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Testimony of the Department of Commerce and Consumer Affairs

Office of Consumer Protection

Before the
Senate Committee on Commerce and Consumer Protection
February 25, 2025
9:32 AM
Via Videoconference
Conference Room 229

On the following measure:
S.B. 1287, S.D. 1, RELATING TO TRANSPARENCY

Chair Keohokalole and Members of the Committee:

My name is Emma Olsen, and I am an Enforcement Attorney at the Department of Commerce and Consumer Affairs' (Department) Office of Consumer Protection (OCP). The Department offers the following comments.

The purpose of this bill is to require food, beverage, and service establishments that accept tips and employ tipped employees to post signs that include certain language explaining their tip allocation practices and the contract information for the Wage Standards Division of the Department of Labor and Industrial Relations and the Wage and Hours Division of the United States Department of Labor. General notification and posting requirements for employers are established in HRS section 388-7.

The department notes the findings of the Senate Committee on Labor and Technology that "This measure protects tipped employees and their earnings by requiring

the posting of signage explaining the tip allocation process to customers and employees and listing the contact information to report violations.” [Stand. Com. Rep. No. 352](#). Although this measure is not designed to protect consumers, it creates a new section in a consumer protection statute, chapter 481B, potentially triggering consumer protection remedies under chapter 480.

The Hawaii Supreme Court previously determined that tipped employees could not recover remedies for unfair or deceptive acts or practices or unfair methods of competition from employers, even though the prohibited practice was established in a consumer protection statute. *Davis v. Four Seasons Hotel Ltd.*, 122 Haw. 423, 446, 228 P.3d 303, 326 (2010); *Villon v. Marriott Hotel Servs., Inc.*, 130 Haw. 130, 141, 306 P.3d 175, 186 (2013). In *Villon*, the Hawaii Supreme Court held that back wages and penalties for back wages under HRS sections 388-6 and 388-10 were available to the plaintiffs for violations of HRS section 481B-14. *Villon*, 130 Haw. at 135, 141.¹ If *Villon* and *Davis* are controlling authority, employees could be left without any remedy for a violation of the notification requirements in this bill unless a court determined that back wages and penalties were available.

Given that this bill is intended to address labor practices of employers toward their tipped employees, and not consumer concerns, we recommend this bill be amended to clarify that back wages and penalties for back wages are available remedies for a violation of the notification requirements imposed on employers. Without this amendment, employers and employees would be left to litigate, and courts would be left to grapple with, the appropriate remedy and the effect of *Villon*. If the appropriate remedy is an

¹ Justice Acoba’s concurrence in *Villon* aptly explains why when no consumer is involved, there is no claim for unfair or deceptive acts or practices under section 480-2(d). *Villon*, 130 Haw. at 144 (Acoba, J., concurring (“Under HRS § 480–2(d), “no person other than a consumer, the attorney general, or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.”)).

In *Davis*, the court confirmed that when the conflict is between the employee and the restaurant, and the employee failed to plead that they were in direct competition with the restaurant or hotel, there is no claim for unfair methods of competition. *Davis*, 122 Haw. at 446.

award of back wages in the amount that the employees should have earned if all tips had been paid directly to the employees, then we request this bill be amended to make that clear. The bill should also be removed from HRS chapter 481B and placed elsewhere to avoid giving rise to the confusion regarding remedies that led to the *Villon* and *Davis* litigation.

Thank you for the opportunity to testify on this bill.

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DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
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February 25, 2025

LATE

To: The Honorable Jarrett Keohokalole, Chair,
The Honorable Carol Fukunaga, Vice Chair, and
Members of the Senate Committee on Commerce and Consumer Protection

Date: Tuesday, February 25, 2025
Time: 9:32 a.m.
Place: Conference Room 229, State Capitol

From: Jade T. Butay, Director
Department of Labor and Industrial Relations (DLIR)

Re: S.B. 1287 S.D.1 RELATING TO TRANSPARENCY

I. OVERVIEW OF PROPOSED LEGISLATION

The **DLIR offers comments** on this proposal. SB1287 SD1 proposes to establish under the State's Unfair and Deceptive Practices Law, Chapter 481B, Hawaii Revised Statutes (HRS), that food, beverage, and service establishments that accept tips and employ tipped employees shall post signs that include certain language explaining their tip allocation practices and the contact information for the Wage Standards Division of the DLIR and the Wage and Hour Division of the United States Department of Labor.

The DLIR notes that the proposed (C) on Pg. 3. Lines 16-19 may violate the Fair Labor Standards Act (FLSA) and notes federal guidance on this issue has changed under different federal administrations.

II. CURRENT LAW

Under the Wage and Hour Law, Chapter 387, HRS, the definition of "wage" in §387-1, HRS, does not include tips or gratuities of any kind, except for the purposes of the last sentence of §387-2, HRS, which relates to the requirements for using the tip credit.

III. COMMENTS ON THE SENATE BILL

§12-20-11, Hawaii Administrative Rules (HAR), Payment of Wages to Tipped Employees, pertains to tip-splitting, tip-pooling, and additional tip credit requirements. §12-20-12, HAR, covers recordkeeping requirements for employers claiming the tip credit.