

ACT 108

S.B. NO. 2351

A Bill for an Act Relating to Equal Pay.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that pay disparity persists between men and women who do similar work. The Institute for Women's Policy Research reported that if the progress to achieve pay parity continues at the same rate as it has since 1960, women and men will not reach pay parity until 2058.

The legislature further finds that existing Hawaii law generally prohibits an employer from paying an employee at wage rates less than the rates paid to employees of the opposite sex. However, in 2015, the gender wage gap in Hawaii stood at sixteen cents on the dollar. A woman working full-time and year-round earned an average of eighty-four cents to every dollar a man earned. The gap was far worse for women of color: for every dollar a white male made, African-American and Asian-American women made only seventy-three cents and Latina women made only sixty-seven cents. This wage gap extends across almost all occupations reporting in Hawaii.

The legislature believes that the ability of employers to consider a job applicant's previous salary history is a contributing factor to the gender pay disparity. Women often disclose their lower salary histories, and employers offer lower salaries in response. In 2017, New York City became the first municipality in the United States to address this problem by prohibiting employers from requesting a job applicant's salary history. Hawaii should follow suit to help promote equality in the workplace and close the pay gap between men and women.

The legislature further finds that there are extreme income disparities for native Hawaiians, particularly for native Hawaiian women, which suggests that the combination of gender and race discrimination in pay may significantly impact the native Hawaiian community. Recent research indicates that native Hawaiian men and women make less than the statewide average annual income. Native Hawaiian men earn on average \$7,621 less annually than the total male population statewide. Native Hawaiian women, meanwhile, make on average \$5,967 less in income annually than women statewide, \$11,393 less annually than native Hawaiian men, and an average of \$19,014 less than all men statewide. Native Hawaiian women make seventy cents for every dollar a man makes, and seventy-nine cents for every dollar a native Hawaiian man makes. Such dispari-

ties should be acknowledged and addressed in the search for true income equity in Hawaii.

The legislature also believes that pay secrecy undermines efforts to close the pay gap. A 2010 Institute for Women's Policy Research/Rockefeller Survey of Economic Security reported that 23.1 per cent of private sector workers reported that discussion of wages and salaries was formally prohibited, and an additional 38.1 per cent reported that this type of discussion was discouraged by managers. Pay secrecy inhibits workers from pursuing claims of pay discrimination because women cannot challenge wage discrimination that they do not know exists. The federal government and many states have taken action to end wage secrecy by prohibiting retaliation against employees who discuss wages. Hawaii can also take this step by prohibiting wage secrecy and retaliation or discrimination against employees who disclose or discuss their wages.

The purpose of this Act is to:

- (1) Disrupt the cycle of wage inequality for women and minorities by prohibiting prospective employers from requesting or considering a job applicant's prior wage or salary history in the job application process so that employers will set compensation offers based on skills and qualifications; and
- (2) Encourage equal pay between men and women by prohibiting enforced wage secrecy and prohibiting retaliation or discrimination against employees who disclose, discuss, or inquire about their own or coworkers' wages for the purpose of exercising rights under the law.

SECTION 2. Chapter 378, Hawaii Revised Statutes, is amended by adding a new section to part I to be appropriately designated and to read as follows:

"§378- 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.”

SECTION 3. Section 378-2.3, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§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.”

SECTION 4. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 6. This Act shall take effect on January 1, 2019.

(Approved July 5, 2018.)

Note

1. Edited pursuant to HRS §23G-16.5.