

**LATE**



# HAWAI‘I CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 · PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

February 5, 2019  
Rm. 224, 2:45 p.m.

To: The Honorable Brian T. Taniguchi, Chair and The Honorable Les Ihara, Vice Chair  
Members of the Senate Committee on Labor, Culture and the Arts

From: Linda Hamilton Krieger, Chair  
and Commissioners of the Hawai‘i Civil Rights Commission

Re: S.B. No. 1048

The Hawai‘i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai‘i’s laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state funded services (on the basis of disability). The HCRC carries out the Hawai‘i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

The HCRC supports the intent of S.B. No. 1048.

S.B. No. 1048, if enacted, would make confidentiality clauses in employment contracts unenforceable as to a sexual harassment claim, with an exception for confidentiality agreements that are part of a settlement of a specific claim. The bill would also prohibit mandatory arbitration agreements requiring the arbitration of sexual harassment claims, except as otherwise provided by federal law, and render such mandatory arbitration agreements unenforceable.

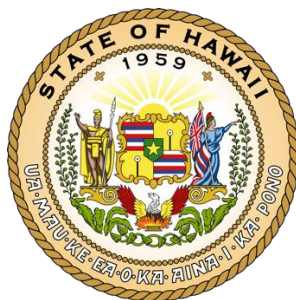
As a result of the Harvey Weinstein accusers coming forward and the rise of the #MeToo movement, there is growing outcry and condemnation of the use of confidentiality agreements and private dispute resolution to keep sexual harassment complaints secret and off the record, allowing serial harassers to escape scrutiny and enabling them to continue to harass others.

HCRC supports the intent of the bill, but notes that state law prohibitions against pre-dispute mandatory arbitration agreement requiring arbitration of employment claims have been held to be preempted by the Federal Arbitration Act (FAA). (See *Brown v. KFC National Management Co.*, 82 Hawai‘i 226 (1996)). The U.S. Supreme Court has refused to enforce agreements that are unconscionable or which would, by the parties’ agreement, limit the law

enforcement authority of the U.S. Equal Employment Opportunity Commission (EEOC), and state and local fair employment enforcement agencies like the HCRC.

It is worth noting that the Obama Administration issued an Executive Order on Fair Pay and Safe Workplaces, prohibiting certain federal contractors from entering into mandatory pre-dispute arbitration agreements with their employees covering employment discrimination claims and tort claims related to or arising out of sexual assault or harassment. The legislature could impose a similar prohibition on state contractors by amending the state procurement law to prohibit state contractors from entering mandatory pre-dispute arbitration agreements with their employees, as a condition of contracting with the state.

The HCRC supports the intent of S.B. No. 1048.



**LATE**

Testimony on behalf of the  
Hawai'i State Commission on the Status of Women  
**Khara Jabola-Carolus, Executive Director**

Prepared for the Senate Committee on Labor, Culture and the arts (LCA)

In Support of SB1048  
Tuesday, February 5, 2019, at 2:45 p.m. in Room 224

Dear Chair Taniguchi, Vice Chair Ihara, and Honorable Members,

The Hawai'i State Commission on the Status of Women writes in **support** of SB1048, which would make unenforceable confidentiality clauses in employment contracts when an act of sexual harassment is claimed by an employee. SB1048 would also ban mandatory arbitration agreements as to sexual harassment claims beginning July 1, 2019.

Workplace sexual harassment is not a new phenomenon, and confidentiality clauses in employment contracts have functioned to ensure its continuance by shielding abusers from civil and even criminal liability. Despite evolving ideas of women's status, sexual harassment continues to plague women workers in Hawai'i. No industry is immune.

To create a harassment-free working environment in Hawai'i, the Legislature should act to ban make confidentiality clauses unenforceable and to sternly prohibit retaliation.<sup>1</sup> Accordingly, the Commission respectfully urges the Committee to pass SB1048.

Sincerely,

Khara Jabola-Carolus

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<sup>1</sup> Grossman, J., "Employer Liability for Sexual Harassment," 61 U. Pitt. L. Rev. 671, 677, Spring 2000.

**SB-1048**

Submitted on: 2/1/2019 4:36:03 PM

Testimony for LCA on 2/5/2019 2:45:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Laurie Field	Testifying for Planned Parenthood Votes Northwest and Hawaii	Support	No

Comments:

**SB-1048**

Submitted on: 2/4/2019 6:58:06 PM

Testimony for LCA on 2/5/2019 2:45:00 PM

**LATE**

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Midwives Alliance of Hawaii	Testifying for Midwives Alliance of Hawaii	Support	No

Comments:

**SB-1048**

Submitted on: 2/4/2019 11:01:58 AM

Testimony for LCA on 2/5/2019 2:45:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Younghi Overly	Testifying for AAUW of Hawaii	Support	No

Comments:

Dear Chair Taniguchi, Vice Chair Ihara, and members of LCA Committee,

Thank you for this opportunity to submit a testimony in SUPPORT of SB1048, which bans mandatory arbitration agreements as to sexual harassment. This will also make mandatory confidentiality clauses in an arbitration agreement unenforceable as to sexual harassment claims.

Mandatory confidentiality clauses in sexual assault and sexual harassment, as are NDAs, is another form of silencing the victims. Hawaii should join other 16 states to put an end to this outdated practice (Source: [SHRM "States Take Action Against Nondisclosure Agreements"](#)).

The American Association of University Women (AAUW) of Hawaii is a state-wide organization made up of six branches (Hilo, Honolulu, Kauai, Kona, Maui, and Windward Oahu) and includes just over 450 active members with over 1700 supporters statewide. As advocates for gender equity, AAUW of Hawaii promotes the economic, social, and physical well-being of all persons.

Please pass SB1048 and mahalo for this opportunity to testify in support of this important bill.

**SB-1048**

Submitted on: 2/4/2019 12:57:06 PM

Testimony for LCA on 2/5/2019 2:45:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Joe P. Moss	Individual	Support	No

## Comments:

Confidentiality clauses help perpetuate sexual harassment. The bad behavior is hidden from the public, who have a right to know. It is not fair to the victim. Mandatory arbitration takes away the valuable right to have a jury decide your claim and let the people of the State of Hawaii determine the appropriate response to people who sexually harass their employees instead of an arbitrator.

**SB-1048**

Submitted on: 2/2/2019 5:42:06 AM

Testimony for LCA on 2/5/2019 2:45:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Caroline Kunitake	Individual	Support	No

Comments:

Please support SB1048. We need to protect all workers so that they feel comfortable and safe to come forward with any sexual harassment complaint.

Mahalo,

Caroline Kunitake



**LATE**

**SB-1048**

Submitted on: 2/4/2019 6:58:38 PM

Testimony for LCA on 2/5/2019 2:45:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Lea Minton	Individual	Support	No

Comments:

**LATE**

**SB-1048**

Submitted on: 2/5/2019 12:05:38 PM

Testimony for LCA on 2/5/2019 2:45:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Melodie Aduja	Testifying for O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments: