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Presentation to House Sexual Discrimination and Harassment Task Force

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It's up to us.

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How Sexual Harassment is defined

Unwelcome sexual conduct that is severe or pervasive enough to create an abusive work environment.

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Unwelcome

- Unwelcomeness is in the eye of the beholder, regardless of the harasser's motivation, or if others are OK with it. But using a "reasonable person" standard.

Charging Party alleges that her coworker made repeated unwelcome sexual advances toward her. An investigation discloses that the alleged "advances" consisted of invitations to join a group of employees who regularly socialized at dinner after work.

  - ✓ The coworker's invitations, viewed in that context and from the perspective of a reasonable person, would not have created a hostile environment and therefore does not constitute sexual harassment.
  - ✓ A "reasonable person" standard also should be applied to whether the challenged conduct is of a sexual nature. In the above example, a reasonable person would not consider the co-worker's invitations sexual in nature, and on that basis as well no violation would be found.

- You can be harassed by someone you once dated but are no longer interested in.

- Unwelcomeness can be conveyed by saying so, or through a look or gesture-body language, or by telling a supervisor. You do not <u>have</u> to tell the person directly.

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Sexual Conduct

- Can be verbal or physical, but must be of a sexual nature. There are other forms of harassment in the workplace, but sexual harassment involves sexual language, references or touching of a sexual nature.

- Sexual harassment is protected under the law as gender discrimination. So, it can also be characterized by repeated derogatory comments about being a woman. This can occur in the context of jokes or "compliments".
  - There is a difference between appropriate work-related comments on performance or even "like your haircut" versus "great legs."

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Unwelcome Physical Contact

- A handshake is the only acceptable business physical interaction.

- Despite its increasing ubiquity in our society, not everyone wants a hug. Don't wait to be told or feel someone flinch; be mindful of the power dynamic.

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Severe or Pervasive Enough

- In a **quid pro quo** situation (this for that) where a supervisor or legislator makes compliance with sexual conduct a term or condition of continued employment or benefits, once is enough to constitute sexual harassment, even if a threat is not acted upon.
- For **hostile environment** sexual harassment, it usually takes more than one instance to create an abusive work environment, but no set number is required. In fact, pervasiveness depends on severity. For example, a cartoon that is posted so that all employees can see it may be pervasive enough although it is one incident.

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Abusive Work Environment

- The key elements are **hostile** and/or **intimidating** and/or **offensive** conditions that **interfere** with a person's ability to do their job.

- Harassment that occurs away from work can impact an employee's work, e.g., after work, at a work-sponsored party, or a harasser who calls the employee at home.

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Supervisor – Supervisee Dating Not a Good Idea

- Sexual harassment is about exerting power over someone.
- This is why there should be a policy regarding not having a romantic relationship between a supervisor and someone he/she supervises.

  -It could work against the supervisee if the relationship doesn't work out.
- It could also impact co-workers of the couple who are not receiving the same benefits or are uncomfortable being around the couple, i.e., Third Party Harassment.

  -The same reason there are anti-nepotism policies.
- The supervisee should not get a worse assignment if this does occur.

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Retaliation

- There must be a clear and unequivocal commitment that retaliation is prohibited, and that reporting or participating in an investigation will not in any way adversely affect the complainant's job, career or treatment in the workplace.

- This commitment must be evidenced by actions and leadership.

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Prevention is the Best Tool to Combat Sexual Harassment

- A legislator can stop a situation before the person who is harassed may feel the need to file a complaint.
- Victims of SH want the harassment to stop without jeopardizing their jobs.
- Taking action right away when a situation arises is the best step - instead of ignoring it.

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Best Practice Recommendations

The EEOC's Select Task Force on the Study of Harassment in the Workplace identified five core principles that have generally proven effective in preventing and addressing harassment:

1. Committed and engaged leadership;
2. Consistent and demonstrated accountability;
3. Strong and comprehensive harassment policies;
4. Trusted and accessible complaint procedures; and
5. Regular, interactive training tailored to the audience and the organization.

Best Practice Recommendations cont.

We would also like to highlight and emphasize these particular practices:

- Employees should be trained to recognize sexual harassment, and to step in as active bystanders.
- Employers should keep records on complaints and their outcomes, include evaluating supervisors' responses to complaints.
- Employees should be regularly surveyed anonymously to assess the effectiveness of the policies and their implementation and enforcement.
- While the current law requires the Inspector General to receive complaints, we recommend someone independent who doesn't have to report to the legislators e.g. an ombudsperson

Goal Should be to Prevent SH – Strive Not To Offend

- People may be bigoted, but they usually know better than to tell racist jokes in the workplace.
- Attitudes might not change, but behavior must in order to keep your job. For those who think they can no longer socialize with members of the opposite sex, or mentor or hire them, or say anything more than "Good morning," just behave professionally – or like you behave in public like at your gym.
- Can talk about personal things like your weekend, your family, sports – <u>but add "sex" to topics to stay away from like religion and politics.</u>
- Don't treat anyone else **or allow other employees** to treat anyone else in a manner you would object to if it were your mother, your spouse, or your child.

LISA MADIGAN
ILLINOIS ATTORNEY GENERAL

House Sexual Discrimination and Harassment Task Force
November 29, 2017

1. Possible legal violations related to discrimination and/or sexual harassment
    a. Civil rights violations
    b. Common law tort claims
    c. Criminal violations
    d. Ethics Act violations

2. Civil rights violations under the Illinois Human Rights Act and/or Title VII
    a. Relevant civil rights violations
        i. Discrimination based on sex
        ii. Sexual harassment
        iii. Retaliation
    b. Avenues available to victims of civil rights violations
        i. Notice to employer
        ii. OAG jurisdiction to investigate patterns and practices
        iii. Individual complaints to the federal Equal Employment Opportunity Commission and the Illinois Department of Human Rights: administrative and court process; available remedies.
    c. Employer liability for civil rights violations in the workplace
        i. Liability depends on employer-employee relationship
        ii. Applying these concepts to workplace relationships within the Capitol

3. Violations of the Criminal Code
    a. Criminal sex offenses
    b. Non-sex offenses
    c. Examples of criminally actionable sexual harassment

4. Best Practices

5. Questions

Promising Practices for Preventing Harassment

As many employers recognize, adopting proactive measures may prevent harassment from occurring. Employers implement a wide variety of creative and innovative approaches to prevent and correct harassment. [1]

The Report of the Co-Chairs of EEOC's Select Task Force on the Study of Harassment in the Workplace ("Report") identified five core principles that have generally proven effective in preventing and addressing harassment:

- Committed and engaged leadership;
- Consistent and demonstrated accountability;
- Strong and comprehensive harassment policies;
- Trusted and accessible complaint procedures; and
- Regular, interactive training tailored to the audience and the organization.[2]

The Report includes checklists based on these principles to assist employers in preventing and responding to workplace harassment.[3] The promising practices identified in this document are based primarily on these checklists.[4] Although these practices are not legal requirements under federal employment discrimination laws, they may enhance employers' compliance efforts.[5]

A. Leadership and Accountability

The cornerstone of a successful harassment prevention strategy is the consistent and demonstrated commitment of senior leaders to create and maintain a culture in which harassment is not tolerated. This commitment may be demonstrated by, among other things:

- Clearly, frequently, and unequivocally stating that harassment is prohibited;[6]
- Incorporating enforcement of, and compliance with, the organization's harassment and other discrimination policies and procedures into the organization's operational framework;[7]
- Allocating sufficient resources for effective harassment prevention strategies;
- Providing appropriate authority to individuals responsible for creating, implementing, and managing harassment prevention strategies;
- Allocating sufficient staff time for harassment prevention efforts;
- Assessing harassment risk factors and taking steps to minimize or eliminate those risks;[8] and
- Engaging organizational leadership in harassment prevention and correction efforts.[9]

In particular, we recommend that senior leaders ensure that their organizations:

- Have a harassment policy that is comprehensive, easy to understand, and regularly communicated to all employees;[10]
- Have a harassment complaint system that is fully resourced, is accessible to all employees, has multiple avenues for making a complaint, if possible, and is regularly communicated to all employees;[11]
- Regularly and effectively train all employees about the harassment policy and complaint system;[12]
- Regularly and effectively train supervisors and managers about how to prevent, recognize, and respond to objectionable conduct that, if left unchecked, may rise to the level of prohibited harassment;[13]
- Acknowledge employees, supervisors, and managers, as appropriate, for creating and maintaining a culture in which harassment is not tolerated and promptly reporting, investigating, and resolving harassment complaints;[14] and
- Impose discipline that is prompt, consistent, and proportionate to the severity of the harassment and/or related conduct, such as retaliation, when it determines that such conduct has occurred.

In addition, we recommend that senior leaders exercise appropriate oversight of the harassment policy, complaint system, training, and any related preventive and corrective efforts, which may include:

- Periodically evaluating the effectiveness of the organization's strategies to prevent and address harassment, including reviewing and discussing preventative measures, complaint data, and corrective action with appropriate personnel;[15]
- Ensuring that concerns or complaints regarding the policy, complaint system, and/or training are addressed appropriately;
- Directing staff to periodically, and in different ways, test the complaint system to determine if complaints are received and addressed promptly and appropriately; and
- Ensuring that any necessary changes to the harassment policy, complaint system, training, or related policies, practices, and procedures are implemented and communicated to employees.

To maximize effectiveness, senior leaders could seek feedback about their anti-harassment efforts. For example, senior leaders could consider:

- Conducting anonymous employee surveys on a regular basis to assess whether harassment is occurring, or is perceived to be tolerated;[16] and
- Partnering with researchers to evaluate the organization's harassment prevention strategies.

B. Comprehensive and Effective Harassment Policy

A comprehensive, clear harassment policy that is regularly communicated to all employees is an essential element of an effective harassment prevention strategy. A comprehensive harassment policy includes, for example:

- A statement that the policy applies to employees at every level of the organization, as well as to applicants, clients, customers, and other relevant individuals;[17]
- An unequivocal statement that harassment based on, at a minimum, any legally protected characteristic is prohibited;[18]
- An easy to understand description of prohibited conduct, including examples;
- A description of any processes for employees to informally share or obtain information about harassment without filing a complaint;[19]
- A description of the organization's harassment complaint system, including multiple (if possible), easily accessible reporting avenues;[20]
- A statement that employees are encouraged to report conduct that they believe may be prohibited harassment (or that, if left unchecked, may rise to the level of prohibited harassment), even if they are not sure that the conduct violates the policy;
- A statement that the employer will provide a prompt, impartial, and thorough investigation;
- A statement that the identity of individuals who report harassment, alleged victims, witnesses, and alleged harassers will be kept confidential to the extent possible and permitted by law, consistent with a thorough and impartial investigation;
- A statement that employees are encouraged to respond to questions or to otherwise participate in investigations regarding alleged harassment;
- A statement that information obtained during an investigation will be kept confidential to the extent consistent with a thorough and impartial investigation and permitted by law;[21]
- An assurance that the organization will take immediate and proportionate corrective action if it determines that harassment has occurred; and
- An unequivocal statement that retaliation is prohibited, and that individuals who report harassing conduct, participate in investigations, or take any other actions protected under federal employment discrimination laws will not be subjected to retaliation.[22]

In addition, effective written harassment policies[23] are, for example:

- Written and communicated in a clear, easy to understand style and format;
- Translated into all languages commonly used by employees;[24]
- Provided to employees upon hire and during harassment trainings, and posted centrally, such as on the company's internal website, in the company handbook, near employee time clocks, in employee break rooms, and in other commonly used areas or locations;[25] and
- Periodically reviewed and updated as needed, and re-translated, disseminated to staff, and posted in central locations.

C. Effective and Accessible Harassment Complaint System

An effective harassment complaint system welcomes questions, concerns, and complaints; encourages employees to report potentially problematic conduct early; treats alleged victims, complainants, witnesses, alleged harassers, and others with respect; operates promptly, thoroughly, and impartially; and imposes appropriate consequences for harassment or related misconduct, such as retaliation.

For example, an effective harassment complaint system:

- Is fully resourced, enabling the organization to respond promptly, thoroughly, and effectively to complaints;
- Is translated into all languages commonly used by employees;[26]
- Provides multiple avenues of complaint, if possible,[27] including an avenue to report complaints regarding senior leaders;
- Is responsive to complaints by employees and by other individuals on their behalf;[28]
- May describe the information the organization requests from complainants, even if complainants cannot provide it all, including: the alleged harasser(s), alleged victim(s), and any witnesses; the date(s) of the alleged harassment; the location(s) of the alleged harassment; and a description of the alleged harassment; [29]
- May include voluntary alternative dispute resolution processes to facilitate communication and assist in preventing and addressing prohibited conduct, or conduct that could eventually rise to the level of prohibited conduct, early;
- Provides prompt, thorough, and neutral investigations;
- Protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers, and other relevant individuals to the greatest extent possible, consistent with a thorough and impartial investigation and with relevant legal requirements;
- Includes processes to determine whether alleged victims, individuals who report harassment, witnesses, and other relevant individuals are subjected to retaliation, and imposes sanctions on individuals responsible for retaliation;
- Includes processes to ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined for harassment; and
- Includes processes to convey the resolution of the complaint to the complainant and the alleged harasser and, where appropriate and consistent with relevant legal requirements, the preventative and corrective action taken.[30]

We recommend that organizations ensure that the employees responsible for receiving, investigating, and resolving complaints or otherwise implementing the harassment complaint system, among other things:

- Are well-trained,[31] objective, and neutral;
- Have the authority, independence, and resources required to receive, investigate, and resolve complaints appropriately;
- Take all questions, concerns, and complaints seriously, and respond promptly and appropriately;
- Create and maintain an environment in which employees feel comfortable reporting harassment to management;
- Understand and maintain the confidentiality associated with the complaint process; and
- Appropriately document every complaint, from initial intake to investigation to resolution, use guidelines to weigh the credibility of all relevant parties, and prepare a written report documenting the investigation, findings, recommendations, and disciplinary action imposed (if any), and corrective and preventative action taken (if any).

D. Effective Harassment Training

Leadership, accountability, and strong harassment policies and complaint systems are essential components of a successful harassment prevention strategy, but only if employees are aware of them. Regular, interactive, comprehensive training of all employees may help ensure that the workforce understands organizational rules, policies, procedures, and expectations, as well as the consequences of misconduct.

Harassment training may be most effective if it is, among other things:

- Championed by senior leaders;
- Repeated and reinforced regularly;
- Provided to employees at every level and location of the organization;[32]
- Provided in a clear, easy to understand style and format;
- Provided in all languages commonly used by employees;
- Tailored to the specific workplace and workforce;
- Conducted by qualified, live, interactive trainers, or, if live training is not feasible, designed to include active engagement by participants; and
- Routinely evaluated by participants and revised as necessary.

In addition, harassment training may be most effective when it is tailored to the organization and audience. Accordingly, when developing training, the daily experiences and unique characteristics of the work, workforce, and workplace are important considerations.

Effective harassment training for all employees includes, for example:

- Descriptions of prohibited harassment, as well as conduct that if left unchecked, might rise to the level of prohibited harassment;
- Examples that are tailored to the specific workplace and workforce;

- Information about employees' rights and responsibilities if they experience, observe, or become aware of conduct that they believe may be prohibited;
- Encouragement for employees to report harassing conduct;
- Explanations of the complaint process, as well as any voluntary alternative dispute resolution processes;[33]
- Explanations of the information that may be requested during an investigation, including: the name or a description of the alleged harasser(s), alleged victim(s), and any witnesses; the date(s) of the alleged harassment; the location(s) of the alleged harassment; and a description of the alleged harassment;
- Assurance that employees who report harassing conduct, participate in investigations, or take any other actions protected under federal employment discrimination laws will not be subjected to retaliation;
- Explanations of the range of possible consequences for engaging in prohibited conduct;
- Opportunities to ask questions about the training, harassment policy, complaint system, and related rules and expectations; and
- Identification and provision of contact information for the individual(s) and/or office(s) responsible for addressing harassment questions, concerns, and complaints.

Because supervisors and managers have additional responsibilities, they may benefit from additional training. Employers may also find it helpful to include non-managerial and non-supervisory employees who exercise authority, such as team leaders.[34]

Effective harassment training for supervisors and managers includes, for example:

- Information about how to prevent, identify, stop, report, and correct harassment, such as:
  - Identification of potential risk factors for harassment and specific actions that may minimize or eliminate the risk of harassment;[35]
  - Easy to understand, realistic methods for addressing harassment that they observe, that is reported to them, or that they otherwise learn of;
  - Clear instructions about how to report harassment up the chain of command; and
  - Explanations of the confidentiality rules associated with harassment complaints;
- An unequivocal statement that retaliation is prohibited, along with an explanation of the types of conduct that are protected from retaliation under federal employment discrimination laws, such as:
  - Complaining or expressing an intent to complain about harassing conduct;
  - Resisting sexual advances or intervening to protect others from such conduct; and
  - Participating in an investigation about harassing conduct or other alleged discrimination;[36] and
- Explanations of the consequences of failing to fulfill their responsibilities related to harassment, retaliation, and other prohibited conduct.

To help prevent conduct from rising to the level of unlawful workplace harassment, employers also may find it helpful to consider and implement new forms of training, such as workplace civility or respectful workplace training and/or bystander intervention training.[37] In addition, employers may find it helpful to meet with employees as needed to discuss issues related to current or upcoming events and to share relevant resources.

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[1] *See, e.g.*, EEOC, *Select Task Force Meeting of October 22, 2015 - Workplace Harassment: Promising Practices to Prevent Workplace Harassment*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/index.cfm. Promising practices may vary based on the characteristics of the workplace and/or workforce.

[2] *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [hereinafter *Select Task Force Co-Chairs' Report*].

[3] *See Select Task Force Co-Chairs' Report*, *supra* note 2, at 79-82 (noting that the checklists are intended as a resource for employers, rather than as a measurement of legal compliance).

[4] This document focuses primarily on several practices identified in Select Task Force testimony and the subsequent Select Task Force Co-Chair Report. While EEOC believes that these practices may help employers prevent and address harassment, these practices do not represent an exhaustive list of promising preventative and corrective actions. We encourage employers to continue to develop, implement, and share additional promising practices.

[5] We note, however, that refraining from taking certain actions recommended here as promising practices may increase an employer's liability risk in certain circumstances. For example, failing to develop and implement an adequate anti-harassment policy and complaint procedure may preclude an employer from establishing an affirmative defense to a supervisory harassment complaint, or a defense to a coworker harassment complaint.

Moreover, state and/or local laws may impose certain harassment prevention-related responsibilities on covered employers that are similar to specific promising practices described in this Appendix; failing to comply with those laws may result in liability. *See, e.g.*, Cal. Gov. Code §§ 12950 - 12950.1 (West 2017) (requiring California

employers to provide information to employees regarding sexual harassment, internal complaint procedures, and remedies; and requiring California private sector employers with at least 50 employees and all California public sector employers to provide sexual harassment training to supervisors); Conn. Gen. Stat. Ann. § 46a-54(15) - (16) (West 2017) (requiring Connecticut employers with at least three employees to prominently post information about sexual harassment prohibitions and remedies, requiring Connecticut employers with at least 50 employees to provide sexual harassment training to supervisors, and requiring Connecticut public sector employers to provide discrimination training to supervisory and nonsupervisory employees);Me. Rev. Stat. tit. 26, § 807 (2017) (requiring Maine employers to prominently post information about sexual harassment and the external complaint process, and to annually provide employees with a written notice regarding sexual harassment and internal and external complaint processes; and requiring Maine employers with at least 15 employees to provide sexual harassment training to employees and supervisors); Mass. Gen. Laws Ann. ch. 151B, § 3A (West 2017) (requiring Massachusetts employers with at least six employees to develop a written sexual harassment policy and to provide the policy to new employees upon hire, and to all employees annually).

[6] For example, in addition to regularly disseminating the organization's harassment policy and complaint procedure, senior leaders could notify employees about relevant policies and resources in response to high profile events.

[7] *See, e.g.*, Patti Perez, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/perez.cfm [hereinafter *Perez Task Force Testimony*] (observing that companies that are committed to preventing inappropriate conduct develop, implement, and incorporate "robust" and "creative" programs into "the fabric of their being").

For example, leaders could direct human resources staff to request information from supervisory and managerial applicants and/or their references about applicants' demonstrated commitment to and experience with enforcing harassment policies and other EEO policies, practices, and procedures. Leaders could also instruct HR to ensure that employee orientation and training material includes information about the organization's harassment policy, complaint procedure, and any related rules, policies, and expectations. In addition, leaders could ensure that enforcement of, and compliance with, the organization's harassment policy and related policies and procedures is included in executive competencies and performance plans for employees with supervisory or managerial responsibilities.

[8] *See Select Task Force Co-Chairs' Report*, *supra* note 2, at 25-30, 83-88 (identifying select risk factors for harassment and proposing strategies to reduce the risk of harassment); *see also, e.g., Preventing Unlawful Workplace Harassment in California*, Soc'y for Human Res. Mgmt. (Apr. 16, 2016) (noting that human resources and information technology staff can monitor workplace communications for prohibited or unacceptable conduct, such as transmission of pornography, obscenities, and threats); Alexander et al., United States Army Research Institute for the Behavioral and Social Sciences, *Best Practices in Sexual Harassment Policy and Assessment* 29 (2005) [hereinafter *Army Research Institute Best Practices Report*] (explaining a practice at one company in which Human Resources staff and managers make unannounced visits during night shifts, which tend to have less managerial supervision and therefore greater opportunity for harassment).

[9] *See, e.g.*, Heidi-Jane Olguin, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/olguin.cfm [hereinafter *Olguin Task Force Testimony*] (noting that senior leadership involvement is "crucial" in "set[ting] the tone for the entire organization" and describing an organization in which corporate executives were promptly notified of harassment complaints (assuming no conflict of interest), updated about investigation determinations, and involved in prevention analysis).

For example, organizations could include harassment prevention and corrective activity, as well as other equal employment opportunity-related information, in reports submitted to Boards of Directors or similar advisory or oversight entities. Employers should consult with legal counsel as necessary regarding any relevant legal considerations, such as confidentiality restrictions associated with complaints or disciplinary action.

[10] *See infra* section B for additional information about promising practices related to harassment policies.

[11] *See infra* section C for additional information about promising practices related to complaint procedures.

[12] *See infra* section D for additional information about promising practices related to training.

[13] *See infra* section D for additional information about promising practices related to training.

[14] *See Olguin Task Force Testimony*, *supra* note 9 (explaining that appropriate acknowledgement of well-handled complaints - such as by privately praising complainants and managers who promptly reported complaints - may help create a compliance-oriented culture, and noting that senior leaders' willingness to critically examine and "aggressively deal with" managers who participate in harassment or who refrain from properly reporting harassment may enhance workplace morale and productivity).

[15] *See, e.g., Perez Task Force Testimony, supra* note 7 (describing a company that tracked complaint trends, discovered multiple complaints of racial harassment and discrimination, and implemented a training program to address the perception of race-based conduct); *Army Research Institute Best Practices Report, supra* note 8, at 30 (describing a company's efforts to measure the success of its sexual harassment policy, including tracking sexual harassment questions and allegations and conducting periodic employee surveys that included questions regarding sexual harassment).

When evaluating the effectiveness of harassment prevention and correction strategies, it may be helpful for organizations to carefully analyze complaint trends. A relatively high number of internal complaints may signify that harassment has occurred or was perceived to have occurred, but may also indicate employees' awareness of and confidence in the internal complaint process. *See, e.g., Perez Task Force Testimony, supra* note 7 (discussing a company that perceives increases in internal complaints positively as a "testament to the comfort and trust employees put in the [complaint] system"). A relatively low number of internal complaints may result from employees' lack of awareness or trust in the complaint process, or, alternatively, from the absence of harassing conduct in the organization. Organizations may find it helpful to solicit information from employees in anonymous surveys, harassment training sessions, or other settings in which employees may feel comfortable, regarding their awareness of and confidence in the organization's harassment policies and complaint procedures. Organizations could also solicit suggestions from employees about how to enhance employees' knowledge of and faith in the organization's harassment prevention and correction efforts.

[16] *See, e.g., Select Task Force Co-Chairs' Report, supra* note 2, at 33 (addressing the development and use of climate surveys to assess perceptions of harassment among employees and members of the military).

[17] It may be helpful to explain and/or provide examples of the non-employees covered by the policy, who may include individuals who interact with the organization's employees during the course of business, such as delivery or repair workers, security guards, and food service workers, as well as individuals otherwise affiliated with the organization, such as members of Boards of Directors or similar advisory or oversight entities.

[18] Federal law prohibits workplace harassment based on race, color, national origin, religion, sex, age, disability, and genetic information. State and/or local laws may prohibit workplace harassment on additional bases. *See, e.g.,* Cal. Gov. Code § 12940(a) (West 2017) (prohibiting workplace harassment based on, among other things, marital status and military and veteran status); D.C. Code Ann. § 2-1402.11 (West 2017) (prohibiting workplace harassment based on, among other things, marital status, personal appearance, family responsibilities, political affiliation, and matriculation); Mich. Comp. Laws Ann. § 37.2202 (West 2017) (prohibiting workplace harassment based on, among other things, height, weight, and marital status); N.J. Stat. Ann. § 10:5-12 (West 2017) (prohibiting workplace harassment based on, among other things, marital status, civil union status, domestic partnership status, and military service); Wis. Stat. Ann. § 111.321 (West 2017) (prohibiting workplace harassment based on, among other things, arrest or conviction records, marital status, and military service). Employers may wish to consult with legal counsel as necessary to ensure that their harassment policies cover, at a minimum, all applicable legally protected bases.

[19] To encourage employees to share and obtain information about harassment, employers may find it helpful to provide a process, such as a phone line or website, that enables employees (anonymously or identified, at their discretion) to ask questions or share concerns about harassment.

[20] *See infra* note 27.

[21] For example, the National Labor Relations Act restricts the circumstances under which employers may require employees to keep information shared or obtained during ongoing disciplinary investigations confidential. *See, e.g.,* Banner Health System d/b/a Banner Estrella Medical Center, 362 NLRB 137, 2015 WL 4179691, at *3 (2015) (holding that employers may restrict employee discussions regarding discipline or ongoing disciplinary investigations involving themselves or their coworkers only if employers can establish a "legitimate and substantial business justification that outweighs employees' Section 7 rights"), *enforced in part*, 851 F.3d 35, 40 (D.C. Cir. 2017) (describing employees' right to discuss investigations with coworkers as "settled Board precedent" (quoting *Inova Health Sys. v. NLRB*, 795 F.3d 68, 85 (D.C. Cir. 2015))).

[22] *See, e.g.,* EEOC, *Facts About Retaliation*, https://www.eeoc.gov/laws/types/retaliation.cfm (last visited Nov. 20, 2017).

