Talking Points for HB 1192: “Relating to Equal Pay”

We believe in the concept of equal pay for equal work and that there should not be a pay gap that is based on a person’s race, sex, gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status. We also acknowledge that studies show a pay gap exists between men and women in Hawaii and the United States.

However, we do not believe creating a law that requires employers to provide equal pay for “substantially similar” work is the solution to the pay gap that exists. Instead, for the following reasons such a law would be a compliance nightmare for employers and create more confusion and the potential for litigation.

Section 1: Equal Pay Provisions

- The requirement that employers pay equal compensation for “substantially similar” rather than “equal” work is unworkably vague, and will lead to excessive and unnecessary litigation. Specifically, the determination as to whether work is “substantially similar” based on a composite of skill, effort, and responsibility will allow claimants to compare themselves with others with different levels of education, or different certifications, or individuals working in different geographic locations and markets.

  For example, suppose a small employer has 3 employees, 2 females working in town and a male working in Kapolei. They perform “substantially similar” duties. The Kapolei site has smaller revenue, and the male employee working there has agreed to be paid 50 cents less per hour because he lives in Kapolei and thereby avoids a long commute. Under the proposed statute, the male employee has a viable Equal Pay claim, regardless of the fact that the employee has agreed to the lower wage, and there is no discriminatory intent by the employer.

- This bill creates a highly subjective standard in determining what types of jobs are “substantially similar” under the law. Therefore, if a claim is brought under this bill, the determination as to whether work is “substantially similar” will generally need to be resolved by a jury, meaning that claimants with spurious claims will be able to bring strike suits, coercing employers to settle meritless suits to avoid litigation costs.

- Eliminating the affirmative defense that allows pay differentials to be based on a bona fide occupational qualification ("BFOQ") directly conflicts with HRS 378-3(2), which specifically recognizes bona fide occupational qualifications as an exclusion from the discrimination laws. For example, a movie company may require that an actor playing George Washington be male, and gender would be a BFOQ. A prison may require that guards accessing women’s quarters and bathrooms be female, as a BFOQ. The BFOQ defense recognizes that in certain very limited situations, discrimination on the basis of a protected characteristic is reasonable and permissible.

- The way this bill is written, employers would be strictly liable for any instance where the pay of two employees may be deemed “substantially similar” but their pay is not necessarily equal.
Upon being sued for such a violation, the burden would be upon the employer to prove that the
pay differential was in fact not discriminatory. This is especially troubling in light of the fact that
the “substantially similar” provision is highly subjective and extremely vague.

Section 2: Pay Disclosure Provisions

• The requirement that employers, at the request of job applicants, provide “the pay scale for a
position to an applicant applying for employment” will lead to confusion, and will substantially
increase labor and administrative costs. It requires employers to affirmatively disclose what
they may be willing to pay for services, even though a job applicant may be willing to accept a
lesser rate. More importantly, the requirement that the employer “disclose the factors the
employer considers in setting salary levels” is a trap for the unwary, and will lead to excessive
litigation. Employers will need to list each and every factor that it could conceivably consider
when making salary adjustments, because if the factor is not disclosed, ostensibly an employee
could sue if the factor is at some point used to give wage increases to others.

• The requirement that upon request, employers provide wage ranges for job that are
“substantially similar” throughout the employer’s organization is unworkable, and clearly will
lead to excessive and unnecessary litigation. Persons are likely to differ in what they consider to
be “substantially similar” work.

• For various reasons, there are likely to be many employees in the private sector who do not
want their pay rates to be disclosed to the rest of their co-workers and the general public.
Therefore, requiring employers to disclose the pay of their entire workforce to all employees
and job applicants could be viewed as an invasion of privacy by many employees.