of the above: This subsection shall not apply to instances in which an employee who has access to the wage information of other employees as a part of such employee's essential job functions discloses the wages of such other employees to individuals who do not otherwise have access to such information, unless such disclosure is in response to a complaint or charge, or in furtherance of an investigation, proceeding, hearing, or action under this section, including an investigation conducted by the employer. We worry that "knowledge of wages stems from ..." could create a loophole. It also needs to include the carve out that disclosures related to litigation/investigations are still acceptable.
2. It was also brought to our attention that "annually and upon request," in Section 2 of HB1192 HD2, page 8 line 11, could be interpreted as that the employers only need to provide the salary range upon request. We recommend adding the word 'also' as in "annually and also upon request," to eliminate the chance of misinterpretation.

Not only would this bill provide stronger equal pay protection for the employees, it would help businesses better manage their pay expenses, recruit and retain employees, and potentially improve employee morale.

- Research shows that workers stay longer and are more productive, when working for companies which treat them with dignity. A recent Harvard-Berkeley study showed that pay inequality decreased worker attendance, cooperation, and output.<sup>1</sup>
- Salary transparency and attempts at pay equity will attract millennials; will be more attractive in a competitive market.<sup>2</sup>
- Being up front about wages saves businesses time so that they are not interviewing candidates that will eventually turn them down. In addition to fairness, this is also about efficiency.<sup>3</sup>
- Salary ranges help employers control their pay expenses and ensure pay equity among employees. It is critical that employers have rational explanations for why they pay their employees a certain rate, and defined salary ranges help accomplish that.<sup>4</sup>

Hawaii is considered as a state with only moderate equal pay protection. Seven other states (California, Illinois, Maryland, Massachusetts, New Jersey, Oregon, and Washington) have equal pay protection much stronger than the state of Hawaii (Source: AAUW Policy Guide to Equal Pay in the States, <https://www.aauw.org/resource/state-equal-pay-laws/>) We believe Hawaii can do better and measures in HB1192 can succeed with a minimal cost or disruption to employers. We believe we can establish Hawaii as a leader in the field of pay equity, as Hawaii has led the way in civil rights.

The American Association of University Women (AAUW) of Hawaii is a state-wide organization made up of six branches (Hilo, Honolulu, Kauai, Kona, Maui, and Windward Oahu) and includes just over 450 active members with over 1700 supporters statewide. As advocates for gender equity, AAUW of Hawaii promotes the economic, social, and physical well-being of all persons.

Please pass this measure with the amendments. Mahalo for your consideration. .

Sincerely,

A handwritten signature in blue ink, appearing to be the initials 'JG' or similar, written in a cursive style.

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<sup>1</sup> Emily Breza, Supreet Kaur & Yogita Shamdasanani 2016 "The Morale Effects of Pay Inequality," *NBER Working Papers*, National Bureau of Economic Research

<sup>2</sup> Forbes, <https://www.forbes.com/sites/jessicalutz/2017/11/30/millennials-are-slowly-killing-salary-secrecy-and-thats-a-good-thing/#67a129946015>

<sup>3</sup> Glassdoor, "Is Salary Transparency More Than a Trend", [https://www.glassdoor.com/research/app/uploads/sites/2/2015/04/GD\\_Report\\_2.pdf](https://www.glassdoor.com/research/app/uploads/sites/2/2015/04/GD_Report_2.pdf)

<sup>4</sup> Society for Human Resource Management, "How to Establish Salary Range", <https://www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/howtoestablishsalaryranges.aspx>



# Island Plastic Bags Inc.

TO: Chair Brian Taniguchi; Vice Chair Les Ihara; and Committee

FROM: Adrian Hong, President of Island Plastic Bags, Inc.

RE: HB 1192 HD 2 RELATING TO EQUAL PAY

POSITION: OPPOSE

Thank you for the opportunity to submit testimony in opposition of HB 1192 HD 2. My name is Adrian Hong and I am the president of Island Plastic Bags Inc. (IPB), a second-generation, family business in Halawa Valley that manufactures plastic trash liners and food grade bags. If passed HB 1192 HD 2 would impose overly-burdensome regulation upon business owners in the name of achieving equal pay.

While IPB supports equal pay, the company is concerned with HB1192 HD2 for the following reasons:

**Existing Law.** It is already against the law for an employer to discriminate in setting employee wages based on gender. At the state level we have the Equal Pay Law, which clearly states that no employer shall discriminate based on gender when setting wages. At the federal level, the Equal Pay Act says that employers must pay equal wages to women and men in the same establishment for performing substantially equal work.

In 2009, Congress passed the Lilly Ledbetter Fair Pay Act, which extended the statute of limitations for filing an equal pay lawsuit. IPB believes these laws already cover the issue of gender wage discrimination.

**No Due Process for Employers.** IPB disagrees and opposes the presumption that the employer is guilty of wage discrimination, and puts the burden of proof on them to prove their innocence. The bill further restricts Hawaii's Equal Pay Law that limits "bona fide" factors for wage differentials to a seniority system, a merit system, or production measures. This ties the hands of the employers in any legal flexibility in compensation.

This section could create many frivolous lawsuits against employers. Lawsuits (threatened or filed) have a substantial impact on small business owners.

**Burdensome Disclosure of Wage Ranges.** This bill would require business owners to provide to job candidates, at the time of hiring and on an annual basis, wage ranges for each employee's each job title. However, this bill does not provide clear definitions of several terms in Section 3. This proposed requirement would add a considerable administrative burden to all businesses, especially small businesses. It also requires that employers disclose this information for "substantially similar" positions, although in many cases, positions do not have clear objective, comparable measurements.

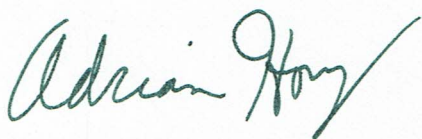
# Island Plastic Bags Inc.

This bill would also require employers to repost a job listing with an updated wage range, if at any time the proposed hourly pay rate or salary does not match the previously posted range. As prospective employees often negotiate their salaries, this requirement could result in added cost to the employer and lengthen the hiring process.

IPB is also concerned that the disclosure of all pay rates in job listings encroaches on an employers' confidential pay information. For the reasons listed above, this bill could result in expensive and protracted litigation.

Due to the concerns listed above, IPB cannot support this bill at this time and respectfully ask that HB1192 HD2 be deferred. Thank you again for the opportunity to testify. Should you have any questions or comments about my testimony you can contact me by email at [ahong@islandplasticbags.com](mailto:ahong@islandplasticbags.com) or by phone at 808-484-4046.

Sincerely,



Adrian K. Hong, CPA\*

President

Island Plastic Bags, Inc.

[www.islandplasticbags.com](http://www.islandplasticbags.com)

Email: [ahong@islandplasticbags.com](mailto:ahong@islandplasticbags.com) | Phone: 808-484-4046 | Fax: 808-488-8505

\*Not in public practice

**LATE**

To: Hawaii State Senate Committee for Labor Relations Board  
Hearing Date/Time: Thursday, March 14, 2019 at 3:00pm.  
Place: Hawaii State Capitol, Room 224  
Re: Judith Ann Armstrong is in support of HB1192 HD2 relating to Equal Pay

Dear Members of the Labor Relations Board Committee,

I, Judith Ann Armstrong, am strongly in support of HB1192 HD2, relating to Equal Pay, with a request for amendment. HB1192 HD2 would provide stronger equal pay protection for the employees, it would help businesses better manage their pay expenses, recruit and retain employees, and potentially improve employee morale. It would directly confront the gender pay gap in Hawaii. Gender pay gap is an issue which hurts not only women but families.

One of the amendments introduced in HD2 adds "provided that this subsection shall not apply to discussion of employee wages if knowledge of the wages stems from human resources, payroll, or legal professional responsibilities in the workplace." to Section 2 of HB1192, Hawaii Revised Statutes Section 378-2.3 (f). This would allow employers to retaliate and discriminate employees in human resources, payroll, or legal departments of businesses if they discussed wages of employees with other employees. Many women would only know of pay inequality at their workplace if they were advised by another employee. This is unfair to employees in human resources, payroll and legal departments who will be prohibited from discussing, inquiring about or disclosing wages of their departmental co-workers. This also undermines newly passed Act 108's protections by placing limits on disclosures and discussions of pay levels in the workplace. Act 108 of Session Laws of Hawaii 2018 just became effective January 1, 2019. Please give Act 108 to take effect first and eliminate this amendment introduced in HD2.

Hawaii is considered as a state with only moderate equal pay protection. Seven other states (California, Illinois, Maryland, Massachusetts, New Jersey, Oregon, and Washington) have equal pay protection much stronger than the state of Hawaii (Source: AAUW Policy Guide to Equal Pay in the States, <https://www.aauw.org/resource/state-equal-pay-laws/>) We believe Hawaii can do better and Act 108, SLH 2018, as is and measures in HB1192 can succeed with a minimal cost or disruption to employers. We believe we can establish Hawaii as a leader in the field of pay equity, as Hawaii has led the way in civil rights."

Thank you for this opportunity to testify in support of this important measure.

Sincerely,  
Judith Ann Armstrong  
1717 Ala Wai Blvd  
Apt 3006  
Honolulu, HI 96815

**LATE**



Testimony to the  
Senate Committee on Labor, Culture, and the Arts  
March 14, 2019, 3:00 p.m.  
State Capitol - Conference Room 224

RE: HB 1192, HD2 Relating to Equal Pay

Aloha Chair Taniguchi, Vice Chair Ihara, and members of the committee:

On behalf of the Society for Human Resource Management – Hawaii Chapter (“SHRM Hawaii”), we are writing in opposition to HB 1192, HD2 relating to equal pay. This bill conforms statutory prohibitions against wage discrimination with other prohibitions on employment discrimination, clarifies allowable justifications for compensation differentials and remedies for pay disparity, requires employers to disclose wage ranges to employees and prospective employees, and exempts wage disclosure and discussion from the prohibitions on employer retaliation or discrimination if knowledge of the wages stems from human resources, payroll, or legal professional responsibilities in the workplace.