[23] Small businesses may be able to prevent and correct harassment without the use of formal, written harassment policies, though they may develop and use such policies at their discretion. For example, small business owners may verbally inform employees that harassment is prohibited; encourage employees to report harassment promptly; advise employees that harassment may be reported directly to the owner; conduct a prompt, thorough, impartial investigation; and take swift and appropriate corrective action. For additional information about how small businesses can prevent and address harassment, *see* EEOC, *Frequently Asked Questions #5: How can I prevent harassment?*, https://www.eeoc.gov/employers/smallbusiness/faq/how_can_i_prevent_harassment.cfm (last visited Nov. 20,

2017); EEOC, *Tips for Small Businesses: Harassment Policy Tips*, https://www.eeoc.gov/employers/smallbusiness/checklists/harassment_policy_tips.cfm (last visited Nov. 20, 2017).

[24] It may also be helpful for employers to periodically determine whether to translate the policy and complaint system into additional languages as a result of any changes in workforce composition and employees' linguistic abilities.

[25] *See, e.g., Army Research Institute Best Practices Report, supra* note 8, at 35 (noting the importance of a coordinated communications campaign to disseminate information about the harassment policy to employees, including policy distribution and strategic, sequenced use of a variety of communication methods and strategies, including bulletin board postings, newsletter and magazine articles, training sessions, and internal website postings); *Olguin Task Force Testimony, supra* note 9 (suggesting that distributing pens or magnets with the complaint hotline phone number or website address may help remind employees about their complaint filing options); *cf. Perez Task Force Testimony, supra* note 7 (describing a company that posted the diversity program mission statement in every elevator in the corporate office).

Employers may need to take additional steps to ensure that employees who work off-site or outside of regular business hours, or who otherwise may have limited access to the organization's employee handbook, internal website, or relevant officials, receive information about harassment policies and complaint systems, participate in harassment training, and are able to communicate with relevant officials. For example, employers could include information about the policy and complaint procedure with employees' schedules or paychecks; schedule training at a time and location convenient for these employees, if possible, or offer online training; provide contact information for appropriate individuals and/or offices;and ensure that employees receive prompt responses to questions, concerns, and complaints.

[26] *See supra* note 24.

[27] *See, e.g., Olguin Task Force Testimony, supra* note 9 (describing a "multifaceted" complaint system as "critical," and recommending that organizations provide multilingual complaint hotlines and online complaint systems, in addition to traditional management and Human Resources Department complaint options). Smaller organizations may have fewer avenues of complaint available, due to their size, but may still consider designating multiple individuals to receive harassment complaints, if possible.

[28] *See, e.g.,* HR Specialist, *Preventing and Handling Workplace Harassment of Teen Workers*, Ill. Emp't Law 7, 7 (2012) (observing that teenagers may not be comfortable discussing harassment and recommending that employers train supervisors to be receptive to harassment complaints from teenage workers' parents).

[29] Organizations that allow employees to submit anonymous complaints telephonically, online, or through some other process, may find it helpful to include a summary of this information in an introductory message for employees, while recognizing that anonymous complainants may not provide all of the requested information.

[30] To address potential Privacy Act concerns related to sharing corrective or disciplinary action with complainants, federal agencies may either: (1) maintain harassment complaint records that include information about corrective or disciplinary action by complainants' names; or (2) ensure that the agency's complaint records system includes a routine use permitting disclosure of corrective or disciplinary action to complainants.

[31] *See, e.g., Perez Task Force Testimony, supra* note 7 (describing a company that provides "comprehensive investigation and conflict resolution training" to internal investigators annually that includes, among other things, information about how to recognize and eliminate implicit or unconscious bias in investigations).

[32] To facilitate participation and communication and to ensure that relevant information is shared with the appropriate audience, organizations may find it helpful to train employees, managers, and Human Resources staff separately. *See, e.g., Olguin Task Force Testimony, supra* note 9 (noting that this approach may enhance participation and enable organizations to obtain information about potential compliance issues).

[33] *See* EEOC, *Best Practices of Private Sector Employers* sections 2.B, 2.G, 3.F (1997), https://www.eeoc.gov/eeoc/task_reports/best_practices.cfm (identifying several creative dispute prevention and resolution strategies used by employers).

[34] *See, e.g., Army Research Institute Best Practices Report, supra* note 8, at 29 (noting a company that designated several workers with long-standing positive reputations who were perceived as trustworthy and good listeners as points of contact for their fellow employees, and trained those workers about how to refer sexual harassment complaints to Human Resources).

[35] *See supra* note 8.

[36] *See, e.g.*, EEOC, *Facts About Retaliation*, https://www.eeoc.gov/laws/types/retaliation.cfm (last visited Nov. 20, 2017).

[37] Broad workplace civility rules that may be interpreted to restrict employees' conduct and/or speech may raise issues under the National Labor Relations Act. Employers may wish to consult with legal counsel prior to implementing training and/or policies to ensure that they do so in a legally compliant manner.

See also Select Task Force Co-Chairs' Report, supra note 2, at 54-58 (describing workplace civility and bystander intervention training, and noting that such trainings "show[] significant promise for preventing harassment in the workplace"); Lilia Cortina, *Written Testimony for the June 20, 2016 Commission Meeting*, https://www.eeoc.gov/eeoc/meetings/6-20-16/cortina.cfm (describing and providing examples of workplace civility training); Dorothy J. Edwards, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/edwards.cfm (describing bystander intervention training Green Dot); Melissa Emmal, *Written Testimony for the October 22, 2015 Meeting of the EEOC Select Task Force on the Study of Harassment in the Workplace*, https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/emmal.cfm (describing the successful implementation of Green Dot training in Anchorage).

NCSL

National Conference of State Legislatures

LegisBrief

A QUICK LOOK INTO IMPORTANT ISSUES OF THE DAY

JUL 2017 | VOL. 25, NO. 26

Sexual Harassment Policies and Training in State Legislatures

BY JONATHAN GRIFFIN

Sexual harassment is recognized as a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to private employers with 15 or more employees, state and local governments, employment agencies and certain labor organizations, as well as certain federal government employees.

Although Title VII does not mention or define "sexual harassment," federal regulations and guidelines for the Equal Employment Opportunity Commission (EEOC), as well as courts, have defined two types of behavior that may qualify as sexual harassment: "Quid pro quo" harassment and "hostile environment" harassment.

- "Quid pro quo" is a Latin phrase that translates (roughly) to "this for that." "Quid pro quo" harassment typically occurs when an employee is fired or demoted due to a refusal to engage in unwelcome sexual activity with a supervisor.
- "Hostile environment" harassment typically occurs when an employee is subjected to sufficiently severe or pervasive sexually offensive behavior that it alters the conditions of the person's employment and creates a hostile or abusive working environment. This behavior can include off-color jokes, discussing sexual activities, touching, leering, posting sexually explicit pictures, or other unwelcome conduct based on sex. A single isolated incident typically does not create a hostile environment unless it is sufficiently severe.

Sexual harassment lawsuits may include both "quid pro quo" and "hostile environment" charges. The categories are distinct but claims under Title VII can interweave the two. For example, a supervisor could engage in pervasively sexual behavior and reward employees who also participate in the behavior with promotions, creating the potential for both quid pro quo and hostile environment lawsuits.

Did You Know?

- Sexual harassment is a violation of The Civil Rights Act of 1964.
- Most states do not require employers to conduct sexual harassment training.
- Most sexual harassment training for state legislators occurs at their orientation.

According to the EEOC, sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim, as well as the harasser, may be a woman or a man. The victim does not have to be of the opposite sex from the harasser.
- The harasser may be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker or a non-employee, such as a vendor or customer.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

State Legislative Policies

Although federal regulations do not require an employer to implement a specific sexual harassment policy, the regulations state that employers "should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned." The EEOC advises that an "effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented."

In October 2016, NCSL conducted a survey of state legislative human resources offices (the HR Survey). Forty-nine offices in 44 states responded to the survey and 37 offices reported "having formal, written personnel policy or guidance for legislative employees" on sexual harassment.

For example, Colorado's state legislature has created its own policy. The policy states: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

It also gives examples of impermissible conduct and instructions on how to submit a complaint, and to whom. It explicitly states that the policy applies to "all legislative employees who are not subject to the state personnel system, each member of the General Assembly, and third parties."

State Legislative Training

Training employees on sexual harassment in the workplace is not mandated under Title VII, but again is encouraged as part of an employer's efforts to prevent unlawful harassment at their work sites. Many state legislatures conduct such training for their staff and members. Sexual harassment training is usually done in a live, classroom setting for both staff and legislators. Most legislator training on sexual harassment occurs at their orientation program and roughly half the states that offer such training have separate programs for their upper and lower chambers.

California is one of the few states that mandates sexual harassment training by statute. Under Section 12950.1 of the California Government Code, all supervisory employees of the state must undergo two hours of "classroom or other effective interactive training" every two years. Employers also must pass out an informational brochure and develop a written sexual harassment policy that meets the requirements of Title 2 of the California Code of Regulations. The California Assembly has taken this a step further and required that "[e]very employee shall, within the first six months of every legislative session, take a course on sexual harassment prevention." Legislators (and staff) who have complaints filed against them must answer to the Assembly's bipartisan Subcommittee on Harassment, Discrimination, and Retaliation Prevention and Response, operated under the Committee on Rules. Sexual harassment training is mandatory for members of the Assembly and Senate as well as legislative staff.

The Washington state Senate's "Respectful Workplace Policy" was created to "provide and maintain a work environment free from discrimination and harassment." To achieve these goals, the Senate created a written policy that provides confidentiality for the parties involved (to the extent possible) and creates rules regarding investigations. The policy also lists requirements for training. It states that "[a]ll Senators and staff must complete training sessions, signing an acknowledgement that they have read the policy and will comply with its provisions, and will be supplied with a copy of the policy."

Additional Resources

Sexual harassment policies for the Alabama House, New York Assembly and Tennessee General Assembly.

Equal Employment Opportunity Commission, Facts About Sexual Harassment.

NCSL Contact

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303-364-1529

Office of Executive Inspector General
for the Agencies of the Illinois Governor

Margaret A. Hickey
Executive Inspector General

Written Testimony

Illinois House of Representatives
House Sexual Discrimination and Harassment Task Force
January 11, 2018
Chicago, IL

Chairperson Barbara Flynn Currie, Republican Spokesperson Sara Wojcicki Jimenez, and members of the House Sexual Discrimination and Harassment Task Force, thank you for allowing me to submit written testimony. My name is Maggie Hickey and I am the Executive Inspector General for the Office of Executive Inspector General for the agencies of the Illinois Governor (OEIG).

The Task Force has requested information about the OEIG's Equal Employment Opportunity Office's (EEOO) process. This statement will provide information about our EEOO's process, and how that process is separate and distinct from our Investigations Division.

The OEIG is an independent, non-partisan agency responsible for conducting investigations of fraud, waste, abuse, and mismanagement, as well as conducting other statutory duties related to enforcement and compliance. Our Office has four main functions: 1) investigations; 2) ethics training; 3) revolving door determinations; and 4) hiring and employment monitoring.

The Investigations Division investigates allegations related to **external entities under our jurisdiction, not OEIG employees**. The OEIG's jurisdiction includes over 170,000 State employees, appointees, and officials, the nine State public universities, and the four Chicago-area regional transit boards (RTA, CTA, Metra, Pace), as well as vendors that do business with those entities. If a complaint is filed against an individual under our jurisdiction, including a complaint related to sexual harassment, and we open it for investigation, our Investigations Division is the division to address the allegation. The OEIG's EEO Officer would not be involved in investigating those complaints.

The OEIG has an EEO Officer that reports directly to me on matters of equal employment and affirmative action related to the employees of my Office. The EEO Officer ensures that the OEIG complies with the procedures and requirements of the Illinois Department of Human Rights regulations related to equal employment opportunities. The EEO Officer also conducts investigations of **internal complaints involving OEIG employees** related to sexual harassment and alleged discriminatory practices on the basis of race, sex, religion, age, disability, national origin, ancestry, marital status, military status, retaliation, and sexual orientation. Public Act 100-0554 (Senate Bill 402), does not change our EEO process.

Thank you for allowing me to submit written testimony. I commend you for working to combat sexual discrimination and harassment and look forward to working with you to address these important issues.

Illinois Department of Human Rights

Process for Charges Alleging Sexual Harassment

Presentation to:
House Sexual Discrimination and Harassment Task Force
Monday, January 29, 2018
State Capitol, Room 118

Agenda

1. IDHR Overview
2. Sexual Harassment under the IL Human Rights Act
3. IDHR Enforcement
4. Legislative Updates
5. Training Institute

Disclaimer: *This presentation is intended for educational and informational purposes only, and is not to be considered as legal advice.*

IDHR

- The Department of Human Rights (IDHR):

  an investigatory agency that administers the Illinois Human Rights Act (IHRA), which prohibits discrimination in the workplace, housing, places of public accommodations, and financial credit institutions.

- IDHR conducts neutral, fair and impartial investigations.

IDHR

Charge Process:

1. Intake: Charge allegations are filed with IDHR and perfected charge is served on Respondent(s).
2. Mediation: Parties may voluntarily agree to mediate.
3. Investigation: IDHR obtains evidence (documents and testimony) from parties.
4. Findings: IDHR issues determination to parties.
5. Legal Review: IDHR's charge may go before the Illinois Human Rights Commission or circuit court.

IDHR

Complainant's legal recourses will vary depending on IDHR's findings:

1) If IDHR finds **Substantial Evidence** (SE) of discrimination, Complainant may file a complaint with either:
   a) The Illinois Human Rights Commission (IHRC) (or request IDHR do so on their behalf); or
   b) The appropriate circuit court.

