A BILL FOR AN ACT

RELATING TO EQUAL PAY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature is committed to ensuring that women and men are paid equally for work that is substantially equal with respect to the skill, effort, and responsibility required to perform the work and the conditions under which the work is performed. The legislature recognizes that Act 108, Session Laws of Hawaii 2018, is a significant step toward ensuring that the pay disparity between men and women diminishes. However, more needs to be done.

The American Association of University Women reports that in 2018, median annual earnings for women in Hawaii were just eighty-three per cent of men's earnings, which represents a seventeen per cent gap. Furthermore, native Hawaiian and other Pacific Islander women earn only sixty-two per cent of white male earnings nationally.

Similarly to how Hawaii has led the way on many civil rights issues, 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.

The purpose of this Act is to:

(1) Amend the list of protected classes under Hawaii's equal pay statute to make the protections afforded by this section consistent with the state statute that prohibits employment discrimination;

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

(3) Provide pay transparency by requiring employers to make salary range information available to employees and job candidates, which will help employers manage their pay expenses and encourage pay equity; and

(4) Update the term "equal work" as used in state non-discrimination statutes to "substantially similar
work," which is the more accurate term used in many other states.

SECTION 2. 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] among employees [because of sex] by paying [wages] compensation to employees [in an establishment] at a rate less than the rate at which the employer pays [wages] compensation to employees of [the opposite] another race, sex [in the establishment] 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 for [equal] substantially similar work [on jobs the performance of which requires equal] when viewed as a composite of skill, effort, and responsibility, [and that are] performed under similar working conditions. [Payment]

(b) Compensation differentials [resulting from:] do not violate this section if the employer demonstrates that the differential solely results from any of the following factors:
1 (1) A non-discriminatory seniority system; provided that time spent on leave due to a pregnancy-related condition or parental, family, or medical leave, shall not reduce seniority;

2 (2) A non-discriminatory merit system;

3 (3) A system that objectively measures earnings by quantity or quality of production; or

4 (4) A bona fide occupational qualification; or

5 (5) A differential based on any other permissible factor other than sex[,] do not violate this section.]

6 (4) A factor that has neither the purpose nor the effect of discriminating on any basis prohibited by this section.

7 (c) For the purposes of subsection (b)(4), a factor has the purpose of discriminating on a basis prohibited by this section if its general use or application in a particular case is motivated, in whole or in part, by considerations 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.

(d) An employer who pays a wage in violation of this
section shall not, in order to comply with the provisions of
this section, reduce the wage rate of any employee.

(e) The agreement of an employee to work for less than the
wage to which the employee is entitled under this section is not
a defense to an action under this section.

(f) An unlawful employment practice in violation of this
section occurs when:

(1) An employer adopts a discriminatory compensation
decision or discriminatory practice;

(2) An individual becomes subject to the discriminatory
compensation decision or practice; or

(3) An individual is affected by application of the
discriminatory compensation decision or practice,
including each time wages, benefits, or other
compensation are paid.

(g) 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 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, or hearing; provided further that nothing in this
subsection shall be construed to limit the rights of an employee
provided under any other provision of law.

(h) For the purposes of this section, the meaning of
"compensation" is to be construed broadly and shall include but
not be limited to use of or access to employee expense accounts,
use of a vehicle, housing, travel budgets, cost reimbursements,
paid vacation or sick leave, sabbatical benefits, endowed
chairs, insurance, stock options, pension contributions, and
other employee benefits associated with the individual
employee's unique job duties, situation, and requirements.
(i) For the purposes of this section, "substantially similar work" means work that is mostly similar in skill, effort, and responsibility, and is performed under similar working conditions; provided that:

(1) "Skill" means the experience, ability, education, and training required to perform the job;

(2) "Effort" means the amount of physical or mental exertion needed to perform the job; and

(3) "Responsibility" means the degree of accountability or duties required in performing the job."

SECTION 3. Section 378-2.4, Hawaii Revised Statutes, is amended to read as follows:

"§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) An employer 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.

(e) Upon hire, and thereafter annually and upon request,
an employer shall provide an employee of the wage range for the
employee's job title and for jobs within the employer's business
that are substantially similar with respect to the skill,
effort, and responsibility required to perform the jobs and the
conditions under which the jobs are performed.

(f) An employer shall disclose an hourly rate or salary
range in all job listings.

(g) For the purposes of this section, the meaning of
"compensation" is to be construed broadly and shall include but
(h) 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 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.

SECTION 6. This Act shall take effect upon its approval.

INTRODUCED BY: [Signature]

JAN 15 2020
Report Title:
Equal Pay; Wage Discrimination; Salary or Wage History; Employment

Description:
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.

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