

‘O kēia ‘ōlelo hō’ike no ke
Komikina Kūlana Olakino o Nā Wāhine

Testimony on behalf of the
Hawai‘i State Commission on the Status of Women

Prepared for the Senate Committee on LCA

In Support of HB488 HD2

Thursday, March 14, 2019, at 3:00 p.m. in Room 224

Dear Chair Taniguchi, Vice Chair Ihara, and Honorable Members,

The Hawai‘i State Commission on the Status of Women supports the intent of HB488 HD2, which prohibits non-disclosure agreements as a condition of employment.

The Commission notes the silencing effect of confidentiality clauses or non-disclosure agreements (NDA). NDAs have functioned to shield serial offenders of sex discrimination, including sexual assault and sexual harassment, by allowing the pattern of misconduct to continue unnoticed and other women to suffer similar abuse by the same offender. In doing so, NDAs perpetuate the power imbalance between men and women in the workplace. The Legislature should act to ban NDAs as part of a broader strategy to eradicate sexual harassment. Accordingly, the Commission asks the Committee to pass HB488 HD2 with the amendments from JUD.

Sincerely,
Khara Jabola-Carolus
Executive Director



March 11, 2019

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

The Senate
The Thirtieth Legislature
Regular Session of 2019

RE: HB 488 HD2 - RELATING TO EMPLOYMENT PRACTICES

DATE: March 14, 2019

TIME: 3:00 pm

PLACE: Conference Room 224

State Capitol 415 South Beretania Street, Honolulu HI

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

Thank you for the opportunity to testify in **support** of this measure. [SAG-AFTRA](#) represents over 1000 actors, recording artists, and media professionals in our state.

We support this ban on pre-employment nondisclosure agreements whenever this legal tool is used to cover up sexual harassment and assault in the workplace. These type of pre-employment requirements cover up abuse and act as a restraint on the freedom of speech on Hawaii's workers.

We also support adding a new section to HRS chapter 378 making it unlawful practice to retaliate against employees for disclosing or discussing sexual harassment or sexual assault. An employee's fear that her/his employer will retaliate against them for disclosing or even just discussing sexual assault or harassment acts as a powerful deterrent and silencer. Adding this section goes a long way to protect workers and to shine a light on discriminatory and dangerous practices.

In taking action to encourage open discourse, the state will not only strengthen the civil rights of Hawaii workers that may find themselves in vulnerable and precarious positions but will also allow for the exposure of persons who pose a risk to public safety.

Thank you again for your continued support and please don't hesitate to contact the SAG-AFTRA Hawaii Local office for more information on this issue as it relates to professional performers.

Respectfully,

A handwritten signature in black ink, appearing to read "Mericia Palma Elmore".

Mericia Palma Elmore
Executive Director SAG-AFTRA Hawaii Local

Mericia Palma Elmore, Executive Director
SAG-AFTRA Hawaii Local
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SCREEN ACTORS GUILD - AMERICAN FEDERATION OF
TELEVISION AND RADIO ARTISTS
SAGAFTRA.org
Associated Actors & Artistes of America / AFL-CIO

HB-488-HD-2

Submitted on: 3/11/2019 8:07:00 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 Committee on Labor, Culture and the Arts,

I am writing in support of HB488 HD2.

It is unacceptable for an employer to retaliate against an employee for disclosing or discussing sexual harassment or sexual assault.

I hope that the state will pass meaningful legislation to promote a safe work environment by protecting the rights of all workers.

Mahalo,

Caroline Kunitake

HB-488-HD-2

Submitted on: 3/12/2019 12:11:49 AM

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

Submitted By	Organization	Testifier Position	Present at Hearing
Younghi Overly	Testifying for AAUW of Hawaii	Support	No

Comments:

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

Thank you for this opportunity to submit a testimony in SUPPORT of HB488 HD2, which would prohibit written nondisclosure agreements involving sexual assault and sexual harassment as part of an employee's conditions of employment, and prohibit employers from retaliating against an employee for disclosing or discussing sexual harassment or sexual assault.

NDA's involving sexual assault and sexual harassment is another form of silencing victims and Hawaii should join other 16 states with legislations to ban this outdated practice (Source: [SHRM "States Take Action Against Nondisclosure Agreements"](#)).

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 important bill to give voice to victims of sexual assault and harassment. Mahalo for your consideration.

HB-488-HD-2

Submitted on: 3/12/2019 11:11:57 AM

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

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

Comments:



Fujiwara & Rosenbaum, L.L.L.C.

*Alahea Corporate Tower
1100 Alahea Street 20th Floor
Honolulu, Hawaii 96813*

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, L.L.L.C.

