

April 24, 2017

Senator Kathleen Taylor
Chair, Senate Workforce Committee
Oregon Senate

Re: House Bill No. 2005-A

Dear Senator Taylor:

The National Women's Law Center is pleased to support House Bill 2005-A, a bill relating to pay equity. The National Women's Law Center has worked for 45 years to advance and protect women's equality and opportunity in the workplace. Please help us to take another step towards putting an end to gender discrimination in the workplace by supporting HB 2005-A and ensuring that it passes without amendments that would undercut its important protections. With HB 2005-A, Oregon has an opportunity to join a nationwide movement for equal pay, promoting fair treatment and increasing economic security for women and their families.

According to data from the U.S. Census Bureau, women in Oregon make an average of 80.8 cents for every dollar made by a man. However, the pay gap for women of color is particularly severe. In Oregon, African American women make 68.2 cents for every dollar a white, non-Hispanic man makes, while Latinas make 51.1 cents, Asian American women make 78.8 cents, and Native American women make 59.6 cents. These lower earnings have a serious impact not only on women, but on the economic security of families—especially those families headed by working single mothers. Twenty-three percent of families with children in Oregon are headed by a single mother.

A. HB 2005 Closes Gaps in Oregon's Current Pay Discrimination Protections

While Oregon's current fair employment practice law and equal pay law provide some protections from discrimination, they contain significant gaps that have allowed pay discrimination and the gender wage gap to persist in Oregon. HB 2005-A takes several important steps to strengthen protections against pay discrimination in Oregon and help close the state's wage gap. Notably, the bill closes judicially created loopholes in the "factor other than sex, race . . ." employer defense to pay discrimination. Some courts have read this broadly worded defense to permit employers to pay discriminatory wages for a limitless number of reasons, including reasons unrelated to the qualifications, skills, or experience needed to perform the job. By spelling out that this defense must be based on a bona fide factor and cannot be based on or derived from sex, race, or another protected factor or based on perceptions of traditional or appropriate roles associated with that protected factor, and that the factor must be job related with respect to the position, based on business necessity, and account for the entire differential, HB 2005-A ensures that employers can no longer rely on compensation differentials that are merely a pretext for discrimination.

With the law on your side, great things are possible.

The bill also includes important protections addressing the problematic practice of using salary history to screen job applicants or set their pay. A job candidate's prior earnings may reflect longstanding wage disparities due to discrimination or other factors such as the applicant's prior part-time work, or period of unemployment due to caregiving. Asking for or relying on an applicant's salary history perpetuates gender and racial wage gaps, forcing women and people of color to carry discrimination with them from job to job. By prohibiting inquiries and reliance on an applicant's wage history, the bill will help ensure that employers and workers can negotiate and set salaries based on the requirements, expectations, and qualifications of the applicant and the job in question, rather than on an individual's earnings at her old job.

We also strongly support the language in HB 2005-A which makes clear that every discriminatory paycheck constitutes an unlawful compensation practice. This ensures that an employee can challenge pay discrimination as long as she continues to feel its effects every pay period, and is a particularly important provision given the difficulty of discovering pay discrimination. Employers do not typically announce to female employees, for example, that they have decided to pay them less than their male colleagues and pay discrimination can persist for years before it is discovered. If the statute of limitations runs from the date of an employer's initial salary-setting decision, an employee who discovers years down the line that she is being paid less than her male colleague will have no recourse, even as she continues to be shortchanged with every paycheck. HB 2005-A ensures that employers can still be held to account in these circumstances, by making clear that a triggering unlawful compensation practice occurs each time compensation is paid pursuant to a discriminatory compensation decision or other practice.

B. Proposed Amendments Risk Undermining HB 2005-A and Oregon's Existing Pay Discrimination Protections

We understand that an amendment proposed in the House would have provided an affirmative defense to liability or compensatory damages for an employer that has conducted a self-evaluation of its pay practices in the three-year period preceding the filing of a pay discrimination complaint, and demonstrated that "reasonable progress has been made toward eliminating wage differentials...." We have significant concerns that such an amendment would undermine the other provisions of HB 2005-A, weaken Oregon's existing pay discrimination protections, and leave individuals harmed by pay discrimination without a remedy. We urge the Senate not to consider a similar amendment.

First, while this amendment may appear to provide employers with an incentive to ensure they are paying their employees fairly, it risks doing more harm than good. HB 2005-A's provisions, which would strengthen existing legal protections, already enhance incentives for companies to adopt practices to ensure they are paying their employees fairly. Stronger legal protections encourage companies to proactively identify, investigate, and remedy disparities within their workforces, reducing the need for litigation. By contrast, amending the bill to provide an employer with an affirmative defense to liability or, in some circumstances, compensatory damages for undertaking a self-evaluation, and making "reasonable progress" towards eliminating pay disparities based on sex or other protected statuses, without actually eliminating them, would undermine the efficacy of the bill's protections.

Second, we are concerned that such an affirmative defense would create a significant loophole in Oregon's pay discrimination protections. The proposed amendment does not provide any concrete parameters or standards to help evaluate the adequacy of an employer's self-evaluation of its pay practices, or ensure its compliance with the law. Recently, many companies have announced publicly that they evaluated their pay practices and found no gender wage gap; few companies have been transparent about methodology, whether the relevant types of data were evaluated, and whether the evaluations were consistent with their obligations under equal pay laws. For instance, earlier this month, Google announced that it conducted an annual compensation analysis and closed its gender and racial pay gaps. A few days later, the U.S. Department of Labor alleged, in the course of litigation related to a compliance audit, that Google's labor practices include "systemic compensation disparities against women pretty much across the entire workforce."

Finally, if Oregon were to adopt an affirmative "self-evaluation" defense, a victim of pay discrimination could be precluded from obtaining justice in court simply because her employer completed some sort of self-evaluation of its pay practices and that "reasonable progress"—a vague, undefined term—has been made towards eliminating wage gaps. Furthermore, the proposed amendment would deny a victim of pay discrimination compensatory damages to make her whole, even if the employer's evaluation of its pay practices is found not to meet the basic requirements of being "reasonable in detail and scope" or consistent with any agency standards. The availability of compensatory damages provides an important incentive under current law for employers to lead the way in tackling the wage gap and fully compensate victims of pay discrimination. The proposed amendment would undermine this important incentive.

We urge your support of HB 2005-A in its current form to ensure that the bill advances, instead of weakens, Oregon's equal pay protections.

Sincerely,



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