

HAWAI‘I CIVIL RIGHTS COMMISSION

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

Wednesday, February 23, 2022
Via Videoconference, 2:00 p.m.
Conference Room 325

To: The Honorable Mark M. Nakashima, Chair
The Honorable Scot Z. Matayoshi, Vice Chair
Members of the House Committee on Judiciary and Hawaiian Affairs

From: Liann Ebesugawa, Chair
and Commissioners of the Hawai‘i Civil Rights Commission

Re: H.B. No. 2495, H.D. 1

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. 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 H.B. No. 2495, H.D. 1, which amends H.R.S. § 378-2.2(a), by adding language that prohibits employers from “entering into” or requiring an employee to enter into “a nondisclosure agreement that prevents the employee from disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work-related events, between employees, or between an employer and an employee.” The bill also deletes the limiting language, “as a condition of employment,” effectively broadening the scope of the prohibited practice.

The current HRS § 378-2.2 was enacted by Act 17, L 2020, and reads:

[§378-2.2] Sexual harassment or sexual assault; nondisclosure agreements; prohibited. (a) No employer shall require an employee to enter into, **as a condition of employment**, a nondisclosure agreement that prevents the employee from disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work-related events, between employees, or between an employer and an employee.

(b) No employer shall retaliate against an employee for disclosing or discussing sexual harassment or sexual assault.

(c) This section shall not apply to:

(1) Human resources employees who are expected to maintain the confidentiality of an investigation as part of their official duties;

(2) Employees who are requested to maintain the confidentiality of an ongoing human resources investigation; and

(3) Proceedings pursuant to section 624-25.5

HRS § 378-2.2(a) prohibits employers from requiring nondisclosure agreements (NDAs) that prevent disclosure of sexual assault or sexual harassment *as a condition of employment*. Subsection 378-2.2(b) prohibits employers from retaliating against an employee for disclosing or discussing sexual harassment or sexual assault. However, while the current statute specifically prohibits requiring NDAs *as a condition of employment*, it does not prohibit other NDAs, whether during employment or post-employment. Even without an express exception for confidential settlement agreements, the narrow focus of the statutory prohibition does not cover NDAs in settlement agreements. (*cf.*, California and other states have recently enacted laws that expressly prohibit nondisclosure provisions in settlement agreements relating to claims regarding sexual assault, sexual harassment, workplace harassment or discrimination based on sex, or other unlawful conduct in the workplace).

As such, current law does not completely prohibit the use of NDAs, and potentially deleterious effects on victims of sexual harassment. Even with this limitation, the § 378-2.2(a) prohibition against NDAs as a condition of employment was a first step in the right direction, and the § 378-2.2(b) protection against retaliation for disclosing or discussing sexual harassment

or sexual assault provides meaningful protection for workers. However, the inherently weak protection provided by subsection (a) should be revisited and addressed. H.B. No. 2495, H.D. 1, is the vehicle for this next step.

Confidential dispositions silence victims of sexual harassment, sometimes allowing harassers to continue sexual harassment of other employees. In recent years, we have seen numerous news stories about repeated offenses by individuals who settled multiple sexual harassment complaints with confidential agreements and NDAs. It is a common standard practice to include confidentiality or nondisclosure provisions in settlement agreements in employment discrimination cases, including sexual harassment cases, but there is growing concern that the use of confidentiality provisions in settlement of sexual harassment cases might enable repeat offenders who engage in a pattern of sexual harassment – that if the employees and employers were not constrained by NDAs, perpetrators could have been prevented from harming others.

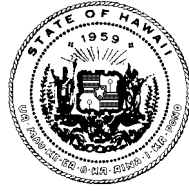
By allowing NDAs in confidential settlements between an employee and an employer, the current statute does not completely prohibit the use and potentially deleterious effects of NDAs, as employees may feel compelled to agree to confidentiality in order to obtain a negotiated settlement or to avoid detrimental effect that disclosure could have on future employment.

It should be noted that the bill raises a potentially difficult issue, where an employee who has brought and settled a complaint of workplace sexual harassment may want the matter to be confidential (for personal or professional reasons). Although the broadened prohibition against NDAs created by the bill does not on its face prohibit a settlement term that would prevent an employer from discussion or disclosure of the underlying facts of a sexual harassment or sexual assault case or a related settlement, it could be more difficult to negotiate for such a

confidentiality agreement if it is one-sided (only applying to the employer) and not mutual.

