

**Testimony of
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National Women's Law Center
In SUPPORT of H.B. 5261
Before the Rhode Island House Committee on Labor**

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Thank you for the opportunity to submit this testimony on behalf of the National Women's Law Center. NWLC has been working since 1972 to secure and defend women's legal rights and opportunities, and to help women and families achieve economic security.

I. The need to strengthen Rhode Island's equal pay laws is more urgent than ever due to the COVID-19 crisis.

The COVID-19 crisis has exposed how the work performed primarily by women, and particularly women of color, continues to be undervalued, even as the rest of the country is depending on it as never before. In Rhode Island, women - disproportionately Black and Latina women - are 65% of front-line workers risking their lives in low-paid jobs and being shortchanged compared to their male counterparts.¹ Women are also being hit hardest by job loss and, nationally, an unprecedented 2.1 million women left the labor force in 2020.²

Longstanding gender and racial wage gaps have left many women with little to no financial cushion to weather the COVID-19 economic crisis. Black women in Rhode Island are paid just 61 cents for every dollar paid to white, non-Hispanic men. Latinas are paid just 53 cents on the dollar; Asian women 73 cents; and white women 83 cents.³

Unless we take action, Rhode Island's gender and racial wage gaps will likely widen in the wake of this crisis as women who have lost their jobs or have been forced to quit to care for children or family members seek to reenter the workforce and may be forced to accept a lower paying job because they don't have the savings to hold out for a higher paying one. H.B. 5261 gives employers the tools to efficiently, effectively, and fairly rebuild their workforce and gives job seekers tools to secure pay that accurately values their worth.

II. H.B. 5261 gives employees and employers the tools they need to close the wage gap

Loopholes and inadequacies have arisen in current equal pay law that have allowed pay discrimination to continue. H.B. 5261 is an important step in fixing those deficiencies and closing Rhode Island's wage gap, in several ways:

A. H.B. 5261 extends Rhode Island's equal pay protections to other critical protected classes

H.B. 5261 will extend Rhode Island's equal pay protections based on sex to other protected characteristics which are often the basis of pay discrimination against working people, including race, religion, sex, sexual orientation, gender identity or expression, disability, age, or national origin. These protections will help root out other discriminatory wage gaps, in addition

to gender wage gaps. These new protections will also more effectively address intersectional pay discrimination that individuals may experience based on, for example, their race and gender or their disability and gender combined.

H.B. 5261 assures that employees have the tools to address the full array of pay discrimination, including this intersecting discrimination. With this amendment, Rhode Island will join states like Alabama, California, Colorado, Oregon, New Jersey, and New York, which have recently amended their laws to provide equal pay protections not only based on sex, but also race, ethnicity, and other protected characteristics.

B. H.B. 5261 will stop the harmful reliance on salary history

Because women in Rhode Island are systematically paid less than men, employers who rely on salary history to select job applicants and to set new hires' pay will tend to perpetuate gender- and race-based disparities in their workforce, condemning women to perpetually depressed salaries throughout their career. According to a recent study by Harvard Business Review, a significant percentage of employers who conduct pay equity audits found that relying on applicants' salary history is a key driver of gender pay gaps within their companies.⁴

Use of salary history as a pay-setting mechanism not only perpetuates these gender- and race-based disparities in the workforce, but it is also an imperfect proxy for an applicant's value or interest in a position. For example, particularly relevant as COVID-19 has driven millions of women out of the workforce, extended time out of the workforce further limits the relevance of an applicant's salary history. Relying on salary history can lead to depressed wages for individuals who have previously worked in the public sector or in non-profits and are moving into the private sector. It can also deprive senior individuals with higher salaries who are looking to change jobs or re-enter the workforce the opportunity to be considered for lower paying jobs they might seek.