Re: **H.B. 488 H.D.2**

I have specialized in civil rights and employment law as a plaintiff's attorney since 1986 with an experience in hundreds of sexual harassment cases as well as found to be an expert in our courts. As many of you are now aware, if you weren't before the public case of my client, Rachael Wong against Joe Souki, sexual harassment in Hawai'i has gone unchecked for years, especially where there are powerful individuals. One reason is the **use of harmful nondisclosure agreements (NDAs)/confidential agreements in the workplace**. NDAs are legally enforceable contracts, often found in employment contracts or settlement agreements, that prohibit a party or parties from disclosing certain information.

Our law firm strongly supports H.B. No. 488 H.D. 2 to limit the NDA: it is a crucial step forward in the fight to prevent and end harassment in the workplace. By amending HRS chapter 378 it prohibits employers from (1) forcing employees to agree to a NDA at the time of hire and (2) retaliating against an employee for disclosing or discussing sexual harassment or sexual assault. Consequently, this bill would help lift the veil of secrecy that enables predatory behavior, would protect employees' rights to report and discuss harassment, and increase employer accountability.

In H.D.2 the House Judiciary "Committee has amended this measure by providing that confidentiality is allowed for settlements between an employee alleging sexual harassment and an employer **only if the employee consents to**

confidentiality.” This amendment followed the language we urged: an amendment of section(c), which seeks to stop the abusive use of NDAs by **limiting the use of NDAs in the context of settlement agreements except when entered into at the claimant’s request.**”

This amendment makes **this bill truly effective by going one step further in protecting victims of sexual harassment from serial perpetrators who go from one victim to another, practicing a pattern of sexual harassment.**

Exactly what is wrong with NDAs/confidential settlements? In Hawai’i it has definitely been my experience for **over 30 years** that it is standard practice to include NDAs/confidentiality provisions in settlement agreements in employment discrimination cases, including sexual harassment cases. **As the sexual harassment and assault cases against Harvey Weinstein, so aptly demonstrated, NDAs have increasingly been used to prevent individuals from speaking up about sexual harassment and discrimination, thereby helping hide harassment and allowing predators to evade accountability.**

On the surface an NDA may look like it’s protecting the victim.

However, as indicated above, the confidential provision is a problem for at least two people: the current victim as well as future victims:

- 1. A confidential provision silences the current victim;**
- 2. A confidential provision allows the harasser to continue sexual harassment of other employees.**

Thus, this amendment of section(c) seeks to stop the abusive use of NDAs by **limiting the use of NDAs in the context of settlement agreements except when entered into at the employee’s request.** Such an amendment does not ban all NDAs in the settlement context, but seeks to shift the power to the employee to decide whether to request confidentiality. Victims of harassment sometimes want to ensure confidentiality to protect themselves from retaliation or damage to their professional reputations and job prospects. Moreover, a policy banning all NDAs in the settlement context could make employers less likely to settle claims or offer significantly less money, forcing victims into costly litigation in court, which is not

a realistic option for many workers.¹

Conclusion. By adopting subsection(c), as amended, you would further empower employees to speak up about sexual assault and sexual harassment at their workplace, where they are supposed to be safe from rape, other sexual assaults of their body and other sexual harassment and **not live in fear of what is going to happen each day**: “How am I going to be terrorized today?”

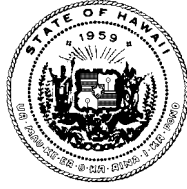
The one-year anniversary of #MeToo in Hawai'i with Rachael Wong's case going viral provides an important opportunity to respond to the systemic problems highlighted over the last year relating to workplace harassment, including the increasing use of contractual provisions like NDAs that silence victims and help hide harassment. We are pleased to see the legislature grappling with this important issue.

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.

¹ Some examples of approaches from other states grappling with this issue are, for example, New York that gives complainants 21 days to review the agreement, and another seven days to revoke their consent even after executing the agreement. Another state considering a bill that would deem an NDA in a settlement agreement involving harassment or discrimination to be against public policy and unenforceable against an employee. However, if the employee divulges sufficient information to make the employer identifiable, the NDA is not enforceable against the employer either.