With that caveat and concern, the HCRC supports H.B. No. 2495, H.D. 1.

DAVID Y. IGE
GOVERNOR



CATHY BETTS
DIRECTOR

JOSEPH CAMPOS II
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES

P. O. Box 339
Honolulu, Hawaii 96809-0339

February 21, 2022

TO: The Honorable Representative Mark M. Nakashima, Chair
House Committee on Judiciary & Hawaiian Affairs

FROM: Cathy Betts, Director

SUBJECT: **HB 2495 HD1 – RELATING TO EMPLOYMENT PRACTICES.**

Hearing: February 24, 2022, 2:00 p.m.
Via Videoconference, State Capitol

DEPARTMENT'S POSITION: The Department of Human Services (DHS) supports this measure, provides comments, and defers to the Hawaii Civil Rights Commission.

PURPOSE: This bill prohibits an employer from entering into or requiring an employee to enter into a nondisclosure agreement pertaining to sexual harassment or sexual assault occurring in the workplace, at work-related events, between employees, or between the employer and an employee. Effective 12/25/2040. (HD1) The HD1 amended the measure by defecting the effective date to encourage further discussion.

This measure is a favorable employment policy that will add protections for Hawaii's working residents, especially as working conditions and communities continue to adjust to the changes wrought by COVID-19.

All individuals should have a workplace environment free from harassment, assault, and violence. Pre-pandemic, the proliferation of nondisclosure agreements (NDA) enabled abusers to continue their abuse and, in turn, silence their victims from reporting. Now, as working residents struggle to make ends meet, conditions for harassment have increased. Both the

health and economic conditions of the pandemic have negatively impacted low-wage, low-skill workers or workers just entering the workforce who are especially vulnerable to harassment. Notably, the pandemic's health and economic impacts have significantly impacted women with child care or elder care responsibilities.

Additionally, while telework capabilities allowed public services to remain accessible during the pandemic and added some work-life flexibility for many middle and high-income workers, studies suggest that women's career pathways stall while working from home as they are no longer in the proximity of decision-makers or the decision-making processes.¹ Reports also indicate an increase in online or cyber harassment during the pandemic.² As COVID-19 variants continue, higher rents and costs of most consumer goods outpace any increase in wages; workers at many pay scales are under a lot of pressure to continue to work through difficult employment situations and not complain for fear of further income loss or fear of retaliation.

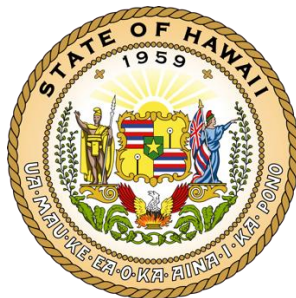
Increasing protections for Hawaii's working residents is necessary to support and strengthen families and build community resilience.

Thank you for the opportunity to testify in support.

¹ See, <https://hbr.org/2020/07/why-wfh-isnt-necessarily-good-for-women>

² See, <https://indianexpress.com/article/cities/ahmedabad/after-covid-cases-of-online-harassment-spiked-by-5-times-7137386/>

LATE



‘O kēia ‘ōlelo hō’ike no ke
Komikina Kūlana Olakino o Nā Wāhine

Testimony on behalf of the
Hawai‘i State Commission on the Status of Women

In Support of HB2495 HD1

Dear Chair Nakashima, Vice Chair Matayoshi, and Honorable Members,

The Hawai‘i State Commission on the Status of Women supports HB2495 HD1 which amends the statute to prohibit non-disclosure agreements, i.e., legally enforceable contracts that prohibit disclosure of sexual harassment or sexual assault, at any time. The Commission notes the silencing effect of confidentiality clauses or non-disclosure agreements (NDAs). NDAs are not actually victim-centered, and have functioned to shield serial offenders of sex discrimination, including sexual assault and sexual harassment, by allowing the pattern of misconduct to continue unnoticed and other women to suffer similar abuse by the same offender.

In doing so, NDAs perpetuate the power imbalance between men and women in the workplace. They also create a ripple effect impact women’s career choices and ability to advance in the workplace. The Legislature should act to fully ban NDAs as part of a broader strategy to eradicate sexual harassment. Accordingly, the Commission asks the Committee to pass HB2495 HD1.