2) If IDHR **dismisses** the charge, Complainant may:
   a) File a request for review (appeal) with the IHRC; or
   b) File a complaint with the appropriate circuit court.

IDHR

IDHR does not make credibility determinations in processing charges alleging unlawful discrimination or sexual harassment.

So, if a case determination hinges on conflicting evidence, IDHR will find "substantial evidence" so that a trier of fact can resolve the issue of credibility.

IHRA

The IHRA specifically prohibits sexual harassment in the areas of employment, housing and education.

In employment, sexual harassment may be either:

- Quid pro quo; or
- Hostile work environment

1. Quid pro quo:
   - submission is made (explicitly or implicitly) a term or condition of employment; or
   - submission/rejection used as basis for employment decision

IHRA

2. Hostile work environment:

   - the conduct has the purpose/effect of substantially interfering with work performance or creating intimidating/hostile work environment.

   - must be sufficiently severe or pervasive:
     - subjectively offensive as perceived by the victim; and
     - objectively hostile or abusive to a reasonable person

   - conduct complained of cannot be occasional, isolated or trivial.

IHRA

Under the IHRA, liability for an employer charged with sexual harassment depends in part on the identity of the alleged harasser:

Non-Managerial Employees:

An employer is responsible for sexual harassment by employees who are non-managerial/supervisory only if the employer became aware of the conduct and failed to take reasonable corrective measures.

Managerial Employees:

Employers are strictly liable for sexual harassment of employees by supervisory personnel regardless of whether the employer knew of such conduct.

IHRA

For sexual harassment, the IHRA also:

1. Covers employers with one (1) or more employees.

2. Prohibits an individual employee or agent of an employer from engaging in sexual harassment.

3. Protects both men and women from sexual harassment by the opposite sex or the same sex.

4. Prohibits Retaliation against a person who:
   - complains of or opposes unlawful discrimination,
   - Files a discrimination charge with IDHR, or
   - Participates in an IDHR investigation.

Enforcement Trends

All State-wide Discrimination Charges filed with IDHR over the past four years across all areas.

Charges Docketed by Area	FY 2017	FY 2016	FY 2015	FY 2014
Employment	2748	2909	3163	3028
Housing	282	289	353	389
Financial Credit	3	6	6	3
Public Accommodations	165	214	197	165
S.H. in Education	3	3	1	4
TOTAL	**3201**	**3421**	**3720**	**3589**

Enforcement Trends

All State-wide Sexual Harassment Charges filed with IDHR in the Employment area.

Charges Docketed	FY 2017	FY 2016	FY 2015	FY 2014
Sexual Harassment	403	397	469	334

Enforcement Trends

Outcome of All Sexual Harassment Charges in Employment

Finding	FY 2017	FY 2016	FY 2015	FY 2014
Substantial Evidence (SE or Default)	35	95	134	89
Dismissal (FTP/LOJ/ LSE)	66	117	150	111
Administrative Closure (withdrawn or settled)	123	170	184	133
Pending Determination	179	15	1	1
TOTAL:	**403**	**397**	**469**	**334**

Enforcement Trends

Employment Allegations by Basis (Top 8)

FY 2017	FY 2016	FY 2015	FY 2014
Retaliation: 948	**Retaliation: 1022**	**Sex: 1078**	**Retaliation: 1019**
Race: 768	Race: 867	Retaliation: 1032	Sex: 913
Disability: 714	Disability: 714	Race: 902	Disability: 867
Age: 628	Sex: 645	Disability: 847	Race: 851
Sex: 539	Age: 635	Age: 731	Age: 726
Sexual Har: 410	Sexual Har.: 421	Sexual Har.: 405	Nat. Origin: 428
Nat. Origin: 382	Nat. Origin: 375	Nat. Origin: 385	Sexual Har.: 296
Sexual Or.: 77	Sexual Or.: 82	Sexual Or.: 94	Sexual Or.: 96

Enforcement Trends

Employment Charges by Respondent (Top 8)

FY 2017	FY 2016	FY 2015	FY 2014
Private: 2095	**Private: 2203**	**Private: 2364**	**Private: 2309**
Individuals: 189	Local Gov.: 205	Individuals: 209	Local Gov: 207
Local Gov: 169	Individuals: 205	Local Gov: 188	Individuals: 135
State Gov: 96	State Gov: 108	State Gov: 135	Schools: 134
Schools: 72	Schools: 78	Schools: 132	State Gov: 118
Universities: 58	Universities: 56	Universities: 62	Universities: 59
Unions: 36	Unions: 46	E. Agencies: 41	Unions: 36
E. Agencies: 33	E. Agencies: 32	Unions: 32	E. Agencies: 30

Recent Legislation Impacting Sexual Harassment

Sexual Harassment in Education

Posting Requirement.

Public Act 96-0574 (eff. August 18, 2009)

Required institutions of higher education to post information regarding sexual harassment prohibition in common areas or to include in online registration process.

Expanded from Higher Education to All Education Levels

Public Act 96-1319 (eff. July 27, 2010)

"Sexual Harassment in Higher Education" expanded to cover elementary, secondary and higher education levels.

Recent Legislation Impacting Sexual Harassment

Employment

Unpaid Interns: Public Act 98-1037 (eff. January 1, 2015)

Amends the definition of "Employee" under Section 2-101(A)(1) Illinois Human Rights Act to include unpaid interns for purposes of charges of discrimination alleging sexual harassment *(Section 2-102(D))*

Recent Legislation Impacting Sexual Harassment

Who is an Unpaid Intern?

- Someone who performs work for an employer who is not committed to hiring the person at the end of the internship;
- has entered into an agreement with the employer that the person is not entitled to wages for the work performed;
- performs work that supplements training given in an educational environment that may enhance the employability of the intern and provides experience to the person; and
- does not displace regular employees, works under close supervision of existing staff, and provides no immediate advantage to the employer and may occasionally impede the operations of the employer

Recent Legislation Impacting Sexual Harassment

Sexual Harassment Prevention in Government:

Public Act 100-0554 (eff. November 16, 2017)

Amends the Employment section of the IHRA to require IDHR to establish and maintain a sexual harassment hotline. *(Adds Section 2-107)*

Also amends other statutes to require training and to allow for reporting of sexual harassment allegations:

- IL Administrative Procedures Act.
- State Officials and Employees Ethics Act
- Secretary of State Act,
- Lobbyist Registration Act

The IDHR Training Institute

IDHR offers free and paid training opportunities for employers and employees via its Institute for Training and Development

Beneficial for preventing forms of discrimination and keeping up to date with current changes to laws

Topics:

- Sexual Harassment Prevention
- State and federal disability laws
- Conflict Resolution
- Diversity Awareness
- And more.

Contact Information:

ILLINOIS DEPARTMENT OF HUMAN RIGHTS
100 West Randolph St., Suite 10-100
Chicago, IL 60601

Chicago:	(312) 814-6200
Springfield:	(217) 785-5100
Marion:	(618) 993-7463
Toll free:	(800) 662-3942
TTY:	(866) 740-3953

Email: IDHR.Webmail@illinois.gov
Website: www.illinois.gov/dhr

We are on Facebook and Eventbrite!

Anti-Harassment Reforms Working Draft

The following working draft proposal is premised on the fact that harassment in the workplace, including sexual harassment, is an employment issue, and there are many nuances that must be considered when drafting legislation. The General Assembly must develop well-reasoned policies for reporting, investigating, and taking action against those who violate the policies. Any policy must (i) provide an opportunity for the person making the allegation to remain anonymous; (ii) recognize the importance of confidentiality for both the accuser and the accused during the complaint and investigation process; and (iii) provide due process to both parties.

State Officials and Employees Ethics Act

This proposal applies to discrimination, harassment, and retaliation under the Illinois Human Rights Act or applicable policies of constitutional officer, legislative leader, or individual member.

ALLEGATIONS

- Require a mechanism for anonymous reporting. Require each constitutional officer and legislative leader, as well as the Joint Committee on Legislative Support Agencies, to designate a specific person to accept such complaints and review them. This is in addition to the ability of the executive and legislative branches to anonymously report to the Legislative Inspector General ("LIG").
- The identity of individuals who report harassment, alleged victims, witnesses, and alleged harassers will be kept confidential to the extent possible and as permitted by law, consistent with a thorough and impartial investigation.
    - If the accuser wants to make the information public, that person maintains that right. However, the public body cannot comment or confirm any information until such time as an investigation has concluded.
- Conduct semi-annual reviews of employment experiences through the use of confidential surveys.
- For the legislature: Each caucus must appoint someone to handle receiving complaints, and that person cannot conduct the investigation, one of these people can be the Ethics Officer. This person is one who takes information and helps provide the person making an allegation with resources if necessary. They review initial complaints and determine what should be turned over for investigation. Recognize that any person appointed is going to be paid by the employer and there will always be a level of concern the person may not be independent, but person (if other than Ethics Officer) should be required to maintain confidentiality, similar to the Ethics Act.
    - Person receiving complaints must immediately advise employer if determines an immediate need to take action (e.g. accuser/accused must have office moved or job reassigned to protect the accuser; need to immediately put the accused on leave for protection of the accused and the office).
- Any person reporting an allegation shall be referred to a victim advocate and told they have a right to seek legal advice, be informed about the process, including but not limited to confidentiality restraints that keep an ethics officer from being able to inform a victim or complainant of the outcome of their complaint.
    - State employees have access to victim services under the Employee Assistance Program. Non-employees can be referred to victim advocate services or legal services.

LEGISLATIVE INSPECTOR GENERAL

- Require public posting of any vacancy in the Office of the Legislative Inspector General

- In the event of a vacancy in the Office of the Legislative Inspector General, the Legislative Ethics Commission must appoint a person to serve as Acting or Special Legislative Inspector General within 30 days of the vacancy.
- Allow the Executive Director to review and make recommendations for appointing a special LIG in the event of a vacancy.

INVESTIGATION

- Each constitutional officer and legislative leader must (i) employ someone to conduct investigations, provided the person cannot have duties that include defending the constitutional officer/leader in court, (ii) use an outside counsel, or (iii) turn the allegation over to the applicable Inspector General. Recognize that any person appointed is going to be paid by the employer and there will always be a level of concern the person may not be independent.
- Require the person to conduct a fair, impartial investigation and report to the employer within 90 days, unless there are extenuating circumstances (determined by the person investigating) and the parties are notified of the need for an extended investigation, but no longer than a 30 day extension. The accuser and the accused should be notified when an investigation is opened and when it is closed. They should be told any parameters for contact with each other or witnesses.
- A written report generated by an independent investigation should be provided the appropriate constitutional officer or leader and a copy given to the Legislative Inspector General, with a description of any punishment imposed. All reports remain confidential except if (i) the accused and the accuser agree to release, or (ii) the report results in a 3-day or more suspension or termination of the employee. Both parties have an opportunity to request redactions.
  - Exploring options for automatic publication of founded reports related to lawmakers.
- If the accuser decides to file a complaint with the Department of Human Rights of EEOC, the person shall notify the person conducting an investigation and the investigation shall be terminated.
- The employer maintains all ability to discipline any employee accused of harassment or discrimination.

REPORTING

- Require the quarterly report of each Inspector General to include the following (i) number of discrimination, harassment, sexual harassment, and retaliation complaints brought to the Inspector General, (ii) the number of discrimination, harassment, sexual harassment, and retaliation complaints brought to the identified intake person within each constitutional office or legislative leader, (iii) number of discrimination, harassment, sexual harassment, and retaliation investigations initiated by each Inspector General, (iv) the number of discrimination, harassment, sexual harassment, and retaliation investigations initiated internally by each constitutional officer or legislative leader, (v) the number of discrimination, harassment, sexual harassment, and retaliation investigations initiated internally by outside counsel for each officer or leader; and (vi) for any founded complaints, a summary of the allegation and the punishment imposed.
- Require each constitutional officer and legislative leader to provide information about complaints and investigations to the LIG for publication in the quarterly report.
- Amend the House Rules to require legislators who have personal knowledge of sexual harassment to report allegations to their Caucus ethics officer
- Require Ethics Officers to report complaints that come to them and what action was taken, keeping all identifying information confidential, including those turned over to outside counsel, the LIG, or other venue.

Illinois Human Rights Act

- Extend the time for filing civil rights violations to 365 days (currently 180 days).
- Expand the Act to include specific scenarios applicable to political committees
  - Expand the definition of "employee" to include individuals providing services to a political committee for which they provide in-kind services or receive any form of payment, regardless of the establishment of an employer-employee relationship.
  - Clarify the definition of "employee" to allow "immediate personal staff" to be employees and able to file actions under the IHRA.
  - Expand the definition of "employer" to include political committees, regardless if the committee has any employees (this covers in-kind situations).
  - Provide a definition of "political committee" – reference the Election Code
- Require DHR to maintain a sexual harassment advocate who will work with any person making an allegation that does not have private counsel or union representation.

Election Code

- Mandate all political committees maintain discrimination and harassment policies, provided political committees may make political considerations when making hiring decisions
- Mandate an established political party offer training for all political committees, including the staff of campaigns (consultants, full and part time employees, interns).

All Public Bodies

- Prohibit all state constitutional officers, legislators, and other public bodies from resolving discrimination or harassment cases using arbitration.
- Prohibit any public officer from using public funds to make payments to any employee, volunteer, or independent contractor in exchange for silence or inaction related to allegations of sexual harassment.
- If a public body is going to enter into a confidential settlement agreement related to discrimination or harassment of any kind, the following must occur: (i) the public body provide 7-day public disclosure of a summary of the allegations and agreement (without any identifying information), and (ii) the public body approves the settlement in a public meeting, or if a constitutional officer or legislator, the individual must personally approve any settlement related to their office.