Fortunately, recent research shows that state salary history bans are helping to narrow gender and racial wage gaps, including increasing employer transparency when it comes to pay.⁵ These bans have resulted in higher wages for job-changers by an average of 8% for women and 13% for African Americans compared to control groups, according to a Boston University analysis of the effects of salary history bans in several states.⁶

By prohibiting employers from requiring job applicants to provide their salary history or from relying on job applicants' salary history in considering applicants for employment or determining their wages, Rhode Island will be joining a national state-led movement to ban reliance on salary history. Since just 2016, Delaware, New Jersey, New York, Illinois, Maryland, Massachusetts, Connecticut, Vermont, Maine, Maryland, Oregon, Hawaii, California, Colorado and Washington, have passed similar salary history bans—all with bipartisan support.

C. H.B. 5261 provides much-needed transparency around salary ranges

When an employer asks a job applicant what his or her salary expectations are without providing the applicant any information about the pay for the position, women and people of color lose out. Studies show that women often ask for less when they negotiate than men, even when the women applicants are otherwise equally qualified.⁷ Fortunately, research shows that

when job applicants are clearly informed about the context for negotiations, including the salary range, women are more willing to negotiate, more successful in negotiating, and the gender wage gap narrows.⁸ The much narrower wage gap in the public sector, where agencies typically have transparent and public pay structures, is further evidence that greater salary range transparency helps reduce wage disparities. Nationally, the gender-based wage gap for all full-time workers is 18 percent, but in the federal government, where pay rates are publicly available, the gender-based wage gap in 2017 was 7 percent.⁹

Likewise, secrecy about pay masks and perpetuates gender pay gaps for employees. Providing employees with compensation information helps employees evaluate whether they are being paid fairly and work with their employers to resolve pay disparities.

H.B. 5261's salary range transparency requirement provides employers with tools to more equitably and efficiently set pay. Maryland, Colorado, Washington, and California have all enacted salary range transparency requirements. Many more states this session are considering salary range transparency requirements, from Indiana to Massachusetts. Just recently, a similar salary range transparency bill reported favorably out of committee in Connecticut.

D. H.B. 5261 will protect employees from retaliation for discussing their pay

One of the reasons that pay discrimination is so difficult to root out is that employers often institute policies or practices prohibiting or discouraging employees from discussing their compensation with co-workers. A recent survey found that 60 percent of workers in the for-profit, private sector reported being formally prohibited or discouraged from discussing their wages.¹⁰ You can't remedy pay discrimination if you have no idea that you are making less than the man across the hall. When workers fear retaliation for talking about their pay, any pay discrimination they face continues to grow, undiscovered, in the shadows.

H.B. 5261 stops employers from prohibiting or punishing employees for asking about, discussing, or disclosing information about pay and makes clear that employees cannot contract away or waive their rights to discuss and disclose pay. At least twenty states—including Massachusetts, Connecticut, New Hampshire, New York, New Jersey, and Vermont—and the District of Columbia have enacted such protections in recent years.

E. H.B. 5261 fixes loopholes in Rhode Island's current equal pay law

i. H.B. 5261 ensures that Rhode Island courts use a fair "comparable work" standard to assess claims

The equal pay for "equal work" standard used in the federal Equal Pay Act and current Rhode Island law is a rigid standard that many courts have very strictly and narrowly interpreted to mean identical work. Thus, if a plaintiff is unable to show that her male counterpart has the same job title, exactly the same responsibilities, and the same working conditions, a court may throw her case out at the very earliest stages of litigation. This analysis does not reflect the reality of today's workplaces and jobs, and denies too many pay discrimination victims the opportunity to have their claims fairly and fully heard.

By requiring equal pay for “comparable work,” H.B. 5261 will ensure that pay discrimination cases aren’t thrown out based just on minor differences in the work being compared. “Comparable work” is a term used in about ten states’ equal pay laws, including Massachusetts and Oregon where it has been a standard that courts have interpreted as broader than the “equal work” standard for several decades. H.B. 5261 provides guidance as to how “comparable work” should be analyzed, specifying in the bill that the work must be “viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”

States across the country are increasingly recognizing the need for a broader standard. Recently, in strengthening their equal pay laws, Massachusetts and Oregon reaffirmed that courts should use a broader and fairer “comparable work” standard. And California, New Jersey, Colorado, New York, and Illinois recently amended their equal pay laws to provide for a broader “substantially similar” standard.

ii. H.B. 5261 ensures pay discrimination is not excused by overly broad employer defenses

Under Rhode Island’s current equal pay law, when an employer is found to be paying female employees less than male employees for equal work, the employer may assert an affirmative defense that the pay differential is based on any “reasonable differentiation except difference in sex.” Some courts have interpreted this type of defense so broadly that they have created loopholes in the law that allow employers to pay women less than men doing the same work without any compelling business reason justifying that lower pay. In particular, some courts have held that a male worker’s salary negotiations or higher previous salary justify a pay disparity, even if these factors themselves may be “based on sex.”