Sincerely,

Khara Jabola-Carolus



To: House Committee on Judiciary & Hawaiian Affairs
Hearing Date/Time: February 23, 2022 2PM
Place: Hawaii State Capitol, Room 325 & Video Conference
Re: Testimony in STRONG SUPPORT of HB2495 HD1

Dear Chair Nakashima, Vice Chair Matayoshi, and the Members of Committee,

Members of AAUW of Hawaii thank you for this opportunity to testify in strong support of HB2495 HD1 which would ban a nondisclosure agreement between an employer and an employee in case of sexual harassment or sexual assault at any time. NDAs silence workers and all workers in Hawaii should be able to make living without sexual harassment or sexual assault from peers or managers.

In 2020, Hawaii passed Act 17 which prohibits employers from requiring an employee to enter into, **as a condition of employment**, a nondisclosure agreement that prevents the employee from disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work—related events, between employees, or between an employer and an employee. Act 17 also prohibits employers from retaliating against employees for disclosing or discussing sexual harassment or sexual assault. Act 17 was a great progress but we need to do more. **There are other conditions such as pay increase or paid sick leave in which employers can require an employee into a nondisclosure agreement.** HB2495 HD1 would eliminate potential loopholes.

A recent survey by Safe Spaces & Workplaces of Hawaii adults showed 52% of women and 42% of men experienced workplace sexual harassment while working in Hawaii. Only 18% reported the incident to Human Resources. Many stay silent because they don't want to make waves; others see sexual harassment as a strictly legal issue likely to result in costly litigation. 15% changed their job or quit.

A recent study "Limiting Our Livelihoods" by American Association of University Women (AAUW) showed 38% of women who were sexually harassed said the harassment contributed to their decision to leave their job, 37% said the harassment disrupted their career advancement. Many do not report the incident because they fear retaliation.



Non-disclosure agreements and retaliating employees for disclosing and discussing sexual harassment or sexual assault allows serial harassers to escape accountability and continue with harassment.

What we need in Hawaii is a state law which would prohibit **all employers** from entering into or requiring an employee to enter into a nondisclosure agreement pertaining to sexual harassment or sexual assault at **any time**.

Please pass this important measure.

The American Association of University Women (AAUW) of Hawaii is an all volunteer, statewide chapter of a national organization and is made up of six branches: Hilo, Honolulu, Kaua'i, Kona, Maui, and Windward Oahu. UH Hilo, UH Manoa, UH Maui College, and Windward Community College are also AAUW partners. AAUW's mission is to advance gender equity for equal opportunities in education, at workplace and for economic security, and in leadership.

Sincerely,
Younghee Overly

A handwritten signature in blue ink, appearing to read "Y. Overly", is positioned below the typed name.

Public Policy Chair, AAUW of Hawaii
publicpolicy-hi@aauw.net



To: House Committee on Judiciary & Hawaiian Affairs
Hearing Date/Time: February 23, 2022 2PM
Place: Hawaii State Capitol, Room 325 & Video Conference
Re: Testimony in STRONG SUPPORT of HB2495 HD1

Dear Chair Nakashima, Vice Chair Matayoshi, and the Members of Committee,

Members of Hawaii State Democratic Women's Caucus thank you for this opportunity to testify in strong support of HB2495 HD1 which would prohibit an employer from entering into or requiring an employee to enter into a nondisclosure agreement pertaining to sexual harassment or sexual assault at any time.

In 2020, Hawaii passed Act 17 which prohibits employers from requiring an employee to enter into, as a *condition of employment*, a nondisclosure agreement that prevents the employee from disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work—related events, between employees, or between an employer and an employee. Act 17 also prohibits employers from retaliating against employees for disclosing or discussing sexual harassment or sexual assault. Act 17 was a great progress but we need to do more. *There are other conditions such as pay increase or paid sick leave in which employers can require an employee into a nondisclosure agreement.* HB2495 HD1 would eliminate potential loopholes.

A recent survey by Safe Spaces & Workplaces of Hawaii adults showed 52% of women and 42% of men experienced workplace sexual harassment while working in Hawaii. Only 18% reported the incident to Human Resources. Many stay silent because they don't want to make waves; others see sexual harassment as a strictly legal issue likely to result in costly litigation. 15% changed their job or quit.