Open Questions

- Acknowledging that the employment relationships, and often lack thereof, in the Legislative branch make traditional sexual harassment and discrimination findings difficult, SB 402 made sexual harassment a violation of the State Officials and Employee Ethics Act. In examining potential changes, the Task Force is open to the question of whether there may be a better avenue to deal with the non-traditional employment relationships of both state and non-state work done in the legislative branch.
- Rights of victims (not necessarily the same as a complainant under the Ethics Act) in the process under the Ethics Act, multiple legislative proposals have been filed and conversations have begun with the Office of the Executive Inspector General to figure out the best way to provide aid to persons utilizing this avenue without compromising the independence and neutrality of the Inspector General's office.

    - For example allowing victim to file a victim impact statement along with LIG report to the LEC.
- Recommending that the LEC review their rules to allow for the LIG to be able to conduct issue a subpoena without prior consent of the LEC.
- Adding additional punishment options to House Rules for lawmakers such as reprimand or censure for violations of the Ethics Act.

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ENSURING RESPECT IN THE WORKPLACE

Effective Training/ Communications for Managers and Employees

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Areas of Practice

Labor & Employment

Corporate

Government Compliance and Enforcement Actions

Experience

Mr. Weiss leads Seyfarth Shaw at Work, the firm's dedicated compliance services and training subsidiary. He works with corporate executive teams and in-house legal/HR leaders to develop core value statements, compliance plans, media strategies and training initiatives. Mr. Weiss directs a global team of firm and consultant attorney-trainers and, individually, presents pilot courses and compliance training roll-out plans to enforcement agencies as part of complex litigation settlement processes. Philippe speaks extensively on legal news and trends affecting individuals and companies and has been frequently interviewed and quoted by broadcast and cable media outlets as well as the New York Times, Washington Post, Forbes, The Guardian, Politico, USA Today, Time.com Money, CNBC.com, the LA Times, and Tribune Media/WGN TV & Radio.

Prior to his tenure at Seyfarth Shaw at Work, Philippe represented both plaintiffs and defendants in the areas of employment, corporate, disability and governmental law. As a practicing attorney, Mr. Weiss appeared before federal and state courts, and represented clients in matters involving human rights agencies and the Equal Employment Opportunity Commission (EEOC).

Mr. Weiss served as a member of the faculty and designed negotiation courses at Northwestern University, University College. He has created interactive negotiation simulations at the University of Michigan including for use at a number of U.S. Department of Defense-related education programs/schools. As a business owner, Mr. Weiss managed compliance products companies serving governmental agencies in all 50 states.

To view Mr. Weiss' biography on the Seyfarth Shaw at Work website, please, click here.

Education

J.D., Boston University School of Law (1990)

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Honors College, with Distinction

Admissions

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Publications

"Keep It Legal: Interviewing and Hiring on the Right Side of the Law," *WinterWyman News & Views* (April 23, 2013)

"How to Host a Smashing Holiday Party Without Getting Sued," *Hispanic Busines.Com* (December 10, 2012)

Co-Author, "The U.S. Supreme Court To Revisit The Scope Of The Faragher/Ellerth Supervisor Liability Rule," *One Minute Mem*o, Seyfarth Shaw LLP (November 15, 2012)

Co-Author, "EEOC Issues New Guidance Applying Title VII And ADA To Domestic Violence, Sexual Assault And Stalking," *One Minute Mem*o, Seyfarth Shaw LLP (October 26, 2012)

Co-Author, "Cut! Harassment Training Videos Aren't Enough," *Law360* (February 23, 2011)

Co-Author, "Winning Legal Strategies for Employment Law: What Every Company Should Know About Labor Law & Legal Compliance," *Aspatore Books* (April 2005)

Presentations

"Crisis Management: Best Practices for Preventing and Addressing Sexual Harassment in the Workplace," Webinar, presented by Seyfarth Shaw LLP (January 4, 2018)

"From Fundamentals to Action," Webinar, presented by Seyfarth Shaw LLP (May 19, 2016)

COMMISSION ON HUMAN RELATIONS

CITY OF CHICAGO

STATEMENT BY MONA NORIEGA, CHAIR AND COMMISSIONER

CHICAGO COMMISSION ON HUMAN RELATIONS

March 13, 2018

Good morning House Sexual Discrimination and Harassment Task Force and Chairperson Leader Barbara Flynn Currie. My name is Mona Noriega, and I have served as the Chair and Commissioner of the Chicago Commission on Human Relations (CCHR) since 2011. The Commission is the civil rights agency for the City of Chicago. We enforce the Chicago Human Rights and Fair Housing Ordinances and its protections against discrimination in employment, housing, public accommodations, credit and bonding. We investigate and adjudicate complaints of discrimination based on 16 protected classes such as race, ancestry, national origin, and religion. The Commission also assists victims of hate crimes, mediates community tensions, and delivers educational workshops on a variety of human relations topics including bullying, prejudice reduction, and conflict resolution.

In response to your committee's inquiries regarding the City of Chicago's sexual harassment policies and procedures, I will share with you the Commission's work in enforcing the City of Chicago's anti-discrimination ordinances and describe the complaint and hearing process.

The Chicago Human Rights Ordinance (CHRO) prohibits sexual harassment in employment and in public accommodations. Under the CHRO, sexual harassment is a form of sex discrimination. A sexual harassment victim can be of the opposite sex or the same sex as the harasser. Workplaces of all sizes in Chicago, from businesses with a single employee to large corporations, are covered under the CHRO.

The CHRO also covers employment discrimination claims against other City of Chicago departments, as well as the City's sister agencies such as the CTA, the Chicago Park District, and Chicago Public Schools. City employees are free to file a claim of discrimination with the CCHR, and their complaints are investigated and evaluated under the same standards and criteria as employees who work for private employers.

Sexual harassment in the workplace is not always easy to spot. In employment, sexual harassment is defined as any unwelcome sexual advances or requests for sexual favors or conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or

740 NORTH SEDGWICK STREET, SUITE 300, CHICAGO, ILLINOIS 60654

condition of an individual's employment; or (2) submission to or rejection of such conduct by an individual is used as the basis for any employment decision; or (3) such conduct substantially interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment.

The following is an overview of the CCHR's investigation and hearing process:

Description of the Complaint and Hearing Process

Individuals who believe they have been subjected to discrimination as defined in the anti-discrimination ordinances may file written complaints with the Commission. After a complaint is filed, the Commission notifies each named respondent and sets a deadline to submit a written response and any documents that support the respondent's position. The complainant also receives a deadline to reply to any response and to submit any documentation that supports the allegations of the complaint.

Although settlement is not an option for everyone, where the parties are amenable to it, the Commission can facilitate settlement discussions regarding a pending complaint. Settlement is voluntary. The Commission does not propose or advocate particular settlement terms, but staff may assist in the drafting of the agreed terms of a settlement for parties to sign.

If the case does not settle or otherwise close at the pleading stage, the investigator completes any additional evidence-gathering that may be needed and compiles the evidence for review by senior staff of the Commission. The investigation of claims usually consists of interviewing witnesses and examining relevant documents or physical evidence. The investigator may seek information about the experiences of other people whose situations are comparable to the complainant's. Investigators may conduct site visits when appropriate to the case. The Commission has subpoena power along with the power to sanction parties that fail to cooperate with the investigation.

Once an investigator has gathered all of the evidence relevant to a particular claim, s/he compiles this material for consideration by a Compliance Committee of Commission senior staff who determine whether or not there is "substantial evidence" of discrimination. A finding of substantial evidence does not mean the complainant has won the case, but only that there is enough evidence of a violation for the case to go forward. If the Compliance Committee finds no substantial evidence of an ordinance violation, it dismisses the case. The complainant may request a review of the dismissal.

If the Commission finds there is substantial evidence of discrimination (or retaliation if applicable), it notifies the parties that the case will proceed to an administrative hearing. The parties have the option of settling the case prior to the hearing.

The administrative hearing is less formal than a court proceeding. A hearing officer is appointed by the Commission from a pre-selected panel of experienced, civil rights attorneys. The hearing officer presides over the hearing and manages the pre-hearing and post-hearing process. Commission staff do not prosecute the case or represent the complainant at this hearing.

It is entirely the complainant's responsibility to prove the case and to prove entitlement to injunctive and monetary relief as well as any attorney fees and costs. Pre-hearing discovery and subpoena procedures are available to the parties to aid in obtaining evidence to support their positions.

Based on the hearing officer's recommendation and the hearing record, the Board of Commissioners makes the final determination as to whether the complainant has proved that the respondent violated the Chicago Human Rights Ordinance or the Chicago Fair Housing Ordinance. If the Board rules that there has been a violation, it also determines what relief will be awarded to the complainant.

Relief may include a fine for each violation, an order to take steps to eliminate discriminatory practices (injunctive relief), an award of damages to be paid to the complainant, and an order to pay the prevailing complainant's attorney fees and related costs. Final orders awarding or denying relief have the force of law, can be appealed to the state court on a certiorari petition, and are enforceable by obtaining a state court judgment.

I am happy to answer any questions this committee may have.

BOARD OF ETHICS
CITY OF CHICAGO

STATEMENT

TO THE HONORABLE MEMBERS OF THE HOUSE SEXUAL DISCRIMINATION AND HARASSMENT TASK FORCE

March 13, 2018

I am the Executive Director of the City of Chicago's Board of Ethics, and have served in this position since December 2008. I appreciate the opportunity to speak to you.

As part of a comprehensive approach to address and prevent sexual harassment, the City of Chicago has made important changes to Chicago's Governmental Ethics Ordinance in recent months.

Specifically, the Ordinance now: (i) requires annual training for all City employees and officials in sexual harassment; (ii) affords redress to anyone who has experienced sexual harassment by City elected officials both within and outside of the traditional employer-employee context; (iii) authorizes the City's Inspector General to receive and investigate, and the Board of Ethics – a separate body – to adjudicate, complaints of sexual harassment by City elected officials brought by any staffer, member of the public, constituent, lobbyist, etc. who believes he or she has experienced sexual harassment in the course of seeking formal or informal City governmental actions, decisions, approvals or recommendations; (iv) provides due process for those accused of sexual harassment; and (v) will enable the Board to make any findings of violations public, along with penalties imposed, thereby assuring citizens and voters that they have complete information. Any formal settlement of such charges would likewise be made public. The adjudication process is confidential. As with all investigations of potential violations of the Ethics Ordinance, if the City's Inspector General finds evidence to sustain the complaint, it will petition the Board of Ethics for a finding of probable cause. If the Board finds probable cause, it affords the subject the opportunity to rebut that finding. If the subject is unable to rebut the finding, the matter can be settled by mutual agreement (all settlements are public), or the subject may proceed to an administrative hearing before a hearing officer or administrative law judge appointed by the City's Department of Administrative Hearings. Following the hearing, the hearing officer/judge sends written findings of fact and law back to the Board of Ethics, which will then make a final determination as to whether the Ordinance was violated, and impose appropriate fines. The finding is public (though if there is a finding of no violation, the subject's name is not made public unless the subject so directs the Board. A finding of a violation may then be appealed to the Circuit Court of Cook County through a petition for certiorari.

City law has long afforded redress to other City employees and officials who experience sexual harassment, and to members of the public who experience it while seeking any City action.

As a closing observation, I wish to stress the importance of education, for which there is no substitute: these new laws are coupled with training on what constitutes sexual harassment, and what an aggrieved person's remedies are. The training will be offered annually by the Department of Human Resources and Board of Ethics to all City employees and officials, and registered lobbyists.

I welcome your questions.

Steven I. Berlin, Executive Director
Board of Ethics

Where to File Employment Discrimination Claims

The following table provides general guidance. This is not a guarantee of coverage. Certain exceptions and limitations may apply. You may be able to file your claim with more than one agency. Please telephone an agency if you have questions.