While we strongly support equal pay for equal work, we believe that this bill does not fulfill its intended purpose. Expanding the Equal Pay Act by adding every protected class creates ambiguity over whether, for example, an older employee with more experience level may be paid more than a younger employer with less experience. In addition, clarity is needed regarding what “substantially similar” means in this context. By shifting the responsibility to the employer to explain why there is a pay differential, there could be unintended exposure to liability for employers that is overly broad and very difficult to limit. We oppose this measure.

Human resource management professionals are responsible for the alignment of employees and employers to achieve organizational goals. HR professionals seek to balance the interests of employers and employees with the understanding that the success of each is mutually dependent. SHRM Hawaii represents more than 800 human resource professionals in the State of Hawaii. We look forward to contributing positively to the development of sound public policy and continuing to serve as a resource to the legislature on matters related to labor and employment laws.

Mahalo for the opportunity to testify.



SHRM Hawaii, P. O. Box 3175, Honolulu, Hawaii (808) 447-1840



# Chamber of Commerce HAWAII

*The Voice of Business*

## Testimony to the Senate Committee on Labor, Culture and the Arts

Thursday, March 14, 2019 at 3:00 P.M.

Conference Room 224, State Capitol

**LATE**

### RE: HB 1192 HD2, RELATING TO EQUAL PAY

Chair Taniguchi, Vice Chair Ihara, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") supports equal pay, however, the Chamber **does not support** HB 1192 HD2, which would impose overly-burdensome regulation upon business owners in the name of achieving equal pay.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 2,000+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

While the Chamber supports equal pay, the Chamber is concerned with HB1192 HD2 for the following reasons:

#### Existing Law

It is already against the law for an employer to discriminate in setting employee wages based on gender. At the state level we have the Equal Pay Law, which clearly states that no employer shall discriminate based on gender when setting wages. At the federal level, the Equal Pay Act says that employers must pay equal wages to women and men in the same establishment for performing substantially equal work.

In 2009, Congress passed the Lilly Ledbetter Fair Pay Act, which extended the statute of limitations for filing an equal pay lawsuit. We believe these laws already cover the issue of gender wage discrimination.

#### No Due Process for Employers

We disagree and oppose the presumption that the employer is guilty of wage discrimination, and puts the burden of proof on them to prove their innocence. The bill further restricts Hawaii's Equal Pay Law that limits "bona fide" factors for wage differentials to a seniority system, a merit system, or production measures. This ties the hands of the employers in any legal flexibility in compensation.

This section could create many frivolous lawsuits against employers. Lawsuits (threatened or filed) have a substantial impact on small business owners. We have heard story



after story of small business owners spending countless hours and sometimes significant sums of money to settle, defend or work to prevent a lawsuit.

#### Burdensome Disclosure of Wage Ranges

This bill would require business owners to provide to job candidates, at the time of hiring and on an annual basis, wage ranges for each employee's each job title. However, this bill does not provide clear definitions of several terms in Section 3. This proposed requirement would add a considerable administrative burden to all businesses, especially small businesses. It also requires that employers disclose this information for "substantially similar" positions, although in many cases, positions do not have clear objective, comparable measurements.

This bill would also require employers to repost a job listing with an updated wage range, if at any time the proposed hourly pay rate or salary does not match the previously posted range. As prospective employees often negotiate their salaries, this requirement could result in added cost to the employer and lengthen the hiring process.

The Chamber is also concerned that the disclosure of all pay rates in job listings encroaches on an employers' confidential pay information. For the reasons listed above, this bill could result in expensive and protracted litigation.

The Chamber does not oppose the language in the bill that exempts wage disclosure and discussion from the prohibitions on employer retaliation or discrimination if knowledge of the wages stems from human resources, payroll, or legal professional responsibilities in the workplace.

While the Chamber supports closing the gender pay gap, due to the concerns listed above, we cannot support this bill at this time and respectfully ask that HB1192 HD2 be deferred. Thank you for the opportunity to testify.

**HB-1192-HD-2**

Submitted on: 3/13/2019 10:25:30 PM

Testimony for LCA on 3/14/2019 3:00:00 PM

**LATE**

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Darlene Ewan	Testifying for Aloha State Association of the Deaf	Support	No

Comments:

Aloha State Association of the Deaf supports the bill. Deaf, Deaf-Blind, and hard of hearing women are likely to experience wage discrimination. This bill will give more support for them to be paid fairly.

Mahalo, Darlene Ewan President