Non-disclosure agreements and retaliating employees for disclosing and discussing sexual harassment or sexual assault allows serial harassers to escape accountability and continue with harassment.

What we need in Hawaii is a state law which would prohibit all employers from entering into or requiring an employee to enter into a nondisclosure agreement pertaining to sexual harassment or sexual assault at *any time*.

Please pass this important measure so all workers in Hawaii can make living without sexual harassment or sexual assault from co-workers or managers. Thank you for your consideration.

The Hawai'i State Democratic Women's Caucus is a catalyst for progressive, social, economic, and political change through action on critical issues facing Hawai'i's women and girls.

Sincerely,

Members of Hawaii State Democratic Women's Caucus



February 22, 2022

Representative Mark M. Nakashima, Chair
House Committee on Judiciary & Hawaiian Affairs

Re: H.B. 2495, H.D. 1, RELATING TO EMPLOYMENT PRACTICES.

Hearing: Wednesday, February 23, 2022, 2:00 p.m., via Videoconference

Dear Chair Nakashima and Members of the Committee on Judiciary & Hawaiian Affairs:

Hawaii Women Lawyers (“HWL”) **supports H.B. 2495, H.D. 1**, which is to prohibit an employer from entering into or requiring an employee to enter into a nondisclosure agreement pertaining to sexual harassment or sexual assault at any time.

The mission of Hawaii Women Lawyers is to improve the lives and careers of women in all aspects of the legal profession, influence the future of the legal profession, and enhance the status of women and promote equal opportunities for all. HWL has approximately 300 active members.

HWL supported the bill that originally established Section 378-2.2 of the Hawaii Revised Statutes in 2020. This measure further prohibits an employer from even entering into a nondisclosure agreement that prevents the employee from disclosing or discussing sexual harassment or assault related to the workplace, expanding the prohibition beyond simply preventing an employer from requiring it as a condition of employment.

In 2018, HWL conducted a survey of its members as to the incidences and experiences of sexual harassment in the legal community.¹ Of the 76 attorneys that responded to the survey, nearly 60% (42 attorneys) reported being sexually harassed at some time during their legal career, with approximately 13% (10 attorneys) reporting having been sexually harassed in the workplace within the last two years.

¹ HWL’s survey was conducted between January 12, 2018 and February 4, 2018. The survey was done on a strictly voluntary and anonymous basis, and with the understanding that any stories provided by survey respondents may be shared publicly to raise awareness of the occurrence of sexual harassment in the legal community. The survey was conducted for informational purposes only, and HWL has not conducted an independent investigation as to and cannot guaranty the accuracy of the results of the survey or the specific instances of harassment shared by survey respondents. HWL recognizes that terminology may carry different connotations for different parties and did not define “sexual harassment” in the survey. HWL also recognizes that men are victims of sexual harassment as well as women, but as the mission of HWL is to improve the lives and careers of women in all aspects of the legal profession, the main focus of the article is on the experiences of female victims.

It is common for victims of sexual assault and harassment not to report abuse for fear of retaliation. Nondisclosure agreements that prevent the disclosure of sexual harassment or sexual assault occurring in the workplace have the impact and effect of further silencing victims. They can also allow repeat offenders to continue to engage in serial harassment and assault.

Thank you for the opportunity to submit testimony on this measure.

HB-2495-HD-1

Submitted on: 2/19/2022 5:58:41 PM

Testimony for JHA on 2/23/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Dara Carlin, M.A.	Individual	Support	No

Comments:

Stand in Support.

HB-2495-HD-1

Submitted on: 2/21/2022 3:13:26 PM

Testimony for JHA on 2/23/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Julie Uyeno-Pidot	Individual	Support	No

Comments:

Aloha, committee members.

I would like to submit testimony in strong support of HB2495 HD1 (Relating to Employment Practices). In order to create healthy, safe, and equitable workplaces, employees must be allowed to report and discuss sexual harassment and assault without being subjected to nondisclosure agreements (or NDAs). NDAs allow inappropriate and illegal behavior to continue unabated, resulting in toxic workplace environments and the loss of productive, dedicated employees. Let's make Hawai'i a great place to work by eliminating any existing loopholes that require NDAs instead of legal action in instances of sexual harassment or assault.

Thank you for your time and consideration.