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MINNESOTA EMPLOYMENT LAW COUNCIL

TO: Chair Ecklund and members of the Labor, Industry, Veterans & Military Affairs Committee

CC: Hon. Kaohly Her

FROM: Melissa Raphan & Ryan E. Mick, Minnesota Employment Law Council

DATE: February 15, 2021

RE: House File 403

The Minnesota Employment Law Council ("MELC") supports the principles on which the Preventing Pay Discrimination Act (H.F. 403) is founded and commends the effort to combat the wage gap in Minnesota. MELC also appreciates the clarifying language set forth in the author's amendment (A1). However, that language leaves fundamental concerns unaddressed. With the modifications proposed below, MELC believes this bill would still achieve the objective of the legislation, but without serious unintended negative consequences.

1. The rebuttable presumption of liability (lines 1.13-1.16) seriously undermines the benefit of the proposed A1 amendment and puts H.F. 403 at odds with the rest of the Minnesota Human Rights Act and federal and state law across the nation. Even with the language in the A1 amendment, so long as the rebuttable presumption of liability is in place, an employer who does everything right, and receives pay history information only as a result of an employee's voluntary, unsolicited disclosure, still can be held liable for use of that information as a presumed wrongdoer. To avoid liability, the employer would have to prove a negative; that is, the employer would have to prove that it did not discriminate. That would be very difficult, even for a fully compliant employer, resulting in unjust liability for employers operating in good faith and with an intent to comply with the law. It does not advance the purpose of the legislation to treat employers who try to comply with the law as presumed wrongdoers. Indeed, as other commenters have noted, pay history laws are working in other states without this problematic provision.

   To MELC's knowledge, there is no precedent under the Minnesota Human Rights Act ("MHRA"), federal law or other state law for a rebuttable presumption of wrongdoing similar to that proposed in H.F. 403. The well-known burden shifting standard under the MHRA (and other federal and state laws) does not impose a burden of proof on employers at any stage of that analysis, much less presume discrimination in the absence of evidence of an employer's wrongdoing.

2. In subpart (c), the phrase "without prompting disclos[ure]" (lines 1.23 – 2.2) remains problematic. Unlike affirmative actions by an employer to inquire about pay history or require its disclosure, whether an employer said or did something to "prompt" a disclosure is a subjective, confusing legal standard. A good faith employer could make a statement or take an action that an applicant misconstrues as "prompting" a disclosure of pay history. Again, as written, H.F. 403 would treat that employer as a presumed wrongdoer, subject to liability for discrimination, despite its good faith effort to comply with the law. That outcome would not advance the purpose of the legislation and is not necessary to achieve the intended outcome.

Thank you for your consideration of these changes. Please do not hesitate to reach out if you would like to discuss these proposals further.