H.B. 5261 tightens this affirmative defense so that it can excuse a pay differential only where the employer can show that the differential is truly caused by something other than a protected characteristic, and is related to the position in question, consistent with business necessity, and accounts for the entire pay differential. By passing this bill, Rhode Island will join the growing chorus of states that have taken similar steps to close the legal loopholes courts have created in this defense, including Maryland, Illinois, New Jersey, New York, Washington, and California.

iii. H.B. 5261 will incentivize employers to comply with the law and redress harm to employees by increasing relief available to employees

Adequate damages and penalties for violating equal pay laws are essential to incentivizing employers to lead the way in tackling the wage gap and to fully compensating victims of pay discrimination. Weak remedies for pay discrimination—for example, only requiring an employer to pay little more than what they should have paid an employee to begin with, as is the case with Rhode Island’s current equal pay law—mean that employers that discriminate in pay can come out ahead by gambling that they won’t get caught. Moreover, an employee who is a victim of pay discrimination can suffer significant financial losses, making her less likely to be able to take care of herself and her family, as well as undermining her

retirement security. Allowing victims of pay discrimination to recover back pay and compensatory and punitive damages will ensure that victims of pay discrimination are made whole for the discrimination they experience.

H.B. 5261 will incentivize employers to prevent pay discrimination in the first instance by allowing a victim of pay discrimination to file a claim either with the Director of Labor and Training or in court and receive monetary relief, including compensatory and punitive damages. The bill also provides for civil penalties to deter employers from violating the law. Other states have similarly recognized the need for robust remedies and penalties for pay discrimination, including, Colorado, Illinois, Maryland, New Jersey, Nevada, Oregon, Utah, Washington, and Wyoming which have all taken steps to increase damages and penalties for equal pay violations in the last several years.

III. H.B. 5261 is Good for Rhode Island Business

H.B. 5261's equal pay measures are crucial to helping employers rebuild their business from the COVID-19 crisis. For example, prohibiting reliance on salary history will help employers more accurately and equitably hire, negotiate, and set pay. It will also help Rhode Island businesses attract and retain talent by ending a practice that is shown to limit talent pools.¹¹ As a human resources professional stated in *Forbes*, the practice of asking for salary history is “intrusive and heavy-handed . . . It's a Worst Practice . . . It hurts an employer's brand and drives the best candidates away.”¹²

Similarly, providing job applicants the salary range for a position can help an employer more efficiently and accurately match with candidates whose salary requirements are aligned with what the employer can offer. Employers know the general range they are willing to pay for a position based on their budget. This bill simply requires employers to be transparent about that range for a particular position, thereby avoiding wasting time interviewing candidates who are not interested in the position given the pay level.

In addition, pay transparency promotes employee loyalty and productivity, which is good for employers' bottom line.¹³ Transparency also provides companies with an opportunity to proactively review and evaluate their compensation practices and address any unjustified disparities between employees, helping to avoid liability.

Moreover, H.B. 5261 will give employers tools to proactively avoid unjustified gender wage gaps from arising and, thus, help insulate themselves from costly pay discrimination litigation. Massachusetts enacted similar equal pay legislation in 2016, which the Greater Boston Chamber of Commerce publicly supported. One year after the law was enacted, the AG's office had received only 22 worker complaints.¹⁴

Recognizing these benefits, businesses like Amazon, American Express, Bank of America, Cisco Systems, Facebook, Google, GoDaddy, Progressive, Starbucks, and Wells Fargo have all recently announced that they are no longer asking applicants to provide their salary history, recognizing that doing so perpetuates gender and racial wage gaps. And some companies are making salary information available to both employees and the general public.¹⁵ One of

these, GoDaddy, includes salary level and range for a given position on each employee's pay statement.

