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April 9, 2019
Testimony in Opposition to SB 123-2 amendment
Senate Workforce
Submitted by Courtney Helstein, Family Forward Oregon

Thank you for the opportunity to provide testimony in opposition to SB 123 and the -2 amendments. We commend your great work on the Pay Equity Act of 2017 (HB 2005), which provided several very important provisions to end pay inequity in Oregon. However, we are concerned that the proposed amendments weaken that standard in several concerning ways. Family Forward Oregon worked hard in 2017 with partners and legislators to ensure we have a strong equal pay law in Oregon. We believe many of the changes contained in the -2 amendments are unnecessary and several will actually weaken this historic law.

The most concerning change we see is outlined in point #6, below, which are the changes to the pay equity analysis that provide employers with a safe harbor from damages. This is an important provision that properly incentivizes employers to do their own analysis and *requires them to* rectify problems they identify before receiving the safe harbor.

We would welcome the opportunity to engage in this conversation moving forward, however the following are a list of our concerns with the -2 amendment:

1. Travel is one of the factors that can justify a pay differential in ORS 652.220, provided the travel is "necessary and regular." Page 3, line 28 deletes "and regular" from the travel provision and we have significant concerns with this deletion. The regularity of travel is important because we want to make sure that if an employee has a one-time travel requirement, it's not used to justify years of pay inequity. As we understand the intent of deleting "regular" is to enable employers to use pay differentials to recruit or retain workers in rural Oregon where there may not be the necessary workforce to meet the demand. If our understanding is correct, this change is unnecessary because 652.220(2)(d) allows for pay differentials on the basis of "work location." We also believe it's important to note that other jurisdictions with pay equity laws that include the travel exception limit it to travel that is necessary *and regular*. Our law is largely based on Massachusetts law, which also includes the necessary and regular language. The regularity of travel is an important component of this exception to pay equity.

2. Related to freezing pay, we believe the language on Page 4, line 13-17 is unnecessary. The current law clearly reads that "An employer may not reduce the compensation level of an employee to comply with the provisions of this section." A pay freeze is simply not a reduction. This is change to current law is not necessary.

3. As a general rule, we don't support creating exemptions to the pay equity law and believe exceptions defeat the entire purpose of the law. The language on page 4, lines 14-24 creates a broadly written blanket exemption for workers on light duty assignments. We believe this change is unnecessary as current law requires that workers be paid equitably for "work of comparable character." In many instances, current law would already allow for a worker on a light duty assignment to be paid differently than they were previously. They just must be paid equivalent to whatever other workers performing similar work were being paid, even if it was *less* than what the worker was previously earning. If, for example, a worker had been working on a production line that required regular lifting of over 50 pounds and was being paid $25/hour. That worker was then put on a medically necessary light duty assignment sweeping floors in the factory because they couldn't meet the lifting requirement. If other workers performing comparable work sweeping floors were being paid $18/hour, the worker on light duty could also be paid the lower wage for the time they spend in the light duty assignment. The worker on light duty is no longer performing "work of comparable character" to what they had previously been doing and can be paid a lower wage accordingly. The key is what kind of work they are actually performing and what others performing that same work are being paid. Depending on the situation, the worker on light duty is no longer performing the same job or a job comparable to others who are able to lift the weight. The law requires a comparison of the ***actual work*** being performed and what others performing that ***same work*** are being paid.

4. On principle, we don't have objections to specifying that predictability pay doesn't violate the Equal Pay law. However, we think it is important to create sidebars on this allowance. We are concerned that a blanket exclusion could still lead to discriminatory practices. It is important to ensure that employer's practices in calling employees in isn't in itself discriminatory. As long as employees are called in at equal rates (i.e. one employee isn't consistently the one called in), it shouldn't be discriminatory. Employers need to treat all employees equally when it comes to call-ins and predictive pay. This blanket exemption for predictability pay doesn't contemplate whether the call-in practices are themselves discriminatory.

5. Perhaps the most concerning change in the -2 amendments are the changes to the pay equity analysis. As you will recall, employers who have performed a pay equity analysis and meet other specific conditions are provided a "safe harbor" from punitive and compensatory damages. However, in order to get the safe harbor, one had to have *actually eliminated* the pay disparity for the plaintiff in question and it required that "reasonable and substantial progress" be made toward eliminating the pay disparity for all protected classes. The changes on page 6, line 1-3 weaken this by deleting the requirement that in order to get the safe harbor, the employer has to have actually "eliminated the wage differentials for the plaintiff." The amendment would require that only "reasonable and substantial progress toward eliminating" pay differentials for the plaintiff and for all other employees. This is significant. We believe the original intent of

this safe harbor was that it only be given to employers who have done both the pay equity analysis ***and*** actually eliminated the disparity. The proposed amendment would mean that an employer could get the safe harbor even if they hadn't actually rectified the problem. They would simply be required to rectify the pay disparity once they get caught (see lines 9-11, page 6).

We applaud this committee's work in advancing pay equity laws in Oregon. We do not believe any of these amendments are necessary and they will weaken the Equal Pay Act. We would be more than happy to engage in further conversations about possible amendments.