[Addressee - Header]
March 13, 2019
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DAVID Y. IGE
GOVERNOR



PANKAJ BHANOT
DIRECTOR

CATHY BETTS
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
P. O. Box 339
Honolulu, Hawaii 96809-0339

March 12, 2019

TO: The Honorable Senator Brian T. Taniguchi, Chair
Senate Committee on Labor, Culture and the Arts

FROM: Pankaj Bhanot, Director

SUBJECT: **HB 488 HD 2 – RELATING TO EMPLOYMENT PRACTICES**

Hearing: March 14, 2019, Time 3:00 p.m.
Conference Room 224, State Capitol

DEPARTMENT'S POSITION: The Department of Human Services (DHS) supports this measure as all individuals should have a workplace environment free from harassment, assault, and violence. Low wage, low skill workers, or workers just entering the workforce are especially vulnerable to harassment. This measure is a positive employment policy that will improve the social and economic mobility of Hawaii's residents. DHS provides benefits and services that support individuals and families with their basic needs so adults can address their children's care and education, and improve their own skills to gain and maintain employment.

PURPOSE: The purpose of the bill is to prohibit written nondisclosure agreements involving sexual assault and sexual harassment as part of an employee's condition of employment under certain conditions. Prohibits employers from retaliating against an employee for disclosing or discussing sexual harassment or sexual assault. (HB488 HD2) DHS appreciates the House Committee on Judiciary's amendment "that confidentiality is allowed for settlements between an employee alleging sexual harassment and an employer only if the employee consents to confidentiality." Standing Committee Report No. 1186.

Women, men, gender non-conforming, and low-income individuals, all may experience sexual harassment and sexually coercive behavior in the workplace. However, the majority of workplace harassment victims are women. The risk of being sexually harassed in the workplace increases greatly for women of color and women who work in low paying jobs.

As such, workplace harassment and subsequent retaliation have a direct effect on individual's ability to work and to be economically self-sufficient. Many victims do not report for fear of being retaliated against.

The proliferation of non-disclosure agreements (NDA) has enabled abusers to continue their abuse and in turn, silence their victims from reporting.

DHS provides services to 1 in 4 Hawaii residents, and some of the most vulnerable individuals and families in the State. Through our multi-generational 'Ohana Nui framework, we endeavor to address the multiple factors that contribute to multi-generational poverty including the impact of trauma on individuals and families. Reducing harassment in the work place and supporting better employment practices will further this goal.

Thank you for the opportunity to testify in support.



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: The Honorable Brian Taniguchi, Chair
The Honorable 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. 488, 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.

The HCRC supports the intent of H.B. No. 488, H.D. 2.

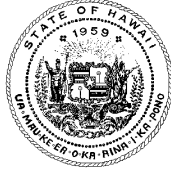
H.B. No. 488, H.D. 2 amends HRS chapter 378 to add a new section prohibiting employers from requiring nondisclosure agreements that prevents disclosure of sexual assault or sexual harassment as a condition of employment. The bill prohibits employers from retaliating against an employee for disclosing or discussing sexual harassment or sexual assault.

This measure prohibits such nondisclosure agreements as a condition of employment, but subsection (c)(3) of the new section expressly allows confidential settlements of individual complaints, with consent of the employee. Confidential dispositions silence victims of sexual harassment, sometimes allowing harassers to continue sexual harassment of other employees. In recent news, we have seen numerous stories about repeated offenses by individuals who settled multiple sexual harassment complaints with confidential agreements. It is a common standard practice to include confidentiality or nondisclosure provisions in settlement agreements in employment discrimination cases, including sexual harassment cases, but there is growing concern that the use confidentiality provisions in settlement of sexual harassment cases

might enable repeat offenders who engage in a pattern of sexual harassment. By expressly allowing nondisclosure agreements in confidential settlements between an employee and an employer, with consent of the employee, this bill does not completely prohibit the use and effect of nondisclosure agreements, as employees may feel compelled to agree to confidentiality in order to obtain a negotiated settlement or to avoid detrimental effect that disclosure could have on future employment.

The HCRC supports the intent of H.B. No, 488, H.D. 2.

DAVID Y. IGE
GOVERNOR



RYKER WADA
DIRECTOR
JASON MINAMI
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES
DEVELOPMENT
235 S. BERETANIA STREET
HONOLULU, HAWAII 96813-2437

March 12, 2019

SENATE COMMITTEE ON
LABOR, CULTURE AND THE ARTS

For Hearing on March 14, 2019
3:00 p.m., Conference Room 224

BY

RYKER WADA
DIRECTOR

House Bill No. 488
Relating to Employment Practices
(WRITTEN TESTIMONY ONLY)

TO CHAIRPERSON TANIGUCHI, VICE CHAIR IHARA AND MEMBERS OF THE
COMMITTEE:

Thank you for the opportunity to provide **comments** on H.B. No. 488.

