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# AOI TESTIMONY ON HOUSE BILL 3042 HOUSE BUSINESS & LABOR COMMITTEE

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AOI opposes HB 3042. The effect of HB 3042 is that it lowers the bar on discrimination claims based on wage differentials.

Pay discrimination is already illegal and actionable for all protected classes under ORS 659A.030(1)(b), which states:

*It is an unlawful employment practice:*

*For an employer, because of an individual's race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to discriminate against the individual in compensation or in terms, conditions or privileges of employment.*

Any member of a protected class who alleges pay discrimination can get relief today under ORS 659A.030(b) either in civil court or through BOLI's Civil Rights Division.

House Bill 3042 essentially creates a duplicative right of action for wage differential in ORS 652.220, but here is the key difference:

- ✓ **The proof necessary to sustain a claim under HB 3042 is substantially less than under ORS 659A.030 or through BOLI's Civil Rights Division. The burden of proof also shifts to the employer.**

Employer liability for discrimination in the payment of wages or compensation under ORS 659A.030 or through BOLI's Civil Rights Division requires proof of disparate treatment, e.g., discriminatory motivation. An employer is also entitled to defend a claim under ORS 659A.030 on the basis of a "legitimate business reason."

House Bill 3042 creates a type of "strict liability" in that no intent to discriminate need be shown. An employee would need to prove only two elements: (1) he or she was a member of a protected class performing work comparable to that of co-workers; and (2) he or she was paid less than those workers.

The burden of proof on an "equal pay" claim under HB 3042 would shift to the employer to prove as an affirmative defense that the pay disparity is based on a particular factor other than protected class status. The absence of discriminatory motivation would not be a defense to a claim.

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An "equal pay" claim under HB 3042 would essentially constitute a no-fault claim. The logic follows this line: because there is a disparity in pay, there is implied discrimination, and therefore the aggrieved party deserves relief.

AOI believes current ORS 659A remedies and burdens of proof are appropriate since there are myriad reasons for disparities in pay including seniority, different skill sets, different educational attainment, etc.

House Bill 3042 has the realistic potential to turn ordinary personnel disputes concerning a denied raise, or other dispute concerning pay, whether due to changed economic conditions, shifts in the labor market, or an employer's good faith appraisal of an employee's capabilities and past experience, into a claim for actionable "equal pay" discrimination.

Here's an example of just one bad outcome from HB 3042: The bill allows claims for age-based disparities that apply to any employee over 18 years of age. Age based differences in pay are frequently nothing more than a proxy for experience. Nonetheless, a younger employee paid less than an older employee would be able to maintain a claim for a violation of ORS 652.220, or at least force the employer to go to the expense of developing evidence justifying the differential.

The history of the Federal Equal Pay Act was premised on eliminating historical differences in pay to female employees for the same work when performed by male employees. The federal law was intended "to call attention to the unconscionable practice of paying female employees less wages than male employees for the same job." (See President John F. Kennedy's *"Remarks Upon Signing the Equal Pay Act."*, June 10, 1963.)

There is no historical record of entrenched, systemic pay discrimination with respect to many of the protected classes specified in the bill.