Agencies to Contact	Chicago Commission on Human Relations	Cook County Commission on Human Rights	Illinois Department of Human Rights	Equal Employment Opportunity Commission (U.S.)
Types of Discrimination Covered	Race Color Religion Sex (including sexual harassment and pregnancy) National Origin Ancestry Age Disability Sexual Orientation Gender Identity Marital Status Parental Status Source of Income Military Status Credit History Criminal History Limited Retaliation	Race Color Religion Sex (including sexual harassment) National Origin Ancestry Age Disability Sexual Orientation Gender Identity Marital Status Parental Status Source of Income Military Discharge Status Housing Status Retaliation Aiding/Abetting Willful Interference	Race Color Religion Sex (including sexual harassment) National Origin Ancestry Age Disability Sexual Orientation (includes gender identity) Marital Status Pregnancy Unfavorable Military Discharge Military Status Citizenship Status Arrest Record Immigration-Related Practices Native Language Order of Protection Status Retaliation Aiding/Abetting Willful Interference Coercion	Race Color Religion Sex (including sexual harassment, sexual orientation, gender identity and pregnancy) National Origin Ancestry Age Disability Genetic Information Retaliation
Geographic Limitations	Violation occurred within the City of Chicago	Violation occurred within Cook County	Violation occurred within Illinois	Violation occurred within U.S. or at U.S. company located outside U.S.
Time Limitations	Must file within 180 days of alleged violation	Must file within 180 days of alleged violation	Must file within 180 days of alleged violation	300 days (or 180 days if state fair employment agency does not cover)
Who Can Be Sued	Employers (no minimum number of employees) Labor Organizations Employment Agencies Individuals	Employers (no minimum number of employees) Labor Organizations Employment Agencies Individuals	Employers with at least 15 employees in Illinois; or with at least 1 employee for sexual harassment, disability, pregnancy, retaliation, public contractors, state/local gov't units, apprenticeship & training programs Labor Organizations Employment Agencies Individual sexual harassers	Employers with at least 15 employees for Title VII and ADA claims and state and local governments; with at least 20 employees for ADEA; with at least 1 employee for Equal Pay Act, federal government, & educational institutions Labor Organizations Employment Agencies Apprenticeship and Training Programs

Agencies to Contact	Chicago Commission on Human Relations	Cook County Commission on Human Rights	Illinois Department of Human Rights	Equal Employment Opportunity Commission (U.S.)
Kinds of Relief Available	Make whole damages (such as back pay, lost benefits and emotional distress damages) Other Damages (such as interest) Punitive Damages Injunctive Relief (such as reinstatement) Fines to the City Attorneys Fees & Costs to prevailing complainant	Make whole damages (such as back pay, lost benefits and emotional distress damages) Other Damages (such as interest) Injunctive Relief (such as reinstatement) Fines to the County Attorneys Fees & Costs to prevailing complainant	Make whole damages (such as back pay, lost benefits and emotional distress damages) Other Damages (such as interest) Injunctive Relief (such as reinstatement and barring contracts with the State), including emergency relief Attorneys Fees & Costs to prevailing complainant	Make whole damages (such as back pay, lost benefits and reinstatement) Compensatory Damages (such as out-of-pocket and emotional harm) Punitive Damages Injunctive Relief, including emergency relief Attorneys Fees & Costs to prevailing complainant
Agency Contact Information	Chicago Commission on Human Relations 740 N. Sedgwick Suite 400 Chicago, IL 60654 (312) 744-4111 (312) 744-1088 (TTY) (312) 744-1081 (FAX) cchrfilings@cityofchicago.org www.cityofchicago.org/humanrelations	Cook Co. Commission on Human Rights 69 W. Washington St. Suite 3040 Chicago, IL 60602 (312) 603-1100 (312) 603-1101 (TDD) (312) 603-9988 (FAX)	Illinois Department of Human Rights James R. Thompson Center, 100 W. Randolph 10th Floor, Intake Unit Chicago, IL 60601 (312) 814-6200 (217) 785-5125 (TTY) (312) 814-6251 (FAX) www.illinois.gov/dhr	U.S. Equal Employment Opportunity Commission Chicago District Office 500 W. Madison Suite 2000 Chicago, IL 60661 (800) 669-4000 (312) 869-8001 (TTY) (312) 869-8220 (FAX)
Office Hours	Filing Hours: Monday through Friday 9:00 - 5:00 (2 copies of all filings required) Intake Hours: Monday through Friday 9:00 - 3:00	Office Hours: Monday through Friday 8:30 – 4:30 Intake Hours: Monday through Friday 9:00-4:00	Office Hours: Monday through Friday 8:30 - 5:00 Intake Hours: Monday through Thursday 8:30 – 3:00	Office Hours: Monday through Friday 8:30 - 5:00 Intake Hours: Monday through Friday 8:30 - 3:30
Other Forms of Discrimination Covered	Housing Public Accommodations Credit & Bonding Transactions	Housing Public Accommodations Credit Transactions County Facilities, Services and Programs	Housing Public Accommodations Financial Credit Sexual Harassment in Education	

Where to File Housing Discrimination Claims

The following table provides general guidance. This is not a guarantee of coverage. Certain exceptions and limitations may apply. You may be able to file your claim with more than one agency. Please telephone an agency if you have questions.

Agencies to Contact	Chicago Commission on Human Relations	Cook County Commission on Human Rights	Illinois Department of Human Rights	U.S. Dept. of Housing and Urban Development
Types of Discrimination Covered	Race Color Religion Sex (including sexual harassment) National Origin Ancestry Age Disability Marital Status Parental Status Sexual Orientation Gender Identity Source of Income Military Status Limited Retaliation	Race Color Religion Sex (including sexual harassment) National Origin Ancestry Age Disability Marital Status Parental Status Sexual Orientation Gender Identity Source of Income Military Discharge Status Housing Status Retaliation Aiding/Abetting Willful Interference	Race Color Religion Sex (including sexual harassment) National Origin Ancestry Age Disability Marital Status Familial Status Sexual Orientation (incl. gender identity) Pregnancy Unfavorable Military Discharge Military Status Order of Protection Status Retaliation Aiding/Abetting Willful Interference and Coercion	Race Color Religion Sex (including sexual harassment) National Origin Disability Familial Status Retaliation Intimidation, Coercion, and Interference
Geographic Limitations	Housing located within the City of Chicago	Housing located within Cook County	Residential and commercial real estate transactions in Illinois	Housing located within U.S. or U.S. territories
Time Limitations	Must file within 180 days of the alleged violation	Must file within 180 days of the alleged violation	Must file within one year of the alleged violation	Must file within one year of the alleged violation
Who Can Be Sued	All persons with right to sell, rent, or lease any housing accommodation within Chicago, & their agents Lenders under credit transaction provisions	All persons with right to sell, rent, lease, or sublease any housing unit within Cook County, & their agents or any agent, broker, or other individual working on behalf of any such individual	Most persons engaging in commercial or residential real estate transactions, including real estate brokers, salespersons, builders, lenders, and appraisers and their agents. Municipalities Advertisers Persons interfering with the exercise of fair housing rights, including neighbors	Most residential housing owners (exceptions: owner-occupied builders with no more than four units, single-family house with no broker, some private organizations), sales and rental agents, builders, lenders and appraisers Municipalities Advertisers

Agencies to Contact	Chicago Commission on Human Relations	Cook County Commission on Human Rights	Illinois Department of Human Rights	U.S. Dept. of Housing and Urban Development
Kinds of Relief Available	Make whole damages (such as moving expenses, rent differentials and emotional distress damages) Punitive Damages Fines to the City Injunctive Relief (such as order to sell/rent) Attorneys Fees and Costs to prevailing complainant	Make whole damages (such as moving expenses, rent differentials and emotional distress damages) Fines to the County Injunctive Relief, including emergency relief (such as order to cease eviction or order to sell/rent) Attorneys Fees and Costs to prevailing complainant	Make whole damages (such as moving expenses, rent differentials and emotional distress damages) Fines to State Injunctive Relief, including emergency relief (such as order to cease eviction or order to sell/rent) Attorneys Fees and Costs for prevailing complainant	Make whole damages (such as moving expenses, rent differentials and emotional distress damages) Punitive Damages Fines to Agency Injunctive Relief, including emergency relief (such as order to cease eviction or order to sell/rent) Attorneys Fees and Costs to prevailing complainant
Agency Contact Information	Chicago Commission on Human Relations 740 N. Sedgwick Suite 400 Chicago, IL 60654 (312) 744-2852 (312) 744-1088 (TTY) (312) 744-1081 (FAX) cchrfilings@cityofchicago.org www.cityofchicago.org/humanrelations	Cook County Commission on Human Rights 69 W. Washington St. Suite 3040 Chicago, IL 60602 (312) 603-1100 (312) 603-1101 (TDD) (312) 603-9988 (FAX)	Illinois Department of Human Rights James R. Thompson Center 100 W. Randolph 10th Floor; Housing Intake Chicago, IL 60601 (312) 814-6229 (866) 740-3953 (TTY) (800) 662-3942 (Toll free) (312) 814-6251 (FAX) IDHR.FairHousing@illinois.gov	U.S. Dept. of Housing and Urban Development Office of Fair Housing and Equal Opportunity 77 W. Jackson Suite 2101 Chicago, IL 60604 (312) 353-5680 (800) 669-9777 (Toll free hotline) (312) 353-7143 (TTY) (312) 886-2729 (FAX)
Office Hours	Filing Hours: Monday through Friday 9:00 - 5:00 (2 copies of all filings required) Intake Hours: Monday through Friday 9:00 - 3:00	Office Hours: Monday through Friday 8:30 – 4:30 Intake Hours: Monday through Friday 9:00-4:00	Office Hours: Monday through Friday 8:30 - 5:00 Intake Hours: Monday through Thursday 8:30 - 3:00	Office Hours: Monday through Friday 8:30 – 5:00 Intake Hours: Monday through Friday 8:30 - 5:00
Other Forms of Discrimination Covered	Employment Public Accommodations Credit & Bonding Transactions	Employment Public Accommodations Credit Transactions County Facilities, Services and Programs	Employment Public Accommodations Credit Transactions Sexual Harassment in Education	

Where to File Public Accommodations Discrimination Claims

The following table provides general guidance. This is not a guarantee of coverage. Certain exceptions and limitations may apply. You may be able to file your claim with more than one agency. Please telephone an agency if you have questions.

Agencies to Contact	Chicago Commission on Human Relations	Cook County Commission on Human Rights	Illinois Department of Human Rights
Types of Discrimination Covered	Race Color Religion Sex (including sexual harassment) National Origin Ancestry Age Disability Marital Status Parental Status Sexual Orientation Gender Identity Source of Income Military Status Limited Retaliation	Race Color Religion Sex (including sexual harassment) National Origin Ancestry Age Disability Marital Status Parental Status Sexual Orientation Gender Identity Source of Income Military Discharge Status Housing Status Retaliation Aiding/Abetting Willful Interference	Race Color Religion Sex (including sexual harassment) National Origin Ancestry Age Disability Marital Status Pregnancy Sexual Orientation (incl. gender identity) Unfavorable Military Discharge Military Status Order of Protection Status Retaliation Coercion/Aiding& Abetting Willful Interference
Geographic Limitations	Violation occurred within the City of Chicago	Violation occurred within Cook County	Violation occurred within Illinois
Time Limitations	Must file within 180 days of the alleged violation	Must file within 180 days of the alleged violation	Must file within 180 days of the alleged violation
Who Can Be Sued	Place, business establishment or agency that sells, leases, provides or offers any product or service to general public, including membership organizations with over 400 members which provide regular meal service and receive payment for dues or other services from or on behalf of nonmembers	Persons that own, lease, rent, operate, manage, or in any manner control a public accommodation Exceptions for sex discrimination in private facilities, sleeping rooms and educational institutions	Accommodation or business facility of any kind which sells or otherwise offers services or goods to public OR Operator of such facility Public officials who are officers or employees of the State or its agencies

Agencies to Contact	Chicago Commission on Human Relations	Cook County Commission on Human Rights	Illinois Department of Human Rights
Kinds of Relief Available	Make Whole Damages (such as out-of-pocket expenses and emotional distress damages) Punitive Damages Injunctive Relief (such as order to admit complainant to public accommodation) Fines to City Attorneys Fees and Costs for prevailing Complainant	Make Whole Damages (such as out-of-pocket expenses and emotional distress damages) Injunctive Relief (such as order to admit complainant to public accommodation) Fines to County Attorneys Fees and Costs for prevailing Complainant	Make Whole Damages (such as out-of-pocket expenses and emotional distress damages) Injunctive Relief (such as order to admit complainant to public accommodation) Attorneys Fees and Costs for prevailing Complainant
Agency Contact Information	Chicago Commission on Human Relations 740 N. Sedgwick Suite 400 Chicago, IL 60654 (312) 744-4111 (312) 744-1088 (TTY) (312) 744-1081 (FAX) cchrfilings@cityofchicago.org www.cityofchicago.org/humanrelations	Cook County Commission on Human Rights 69 W. Washington St. Suite 3040 Chicago, IL 60602 (312) 603-1100 (312) 603-1101 (TDD) (312) 603-9988 (FAX)	Illinois Dept. of Human Rights James R. Thompson Center 100 W. Randolph 10th Floor; Attn. Intake Unit Chicago, IL 60601 (312) 814-6200 (217) 785-5125 (TTY) (312) 814-6251 (FAX) www.illinois.gov/dhr
Office Hours	Filing Hours: Monday through Friday 9:00 - 5:00 (2 copies of all filings required) Intake Hours: Monday through Friday 9:00 - 3:00	Office Hours: Monday through Friday 8:30 – 4:30 Intake Hours: Monday through Friday 9:00-4:00	Office Hours: Monday through Friday 8:30 - 5:00 Intake Hours: Monday through Thursday 8:30 - 3:00
Other Forms of Discrimination Covered	Employment Housing Credit & Bonding Transactions	Employment Housing Credit Transactions County Facilities, Services, and Programs	Employment Housing Credit Transactions Sexual Harassment in Education

Joint Task Force Hearing

House Task Force on Sexual Discrimination and Harassment

Majority Leader Barbara Flynn Currie, Chairperson
Representative Sara Wojcicki Jimenez, Minority Spokesperson

Senate Sexual Discrimination and Harassment Awareness and Prevention Task Force

Senator Melinda Bush, Co-Chair
Senator Jil Tracy, Co-Chair

Tuesday, March 27, 2018

11:00 a.m., Room C600 – Michael A. Bilandic Building

AGENDA

Joint Task Force Hearing

House Task Force on Sexual Discrimination and Harassment

Majority Leader Barbara Flynn Currie, Chairperson
Representative Sara Wojcicki Jimenez, Minority Spokesperson

Senate Task Force on Sexual Discrimination and Harassment Awareness and Prevention

Senator Melinda Bush, Co-Chair
Senator Jil Tracy, Co-Chair

Tuesday, March 27, 2018
11:00 A.M., Room C600 - Michael A. Bilandic Building

I. Opening Remarks

Majority Leader Currie
Representative Jimenez
Senator Bush
Senator Tracy

II. Sexual Harassment Policy and Legislation in Other States

Jon Griffin, Program Principal, National Conference of State Legislatures

III. Federal Policy and Legislation on Sexual Harassment

Muslima Lewis, Senior Attorney Advisor, Equal Employment Opportunity Commission Office of Legal Counsel

