SUBJECT: Prohibiting employment discrimination on the basis of certain factors

COMMITTEE: Economic Development — committee substitute recommended

VOTE: 5 ayes — Solis, Deshotel, Homer, Luna, Yarbrough

0 nays

1 present, not voting — Seaman

3 absent — Keffer, Clark, McClendon

WITNESSES: For — Penny Anthon Green, Texas Pay Equity Committee; Hannah Riddering, Texas National Organization for Women; *Registered but did not testify:* Lulu Flores, Texas Women's Political Caucus; Rick Levy and Paula Littles, Texas AFL-CIO

Against — Chris Knepp, Texas Employment Law Council; David Pinkus, Small Business United of Texas; Jeff Clark, National Federation of Independent Business; *Registered but did not testify*: Bill Hammond, Texas Association of Business and Chambers of Commerce

BACKGROUND: Labor Code, ch. 21 prohibits discrimination in employment, including hiring and firing decisions and any other discrimination in connection with compensation or the terms, conditions, or privileges of employment, on the basis of the employee's race, color, disability, religion, sex, national origin, or age. The chapter provides guidelines for filing complaints of discrimination with the Texas Commission on Human Rights and for investigations of these complaints by the commission. The chapter also authorizes a court to impose injunctive relief and to order additional equitable relief as appropriate.

DIGEST: (The author intends to offer a floor substitute to CSHB 1082. The digest and analysis below reflect that substitute.)

HB 1082 as substituted would prohibit an employer from paying lower wages to an employee on the basis of race, color, disability, religion, sex,

national origin, or age compared to the wages of another employee in an equivalent job who was not a member of the protected class. The bill would define two jobs as equivalent if they required equal skill, effort, and responsibility and were performed under similar working conditions.

The bill would be limited to employers with at least 50 employees, including state entities and political subdivisions, and would apply to all permanent employees and any temporary employee employed by an employer for at least three months. Labor organizations could not cause or attempt to cause an employer to violate the bill's provisions.

The bill would not prohibit an employer from paying different wage rates on the basis of a seniority or merit system, a system that measured earning by quantity, or a bona-fide factor other than race, color, disability, religion, sex, national origin, or age. It would not prohibit a difference in wages in equivalent jobs due to varying market rates or the differing economic benefits of the jobs to the employer.

An employer who was out of compliance with these provisions could not reduce the wages of an employee in order to comply.

An employer could not take an adverse action or otherwise discriminate against an employee because that person opposed an act or practice that was made unlawful by the bill, sought to enforce rights protected by the bill, or testified, assisted, or participated in a proceeding to enforce the bill's provisions. Nor could an employer discharge, discriminate against, intimidate, threaten, or otherwise interfere with an employee for inquiring about, disclosing, comparing, or discussing an employee's wages, or for exercising or enjoying any right granted or protected by the bill.

A person could file a complaint with the Commission on Human Rights against practices that violated the bill's provisions. The commission could enforce the bill's provisions in accordance with Labor Code, chapter 21.

The Texas Workforce Commission annually would have to submit the information contained in quarterly unemployment insurance records to the Commission on Human Rights. The human rights commission would have to maintain these files for up to five years and would have to adopt rules that

would protect the confidentiality of employees. The commission could use the information for statistical and research purposes and to prepare and publish studies, analyses, reports, or surveys. The commission would have to issue a report to the Legislature before each regular session on the extent and nature of wage discrimination, based on information gathered from these records and from complaints received by the commission.

At an employee's request, an employer would have to provide the employee with a statement of the employee's job title and wage rate and how the wage was computed. The employer could not be required to provide this information more than once a year.

The Commission on Human Rights would have to adopt guidelines specifying the criteria for determining whether a job was dominated by a member of the protected class. These rules would have to include:

- whether the job ever had been classified as a "male" or "female" job or a "white" or "minority" job;
- whether there was a history of discrimination against people in the protected class with regard to the terms and conditions of employment; and
- the demographic composition of the workforce in equivalent jobs.

The commission's guidelines could include a list of jobs.

HB 1082 as substituted would take effect September 1, 2001, except for the complaint and enforcement provisions, which would take effect January 1, 2003. The Commission would have to adopt the required rules by December 1, 2001.

SUPPORTERS SAY:

HB 1082 as substituted would provide more comprehensive guarantees against job discrimination on the basis of race, color, disability, religion, sex, national origin, or age, and would require additional reporting of this discrimination to the Legislature so that the state can address this problem more effectively.