H.B. No. 488 amends Chapter 378, Hawaii Revised Statutes, by adding a new section that prohibits written nondisclosure agreements involving sexual assault and sexual harassment as part of an employee's condition of employment under certain conditions. The proposed legislation also prohibits employers from retaliating against an employee for disclosing or discussing sexual harassment or sexual assault. The following exceptions are excluded from the purview of this new section:

(1) Human resources employees expected to maintain the confidentiality of an investigation as part of their official duties;

(2) Employees requested to maintain the confidentiality of an ongoing human resources investigation; and

(3) Confidential settlements between an employee alleging sexual harassment and an employer only if the employee consents to confidentiality.

The Department of Human Resources Development (DHRD) notes that investigations regarding sexual harassment or sexual assault may be conducted by individuals other than human resources employees. For example, investigations may be conducted by employees or investigators from the State Ethics' Commission, the Office of Attorney General, or a Department's investigation unit or Civil Rights Compliance Office, all of whom are not considered to be human resources employees. Additionally, complaints involving sexual harassment or sexual assault may also result in criminal investigations.

Accordingly, DHRD respectfully requests that Section 1, subsection (c), line 15 on page 1, and line 2 on page 2 be amended to read as follows:

"(c) This section shall not apply to:

- (1) ~~Human resources~~ Employees expected to maintain the confidentiality of an investigation as part of their official duties;
- (2) Employees requested to maintain the confidentiality of an ongoing human resources investigation;"

Thank you for the opportunity to provide comments on this measure.

LATE



March 13, 2019

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

Re: H.B. 488, H.D. 2, RELATING TO EMPLOYMENT PRACTICES.

Hearing: Thursday, March 14, 2019, 3:00 p.m., Room 224

Dear Chair Taniguchi and Members of the Committee on Labor, Culture and the Arts:

Hawaii Women Lawyers (“HWL”) **supports** H.B. 488, H.D. 2, which is to prohibit written nondisclosure agreements involving sexual assault and sexual harassment as part of an employee's condition of employment; and prohibit employers from retaliating against an employee for disclosing or discussing sexual harassment or sexual assault.

The mission of Hawaii Women Lawyers is to improve the lives and careers of women in all aspects of the legal profession, influence the future of the legal profession, and enhance the status of women and promote equal opportunities for all.

Last year, HWL conducted a survey of its members as to the incidences and experiences of sexual harassment in the legal community.¹ 76 attorneys responded to the survey. Nearly 60% (42 attorneys) reported being sexually harassed at some time during their legal career, with approximately 13% (10 attorneys) reporting having been sexually harassed in the workplace within the last two years.

It is common for victims of sexual assault and harassment not to report abuse for fear of retaliation. Nondisclosure agreements that prevent the disclosure of sexual harassment as a condition of employment have the impact and effect of further silencing victims. They can also allow repeat offenders to continue to engage in serial harassment.

Thank you for the opportunity to submit testimony on this measure.

¹ HWL has 357 active members, who are all members of the Hawaii State Bar Association. The survey was conducted between January 12, 2018 and February 4, 2018. The survey was done on a strictly voluntary and anonymous basis, and with the understanding that any stories provided by survey respondents may be shared publicly to raise awareness of the occurrence of sexual harassment in the legal community. The survey was conducted for informational purposes only, and HWL has not conducted an independent investigation as to and cannot guaranty the accuracy of the results of the survey or the specific instances of harassment shared by survey respondents. HWL recognizes that terminology may carry different connotations for different parties and did not define “sexual harassment” in the survey. HWL also recognizes that men are victims of sexual harassment as well as women, but as the mission of HWL is to improve the lives and careers of women in all aspects of the legal profession, the main focus of the article is on the experiences of female victims.

LATE

HB-488-HD-2

Submitted on: 3/13/2019 10:23:39 PM

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

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

Comments:

Aloha State Association of the Deaf supports the bill. We have been silenced too long when it comes to Sexual Harassment. We should never have an agreement to keep information to ourselves to save the face of ones who made the mistake. That is where the problem continues. Please pass this bill.

Mahalo, Darlene Ewan President



Hawaii Women's Coalition

COMMITTEE LABOR, CULTURE AND THE ARTS
Sen. Brian Taniguchi, Chair
Sen. Les Ihara, Vice Chair

LATE

DATE: Thursday, March 14, 2019
TIME: 3:00 p.m.
PLACE: Conference Room 224

Aloha Chair Taniguchi, Vice Ihara and members,

The Women's Coalition is in strong support of this measure. Given the prevalence of the use of these types of agreements to cover up the behavior of serial sex abusers, this seems the right step to take.

Mahalo for the opportunity to testify,

Ann. S. Freed
Co-Chair, Hawaii Women's Coalition