IV. A fair-pay analysis affirmative defense would significantly undermine Rhode Island's efforts to close the wage gap and should not be included in the bill

We understand that certain business voices are advocating for the bill to include an affirmative defense to liability or compensatory damages for an employer that has conducted a self-evaluation of its pay practices in the three-year period preceding the filing of a pay discrimination complaint, and demonstrated that "reasonable progress has been made toward eliminating wage differentials...." We have significant concerns that such an amendment would undermine the other provisions of H.B. 5261, weaken Rhode Island's existing pay discrimination protections, and leave individuals harmed by pay discrimination without a remedy. We urge the legislature not to consider such an amendment.

First, while this amendment may appear to provide employers with an incentive to ensure they are paying their employees fairly, it risks doing more harm than good. H.B. 5261's provisions, which would strengthen existing legal protections, already enhance incentives for companies to adopt practices to ensure they are paying their employees fairly. Stronger legal protections encourage companies to proactively identify, investigate, and remedy disparities within their workforces, reducing the need for litigation. By contrast, amending the bill to provide an employer with an affirmative defense to liability or compensatory damages for undertaking a self-evaluation, and making "reasonable progress" towards eliminating pay disparities based on sex or other protected statuses, without actually eliminating them, would undermine the efficacy of the bill's protections.

Second, we are concerned that such an affirmative defense would create a significant loophole in Rhode Island's pay discrimination protections. Such an amendment does not provide any concrete parameters or standards to help evaluate the adequacy of an employer's self-evaluation of its pay practices, or ensure its compliance with the law. Recently, many companies have announced publicly that they evaluated their pay practices and found no gender wage gap; few companies have been transparent about methodology, whether the relevant types of data were evaluated, and whether the evaluations were consistent with their obligations under equal pay laws. For instance, in 2017, Google announced that it conducted an annual compensation analysis and closed its gender and racial pay gaps. A few days later, the U.S. Department of Labor alleged, in the course of litigation related to a compliance audit, that Google's labor practices include "systemic compensation disparities against women pretty much across the entire workforce." Google settled these allegations with the Department of Labor in February 2021.¹⁶

Finally, if Rhode Island were to adopt such an affirmative defense, a victim of pay discrimination could be precluded from obtaining justice in court simply because her employer completed some sort of self-evaluation of its pay practices and that "reasonable progress"—a vague, undefined term—has been made towards eliminating wage gaps. Furthermore, the proposed amendment would deny a victim of pay discrimination compensatory damages to make her whole, even if the employer's evaluation of its pay practices is found not to meet the basic

requirements of being “reasonable in detail and scope” or consistent with any agency standards. This would mean that an individual who is in fact a victim of pay discrimination and who in fact suffered harm above and beyond lost wages would be denied a remedy even though the self-evaluation completed by the employer failed to avoid this harm. Denying victims of pay discrimination a complete remedy is unacceptable.

V. Conclusion

Since the wage gap has barely budged in more than a decade, Rhode Island needs to take action now. H.B. 5261 promises to make a real difference in closing the race and gender pay gaps that have shortchanged too many in Rhode Island for far too long. We urge your support of H.B. 5261.

¹ NWLC calculations using 2014-2018 American Community Survey (ACS), 5-year sample, using IPUMS-USA, available at <https://usa.ipums.org/usa/>. Front-line workforce defined using methodology outlined in Hye Jin Rho, Hayley Brown, & Shawn Fremstad, Center for Economic Policy Research, A Basic Demographic Profile of Workers in Frontline Industries (Apr. 2020), available at <https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries/>.

² NWLC COVID-19 Jobs Day Report, <https://nwlc.org/resources/2020-jobs-day-reports/>

³ NAT'L WOMEN'S LAW CTR (NWLC). THE WAGE GAP, STATE BY STATE, <http://nwlc.org/resources/wage-gap-state-state/>.