Teresa James, Director of Administrative Dispute Resolution Program, Congressional Office of Compliance

Senate Task Force on Sexual Discrimination and Harassment Awareness and Prevention

Senator Melinda Bush, Co-Chair
Senator Jil Tracy, Co-Chair

Member List

President Cullerton's Appointees:

- Senator Omar Aquino
- Senator Scott M. Bennett
- Senator Melinda Bush
- Senator Bill Cunningham
- Julie Curry, Curry & Associates
- Felicia Davis, Olive-Harvey College
- Carrie Herschman, Choate Herschman Levison
- Senator Mattie Hunter
- Senator Toi W. Hutchinson
- Rikeesha Phelon, Phelon Strategies
- Polly Poskin, Illinois Coalition Against Domestic Violence
- Senator Heather Steans

Leader Brady's Appointees:

- Senator Pamela Althoff
- Senator John F. Curran
- Ahlam Jbara, Illinois Coalition for Immigrant and Refugee Rights
- Leslie Quade Kennedy, Odelson & Sterk
- Maureen Maffei, Ice Miller
- Senator Karen McConnaughay
- Julie Proscia, Smith Amundsen
- Senator Dale A. Righter
- Dr. Kathleen Robbins, Equality Illinois
- Anita Rodriguez, Assistant State's Attorney, Adams County
- Maria Rodriguez, Former Mayor of Long Grove
- Senator Jil Tracy

House Task Force on Sexual Discrimination and Harassment

Representative Barbara Flynn Currie, Chairperson
Representative Sara Wojcicki Jimenez, Republican Spokesperson

Member List

Speaker Madigan's Appointees:

- Representative Kelly M. Burke
- Representative Johnathan Carroll
- Representative Kelly M. Cassidy
- Representative Deb Conroy
- Representative Sara Feigenholtz
- Representative Laura Fine
- Representative Natalie Phelps Finnie
- Representative Mary E. Flowyers
- Representative Robyn Gabel
- Representative LaToya Greenwood
- Representative Will Guzzardi
- Representative Gregory Harris
- Representative Elizabeth Hernandez
- Representative Frances Ann Hurley
- Representative Stephanie A. Kifowit
- Representative Robert Martwick
- Representative Rita Mayfield
- Representative Carol Sente
- Representative Juliana Stratton
- Representative Katie Stuart
- Representative Litesa E. Wallace
- Representative Emanuel Chris Welch
- Representative Ann M. Williams
- Representative Michael J. Zalewski

Leader Durkin's Appointees:

- Representative Steven A. Andersson
- Representative Mark Batinick
- Representative Particia R. Bellock
- Representative Avery Bourne
- Representative Terri Bryant
- Representative Tim Butler
- Representative Norine K. Hammond
- Representative Michael P. McAuliffe
- Representative Tony McCombie
- Representative Margo McDermed
- Representative David S. Olsen
- Representative Lindsay Parkhurst
- Representative Nick Sauer
- Representative Allen Skillicorn
- Representative Barbara Wheeler
- Representative Christine Winger

Senate Resolution 1076
Creation and Mandate of the Senate Task Force on Sexual Discrimination and Harassment Awareness & Prevention

SENATE RESOLUTION

WHEREAS, In recent weeks more than 300 legislators, lobbyists, staffers, and policy-makers have signed an open letter acknowledging and condemning the culture of sexual harassment in Illinois politics and government; and

WHEREAS, The problem of sexual harassment extends far beyond government to limit women's professional and educational opportunities in virtually every arena, with recent reports of rampant sexual harassment in entertainment, the media, technology, academia, and more; and

WHEREAS, Sexual harassment imposes steep psychological, physical, and economic costs on victims, which have the effect of reducing women's economic opportunities and lifetime wages, driving women from the workplace, and discouraging women from public service; and

WHEREAS, Sexual harassment also imposes costs on the economy, businesses, and employers by causing decreased productivity, increased job turnover, reputational harm, and costly litigation; and

WHEREAS, Sexual harassment takes a toll not just on women but is also frequently directed toward men or can take the form

of harassment based on sexual orientation or gender identity; and

WHEREAS, Sexual harassment is too often combined with and exacerbated by harassment or discrimination based on race, ethnicity, religion, disability status, or age, and therefore requires an intersectional approach; and

WHEREAS, The Equal Employment Opportunity Commission has found that roughly three out of four people who experience harassment never report it because those who do report encounter disbelief, inaction, blame, or social or professional retaliation; and

WHEREAS, For too long Illinois has not provided victims of harassment with adequate recourse, allowing this culture of sexual harassment to go largely unchecked; and

WHEREAS, The members of the General Assembly recognize it is critical that this conversation continue in a productive and meaningful manner and that appropriate changes be made to maximize legal remedies and protections for those victimized by sexual discrimination and harassment; therefore, be it

RESOLVED, BY THE SENATE OF THE ONE HUNDREDTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, that there is hereby created

the Senate Task Force on Sexual Discrimination and Harassment Awareness and Prevention; and be it further

RESOLVED, That the Task Force shall conduct a comprehensive review of the legal and social consequences of sexual discrimination and harassment, in both the public and private sectors; and be it further

RESOLVED, That the Task Force shall study and make recommendations on combating sexual discrimination and harassment in Illinois, including in workplaces, in educational institutions, and in State and local government; and be it further

RESOLVED, That within 10 days after the adoption of this resolution, members of the Task Force shall be appointed as follows:

(1) five legislative members appointed by the President of the Senate, who shall reflect the gender, racial, and ethnic diversity of the caucus appointing them;

(2) five legislative members appointed by the Minority Leader of the Senate, who shall reflect the gender, racial, and ethnic diversity of the caucus appointing them;

(3) two members from a Statewide association representing women or working to advance civil rights, appointed by the President of the Senate;

(4) two members from a Statewide association representing women or working to advance civil rights, appointed by the Minority Leader of the Senate;

(5) five members appointed by the President of the Senate;

(6) five members appointed by the Minority Leader of the Senate; and be it further

RESOLVED, That 2 co-chairpersons, representing different political parties, shall be selected by the members of the Task Force; and be it further

RESOLVED, That meetings of the Task Force shall be held as necessary to complete the duties of the Task Force and that the Task Force shall hold its initial meeting no later than December 15, 2017; and be it further

RESOLVED, That the Task Force shall permit any interested member of the Senate or private citizen to participate in meetings and provide ideas, thoughts, and recommendations; and be it further

RESOLVED, that the Task Force shall work in conjunction with any task force created by the House of Representatives for a similar purpose, and that both entities shall aspire to produce legislation to address the concerns and issues

presented to the Task Force; and be it further

RESOLVED, That the legislative caucuses shall provide administrative and other support to the Task Force; and be it further

RESOLVED, That the members of the Task Force shall receive no compensation for serving; and be it further

RESOLVED, That the Task Force shall study and make recommendations regarding:

(1) best practices for preventing and responding to sexual discrimination and harassment;

(2) proposed legislation or rule-making that would improve the State's existing enforcement efforts to ensure that institutions effectively prevent and respond to sexual discrimination and harassment;

(3) increasing the transparency of the State's enforcement activities concerning sexual discrimination and harassment;

(4) evaluating the existing ethical, civil, and criminal penalties for sexual discrimination and harassment and determining whether they are sufficient and what changes should be made;

(5) broadening public awareness of how to report sexual discrimination and harassment and the remedies available

to victims;

(6) facilitating coordination among agencies engaged in addressing sexual discrimination and harassment;

(7) any other issue related to reducing the incidence of sexual discrimination and harassment or harassment in other forms and protecting the rights of victims; and be it further

RESOLVED, That the Task Force shall submit a report with comprehensive recommendations to the General Assembly no later than December 31, 2018, provided that the Task Force is encouraged to produce interim reports.

House Resolution 687
Creation and Mandate of the House Task Force on Sexual Discrimination and Harassment

HOUSE RESOLUTION

WHEREAS, There is currently a worldwide social and cultural campaign to raise awareness about sexual discrimination and harassment that has led both women and men to publicly report their experiences of widespread sexual discrimination and harassment; and

WHEREAS, The members of the General Assembly recognize it is critical to continue this conversation in a productive and meaningful manner and that legal remedies and protections for those victimized by sexual discrimination and harassment should be appropriately maximized; therefore, be it

RESOLVED, BY THE HOUSE OF REPRESENTATIVES OF THE ONE HUNDREDTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, that there is created the Task Force on Sexual Discrimination and Harassment; and be it further

RESOLVED, That that the Task Force shall conduct a comprehensive review of the legal and social consequences of sexual discrimination and harassment, in both the public and private sectors, and make recommendations to the General Assembly; and be it further

RESOLVED, That the Task Force shall, at a minimum, review

and produce recommendations concerning amendments to the legal definition of the terms "sexual discrimination" and "sexual harassment"; which behaviors should be legally actionable as sexual harassment; review and assess best practices to improve procedures for accepting sexual discrimination and harassment complaints, including methods to increase and improve reporting allegations of sexual harassment; the process and structure for reporting allegations to ethics officers, inspectors general, and others, and whether an independent third party should be assigned to handle complaints; necessary amendments to anti-retaliation and whistleblower protections for individuals making sexual discrimination or harassment complaints; the process for filing complaints with the Department of Human Rights; the process for filing civil complaints, including any applicable statute of limitations; legal remedies available to victims of sexual discrimination and harassment, including whether plaintiffs should be entitled to punitive damages; the need for a code of conduct and zero tolerance policies for units of government; the ability of complainants to seek independent counsel when reporting allegations; and the prevention of sexual discrimination and harassment in the public and private sector; and be it further

RESOLVED, That that the Task Force shall be comprised of members of the House of Representatives appointed by the

Speaker of the House of Representatives and House members appointed by the Minority Leader of the House of Representatives, with each appointing no more than 20 members, and the Chair appointed by the Speaker, and any action of the Task Force shall be approved by a majority of those voting on the question; and be it further

RESOLVED, That the Task Force shall work in conjunction with any task force created by the Senate for a similar purpose, and that both entities shall aspire to produce legislation to address the concerns and issues presented to the Task Force; and be it further

RESOLVED, That the Task Force shall make recommendations to the General Assembly in the form of legislation, as well as a report to the General Assembly no later than December 31, 2018, provided that the Task Force is encouraged to produce interim reports.

National Conference of State Legislatures

Recommendations Regarding Legislative Sexual Harassment & PowerPoint Presentation

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Deb Peters
Senator – District 9
South Dakota
President, NCSL

Chuck Truesdell
Fiscal Analyst
Office of Budget Review
Legislative Research Commission
Kentucky
Staff Chair, NCSL

William T. Pound
Executive Director

NCSL Recommendations Regarding Legislative Sexual Harassment Policies and Training

In October 2017, NCSL conducted a survey to learn more about legislative policies and training on sexual harassment. After reviewing the survey responses and recommendations by experts in the field—including general harassment guidelines promoted by the EEOC—NCSL offers the following benchmarks for creating a strong legislative sexual harassment policy.

- A clear definition of "sexual harassment."
- Examples of what behaviors are considered inappropriate in the workplace.
- A policy that applies to legislators and staff, as well as nonemployees, such as lobbyists and outside vendors.
- A diversity of contacts within the legislature to whom sexual harassment can be reported, allowing the complainant to bypass reporting to his or her direct supervisor.
- A clear statement prohibiting retaliation for the filing of any claim.
- A statement providing for confidentiality, to the extent possible, for all parties involved.
- Specific examples of potential discipline, if warranted.
- The possibility of involving parties outside the legislature to assist in the investigation, if it is warranted or requested.
- An appeal procedure.
- A statement informing the complainant that she or he can also file a complaint to the Equal Employment Opportunity Commission and/or the state's Human Rights Commission.