Despite progress toward eliminating employment discrimination, women and minorities still receive substantially lower pay than their male or Caucasian

counterparts. The most recent studies by the Federal Bureau of Labor Statistics found that for every dollar earned by Caucasian men, women earn 72 cents, African Americans earn 78 cents, and Latinos earn just 67 cents. By prohibiting employers from paying lower wages to employees on the basis of race, color, disability, religion, sex, national origin, or age, CSHB 1082 would guarantee these workers equal pay for equal work.

Although current state law already prohibits employment discrimination on the basis of these factors, it does not define what constitutes equivalent work. Nor does it prevent an employer from becoming compliant by lowering the wages of higher-paid employees. HB 1082 would ensure that employers who had discriminated against some of their employees would remedy the situation equitably by raising the wages of the employees who had been discriminated against.

Current law also does not protect the rights of employees to discuss their wages. Being able to discuss one's wages without fear of retaliation is essential for workers to determine if an employer is practicing discrimination. The concern that a worker would obtain wage information inappropriately or harass other employees for this information is exaggerated.

The bill also would give the Legislature more information about employment discrimination in Texas by requiring the Commission on Human Rights to submit a report to the Legislature before each regular session. These reports would help the state formulate better policies for addressing this continuing problem.

It would not be burdensome to require an employer to provide information to an employee about how that employee's wage is calculated. The act of setting a wage requires a determination by the employer, whether based on market rates, seniority, or other factors. Changes in pay based on seniority or positive job evaluations can be documented easily.

OPPONENTS SAY:

HB 1082 is unnecessary. State and federal laws already prohibit discrimination in employment on the basis of the listed factors.

The requirement that an employer provide an accounting to an employee of how the employee's wage rate was determined would be highly burdensome. Businesses generally have pay ranges for jobs that are modified on basis of an employee's education, experience, or other factors. As an employee gains seniority or goes through job evaluations, the employee's wage rate changes. Having to demonstrate how a wage rate is set based on all of the various factors would be a huge burden on companies, particularly on large companies with many employees.

The provisions that would authorize employees to discuss their wages are unnecessary and could infringe on employee privacy. The National Labor Relations Act already prohibits employers from preventing non-management employees from discussing their wages. CSHB 1082 would allow an employee to pry into another employee's wage information without that employee's consent. For example, if an employee wanted to know how much another employee in a comparable position was paid and could persuade a friend in the payroll section to divulge that information, the employer could take no action against either of those employees. The bill also would prevent an employer from taking any action against an employee whose repeated inquiries to fellow employees about their wages bordered on harassment.

The bill's definition of an employee is inconsistent with state law and could be confusing. Employment statutes in Texas almost never refer to a person as a "permanent" employee because the term implies that an employee cannot be fired, which contradicts the employment-at-will status of most employment. Instead, state laws generally refer to an employer's "regular" employees. In addition to potentially limiting the application of the bill's provisions, this definition could create confusion as to whether an employee was permanent and could not be fired at will, opening the door to greater litigation. Although the courts might not sustain such a lawsuit, the company still would face the burden of having to defend itself against the suit, which could hurt smaller businesses in particular.

It is also unclear whether the bill's definition of an employee would include temporary employees hired through an employment agency, or only those temporary employees directly hired by the employer. Staffing agencies are the primary employer of temporary workers, and applying the bill's

provisions to temporary employees hired through an agency would disturb the employment relation between the staffing company and its employees.

OTHER OPPONENTS SAY:

HB 1082 as substituted could require an employer to provide a wage report to each employee upon the request of a single employee. This requirement would be highly burdensome. The bill should require only that the employer provide a wage report to the employee who made the request.

NOTES:

The author intends to introduce a floor substitute that would remove a provision in CSHB 1082 prohibiting an employer from paying a lower wage for a job that is dominated by employees in the protected class than the wage for an equivalent job that is dominated by employees of the opposite sex or of a different race, color, religion, national origin, or age. The floor substitute also would remove a provision in CSHB 1082 requiring an employer to compile and maintain records on the wages paid to each employee and the method or system used to determine the wage rates paid to employees and to submit that information annually to the Commission on Human Rights. The floor substitute would allow the commission to create a list of jobs that are dominated by protected classes, and it would require the commission to submit information on employment discrimination to the Legislature.

In comparison to HB 1082 as filed, the committee substitute raised from three to 50 the number of employees that an employer would have to employ in order to be covered by the bill's provisions, and it changed the effective date of the complaint and enforcement provisions from 2002 to 2003. The committee substitute would require an employer to provide information about the employee's wage upon the employee's request, rather than annually. The committee substitute also would limit to five years the length of time that the Commission on Human Rights could maintain the files that employers would have been required to submit.

The companion bill, SB 900 by Van de Putte, has been referred to the Senate Business and Industry Committee.