⁴ See HARV. BUS. REV. ANALYTIC SERVS., *Pulse Survey: Navigating the Growing Pay Equity Movement: What Employers Need to Know About What To Do 5* (2019), <https://resources.trusaic.com/pay-equity-resources-hub/harvard-business-review-trusaic-pulse-survey>.

⁵ Benjamin Hansen & Drew McNichols, *Information and the Persistence of the Gender Wage Gap: Early Evidence from California's Salary History Ban* (Feb. 1, 2019), available at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3277664; Bessen, James; Meng, Chen; Denk, Erich, Perpetuating Inequality: What Salary History Bans Reveal About Wages (June 24, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628729.

⁶ Bessen, James; Meng, Chen; Denk, Erich, Perpetuating Inequality: What Salary History Bans Reveal About Wages (June 24, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628729.

⁷ See Linda Babcock & Sara Laschever, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003); Jenny Save-Soderbergh, *Are Women Asking for Low Wages? Gender Differences in Wage Bargaining Strategies and Ensuring Bargaining Success*, Swedish Inst. Soc. Res. Working Paper Series 7/2007 10 (2007), available at https://ideas.repec.org/p/hhs/sofiwp/2007_007.html.

⁸ See, e.g., Maria Recalde & Lise Vesterlund, *Gender Differences in Negotiation and Policy for Improvement*, National Bureau of Economic Research (Dec. 2020); Hannah Riley Bowles, Linda Babcock & Kathleen L. McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiations*, 89 J. PERSONALITY & SOC. PSYCH. 951, 955-56 (2005)

⁹ Gender Pay Differences: The Pay Gap for Federal Workers Has Continued to Narrow, but Better Quality Data on Promotions are Needed, GOVERNMENT ACCOUNTABILITY OFFICE (2020), <https://www.gao.gov/assets/720/711014.pdf>.

¹⁰ On the Books, Off the Record: Examining the Effectiveness of Pay Secrecy Laws in the U.S. (Jan. 2021), <https://iwpr.org/wp-content/uploads/2021/01/Pay-Secrecy-Policy-Brief-v4.pdf>.

¹¹ Moshe A. Barach & John J. Horton, How do Employers Use Compensation History: Evidence From a Field Experiment (CESifo, Working Paper No. 6559, 2017), <http://moshebarach.com/wp-content/uploads/2017/06/WageHistory.pdf>.

¹² Liz Ryan, When Someone Demands Your Salary History, Give Your Salary Requirements Instead, forbes (Jan. 16, 2017), <https://www.forbes.com/sites/lizryan/2017/01/16/when-they-demand-your-salary-history-give-your-salary-requirement-instead/#944ba255a8bb>.

¹³ See, Deborah Thompson Eisenberg, Money, Sex and Sunshine: A Market-Based Approach to Pay Discrimination, 43 Ariz. State L.J. 951, 1001-15 (2011); Lamb, N. & Klein, W., A Proactive Approach to Wage Equality is Good for Business, Employment Relations Today (Summer 2015), <http://arjuna-capital.com/news/a-proactive-approach-to-wageequality-is-good-for-business/>; See, Andrew Chamberlain, Is Salary Transparency More Than a Trend?, Glassdoor (Apr. 27, 2015), <https://www.glassdoor.com/research/studies/issalary-transparency-more-than-a-trend/>.

¹⁴ <https://www.wbur.org/bostonmix/2019/07/19/equal-pay-act-massachusetts-one-year-anniversary>

¹⁵ NAT'L WOMEN'S LAW CTR, EMPLOYER LEADERSHIP TO ADVANCE EQUAL PAY: EXAMPLES OF PROMISING PRACTICES (Mar. 1 2017), <https://nwlc.org/resources/employer-leadership-to-advance-equal-pay-examples-of-promising-practices/>.

¹⁶ Google Settles Hiring, Pay Bias Claims for 5,500 Workers, <https://news.bloomberglaw.com/daily-labor-report/google-settles-hiring-pay-bias-claims-for-over-5-000-workers>