**Memorandum**

**From:** Richard Cassidy, of Rich Cassidy Law
**To:** Chair and Members of the House Committee on General and Military Affairs
**Re:** H. 294 - An act relating to inquiries about an applicant's salary history
S. 275 - An act relating to equal pay
**Date**: January 31, 2018

I had intended to be with you to discuss this legislation in person, however an unforeseen event prevents me from traveling to Montpelier this morning. So, I have put my views in writing. If you have questions, I would be happy to try to answer them by telephone. I will be in the office and available by phone at 802-864-8144 at or after 10:00 AM this morning.

I do not write at the behest of any client or organization, but rather to express my own views developed after long and intense experience.

I anticipate that on Labor Day 2018, I will have engaged in the practice of law (including my judicial clerkship) in Vermont for 40 years.

During nearly all that time, a major part of my practice has been labor and employment law. Most of my employment law practice has been for individual employees. It is a bit of a labor of love. Although I earn income from my employment law practice, it takes the majority of my time, while my other practice areas, personal injury practice and work as a mediator, yield most of my income.

Because I feel that I contribute to the cause of justice by doing so, I mostly represent individual employees.

I learned long ago that the law strongly favors employers. In the United States (unlike nearly every other developed country in the world), except for employees who belong to labor unions, nearly all employees are "employed at will," which means that unless the employee has an individual employment contract, the employee can be fired at any time and for any reason or no reason, except for an illegal reason. The most common exceptions are our laws prohibiting employment discrimination.

The "at will" doctrine sets up an employment relationship in which nearly all the power is in the hands the employer. We are fortunate that many, perhaps most, employers treat their employees in a decent and civilized fashion. But the law does not require it, such behavior can, sometimes does turn on dime. For example, I recently represented an employee terminated – without warning—after more than 50 years of responsible work.

Sadly, some employers take full advantage of that power imbalance. A frequent example that I see in my practice is the employer who suddenly requires that an employee sign an agreement not to compete or immediately lose the job, even one of very long standing.

Most employees don't seem to understand this, any may learn it only when the suddenly those their jobs, usually the source of the income with they support their families, pay a mortgage or rent, feed themselves and their families, and pay for their health care. My job is to find an exception to the "at will" doctrine for such people; sometimes I can. Often, I cannot.

It does not have to be this way. No western European country operates this way. The European companies that I have represented cannot quite believe that just cause is not required to terminate an American employee.

Ours is a system that is in desperate need of fundamental reform. Each of the bills you are considering takes a small step in the right direction.

H. 294 takes a modest step in the direction of preventing low wage worker from being pigeon-holed as such when applying for new employment. This may help some employees, particularly employees who have historically suffered from lower wages due to discriminatory attitudes, such as women, from being held back from improved economic status by their wage history

The language prohibiting employers from requiring compensation history as a condition of an interviewed or considered for an offer of employment (subsection a (3)) seems contradicted to some extent by subsection (b), which permits an employer to confirm compensation history after an offer of employment. I suggest that subsection (b) at least be amended to make clear that the information bring confirmed must have been volunteered or given after an offer of employment. It would be better if subsection (b) were struck entirely from the legislation.

S.275 contains a similar provision, and more important, expands the requirement that employees be free from sex-based wage discrimination to freedom from compensation discrimination based on membership in any legally protected class, such as race, color, religion, national origin, sex, sexual orientation, gender identity, ancestry, place of birth, age, or qualified individuals with disabilities.

This is a useful idea, particularly since in sex-based equal pay claims, once a pay differential has been identified between similarly situated employees of different genders, doing the same of similar work, the employer must show that the differential is caused by factors other than sex. This is a far lighter burden than the burden of proving a traditional discrimination case.

I urge you to adopt the substance of S.275. If adopted, it should cover the concerns addressed by H. 294, and do more to level the playing field.

Thank you for considering my views.