NCSL also recommends that an effective sexual harassment training program include the following elements:

- Training should be done in a classroom setting with a live trainer
- Training should be mandatory
- Training should include a summarization of the national laws on sexual harassment, as well as state- and legislature-specific policies
- The legislative HR director, or other individual(s) tasked with receiving sexual harassment complaints, should be present
- Training should be offered at new member or new employee orientations
- Leadership should be engaged in the training
- Training should incorporate case studies and examples of harassment, specifically highlighting situations unique to the legislature
- Annual training should be dynamic and vary by topics covered and in presentation style
- Trainers should ask attendees to fill out evaluations, to ensure the training is meeting their needs
- There should be separate training for legislative staff and membership

Contact: Jonathan Griffin, NCSL. Phone: 303-856-1529; Email: jonathan.griffin@ncsl.org

NATIONAL CONFERENCE of STATE LEGISLATURES

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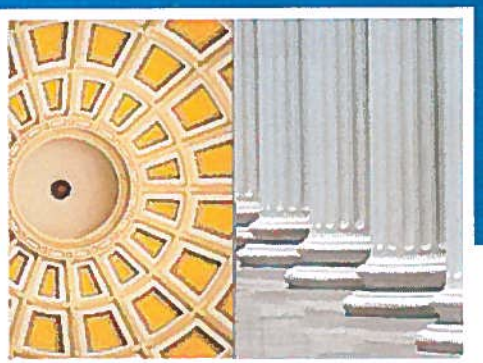


Sexual Harassment Policies and Legislation Among the States

March 27, 2018

Jonathan Griffin
NCSL's Center for Legislative Strengthening

Prior to 2018

- **NCSL produced a LegisBrief on Sexual Harassment Policies and Training in July 2017**
- **NCSL surveyed legislative offices on sexual harassment policies and training in Nov. 2017**
- **Illinois became the first state to pass legislation on sexual harassment in the legislature post-#metoo**

Results from Survey

- **We heard from 26 legislatures and 13 chambers, and roughly 30 policies**
- **The responses from the surveys, along with recommendations from experts in the field, informed NCSL's recommendations on policies and training**

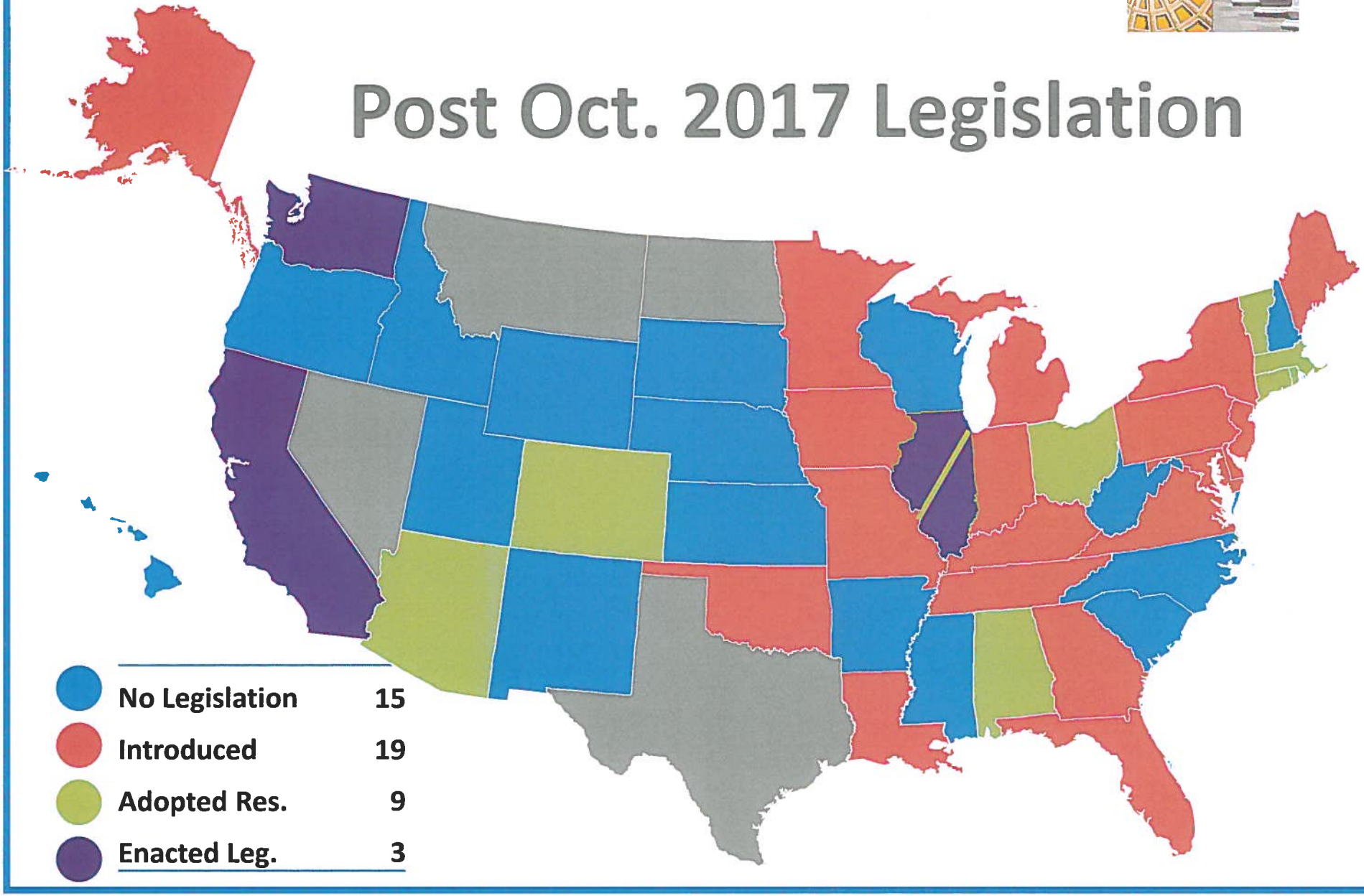
2018

- **11 chambers have created or changed their sexual harassment policies in 2018**
- **Most are minor refinements or attempts to bring clarity to the reporting process**
- **In addition, there is an unprecedented amount of legislation on the topic**

National Conference of State Legislatures

The Forum for America's Ideas

Post Oct. 2017 Legislation



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NCSL Resources on Sexual Harassment

- Policy and Training Recommendations
- Webinar
- LegisBrief
- Sexual Harassment Training

NCSL

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Questions?

Sexual Harassment Landing Page

http://www.ncsl.org/research/about-state-legislatures/sexual-harassment-in-the-legislature-resources.aspx

Contact Information

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Prepared Statement of Susan Tsui Grundmann

Executive Director,

Congressional Office of Compliance

Prepared Statement of Susan Tsui Grundmann,
Executive Director,
Congressional Office of Compliance

Mr. Chairman and Members of the Committee: On behalf of the Board of Directors and staff of the Congressional Office of Compliance ("OOC"), I thank you for this opportunity to participate in this Committee's comprehensive review of the Congressional Accountability Act ("CAA") and the protections that law offers legislative branch employees against harassment and discrimination in the congressional workplace.

More than thirty years ago, the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank v. Vinson* that workplace harassment was an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964. Twenty years ago, Congress enacted the CAA, which extends the protections of Title VII, as well as 12 other federal workplace statutes, to over 30,000 employees of the United States Congress and its associated offices and agencies, including the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Accessibility Services, and the OOC. Recent events, however, show us that sadly, we still have far to go to eliminate discrimination, harassment and retaliation from the nation's workplaces, including in the legislative branch. Workplace harassment on the basis of sex—as well as race, disability, age, ethnicity/national origin, color, and religion—remains a persistent problem.

I welcome the opportunity to provide this Committee with additional information about the CAA and the important role the OOC plays in educating the legislative branch on combatting workplace harassment and retaliation and providing victims a remedy when it occurs. I also appreciate the opportunity to discuss the Board's views on possible amendments to the CAA to make Capitol Hill a model workplace environment free from the effects of unlawful discrimination.

Overview

The OOC administers the CAA and performs the job of multiple agencies in the executive branch, including the Equal Employment Opportunity Commission ("EEOC"), the Department of Justice, the Department of Labor, and the Federal Labor Relations Authority. The OOC is an independent, impartial, nonpartisan office comprised of approximately 20 executive and professional staff and has a 5-member, part-time Board of Directors. Board members are appointed by unanimous consent of the majority and minority leadership of both the House of Representatives and the Senate. All of our current Board members are attorneys in private practice who were chosen for their expertise in employment and labor law.

Among other functions, the OOC is responsible for carrying out a program to educate and inform Members of Congress, employing offices, and legislative branch employees of their rights and responsibilities under employment laws made applicable to them through the CAA, adjudicating workplace disputes, and recommending to Congress changes to the CAA to advance the workplace rights of legislative branch employees. Thus, section 102(b) of the CAA tasks the Board of Directors to report to every Congress on: first, whether or to what degree provisions of federal law relating to employment and access to public services and accommodations are applicable to the legislative branch; and second, with respect to provisions not currently applicable, whether such provisions should be made applicable to the legislative branch.

Consideration of possible changes to the CAA, including its dispute resolution procedures, is also a critical component of this Committee's comprehensive review. As I discuss below, the Board strongly recommends that, in conducting its review, the Committee consider existing models under comparable statutes in the federal government when deciding what changes should be made to the dispute resolution procedures under the CAA.

The Board's Views on Possible Changes to the General Provisions and Scope of the CAA

Mandatory Anti-Discrimination, Anti-Harassment, and Anti-Retaliation Training for All Congressional Employees and Managers

The Board has consistently recommended in its past biennial section 102(b) reports that Congress mandate anti-discrimination, anti-harassment, and anti-retaliation training for all Members, officers, employees and staff of the Congress and the other employing offices in the legislative branch; and that it adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA. We commend the House and the Senate for their recent votes to require all Members, Officers, employees, including interns, detailees, and fellows, to complete an anti-harassment and anti-discrimination training program, as well as the House's vote to also require the posting of a statement advising employees of their rights and protections under the CAA. We remind this Committee, however, that the CAA applies across the legislative branch, and that these mandates do not extend beyond the two houses of Congress. We therefore recommend that any statutory change to the CAA include these broader mandates for the congressional workforce at large.

The CAA is a unique law and its processes and programs are tailored to the legislative branch workforce. The OOC has both the statutory mandate from Congress and the practical experience develop and deliver a comprehensive program of education under the CAA for the entire legislative branch community. Indeed, after years of

delivering in-person training, informational videos, and multimedia campaigns to combat sexual harassment, the OOC has seen a recent and notable jump in requests for our help: a triple-digit percentage increase in the number of in-person anti-sexual harassment training requests by offices; a triple-digit percentage spike in the number of staffers enrolling in online training modules; twice as many visits to the OOC's online information on how to report sexual harassment; and a significant increase in those subscribing to OOC social media channels and e-Alerts (12 percent) to receive updates on sexual harassment issues.

Mandatory training across the legislative branch on the CAA will provide an opportunity to prevent workplace problems from occurring in the first place. The OOC's current training program is not confined to the legal definition of workplace harassment, but further examines workplace conduct which, while not "legally actionable" in itself, may set the stage for unlawful harassment if left unchecked. Our training directly impacts behavior; congressional employees who understand their legal responsibilities will act more responsibly. A comprehensive training program continues to be one of the most effective investments employing offices in the legislative branch can make in preventing harassment and discrimination, reducing complaints and creating a more productive workforce.

Workplace harassment exacts a steep cost from those who suffer its mental, physical, and economic harm. The many legislative staffers who are entering the workforce for the first time are a particularly vulnerable population in particular need of education and awareness on their workplace rights. But workplace harassment can also impact the larger workplace through decreased productivity, increased turnover, and reputational harm. In short, mandatory training on the CAA will benefit the entire legislative branch workplace.

Mandatory training will also greatly benefit managers, who will not only obtain vital information on their workplace responsibilities under the CAA, but will also learn about workplace "best practices" and how to effectively handle discrimination and retaliation issues. Employing offices must understand the importance of curtailing objectionable behavior at the outset. Training can and does accomplish this goal. Leadership and accountability in this regard are critical. Employing offices must dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information—even before such harassment reaches a legally-actionable level.

It is also essential that employing offices in the legislative branch adopt and maintain comprehensive anti-harassment and anti-retaliation policies. We stand ready to work with employing offices through employment counsel to ensure that such policies, including clear instruction on how to complain of harassment and how to report observed

harassment, are communicated effectively to all employees. Employing offices must also be alert to any possibility of retaliation against an employee who reports harassment and must immediately take steps to prevent it. At all levels, across all positions, employing offices must have systems in place that hold employees accountable to these standards. Accountability means that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment are rewarded for doing that job well (or are penalized for failing to do so).

We need to have these conversations in offices all over Capitol Hill. We need to talk with managers about being vigilant, about nipping potential problems in the bud, about taking the time to investigate reports of offensive behavior, and about taking corrective action. It is a new day for combating sexual harassment. The OOC looks forward to working with employees, employing offices, and employment counsel to accomplish this important goal.

Although both the House and Senate have recently mandated discrimination and sexual harassment training, such training remains voluntary in other employing offices throughout the legislative branch. Much of the training done directly by employing offices fails to even mention the OOC as a resource for information or as the agency charged with resolving workplace disputes. To ensure universal awareness of workplace rights and responsibilities, the OOC recommends mandatory training on the CAA for every new employee and biennial update training for all employees and supervisory personnel. Mandatory training for all congressional employees and managers would go far in creating a model workplace free from harassment, discrimination and retaliation.

Congress also must devote sufficient resources to harassment prevention efforts to ensure that such efforts are effective, and to underscore its commitment to creating a workplace free of harassment. To meet this mandate, additional resources will be required, including additional trainers, a technical specialist to provide IT expertise and support, and an administrator to manage the increased demand in training for the 30,000 employees of the legislative branch.

Require Notice-Posting of Congressional Workplace Rights in All Employing Offices

Workplace harassment too often goes unreported. Common responses by those who experience sex-based harassment are to avoid the harasser, deny or downplay the gravity of the situation, attempt to ignore, forget, or endure the behavior, or simply leave the workplace for another job. According to the EEOC, the least common response to harassment is to take some formal action—either to report the harassment internally or to file a formal legal complaint. The Board has long been concerned that employees in the

legislative branch may also be deterred from taking formal action simply due to a lack of awareness of their rights under the CAA.

The Board has therefore consistently recommended in its section 102(b) reports that Congress adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA. Although it commends the House for adopting resolutions requiring the posting of a notice advising employees of their rights and protections under the CAA, the Board recommends that the CAA be amended to require that all employing offices throughout the legislative branch post this notice of employee rights. Through permanent postings, current and new employees remain informed about their rights regardless of their location, employee turnover, or other changes in the workplace. The notices also serve as a reminder to employers about their workplace responsibilities and the legal ramifications of violating the law.

Although the CAA does require the OOC to distribute informational material "in a manner suitable for posting," it does not mandate the actual posting of the notice. Exemption from notice-posting limits legislative branch employees' access to a key source of information about their rights and remedies. Accordingly, the Board continues to recommend that Congress amend the CAA to adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA.

Name Change

The Board agrees with proposals to change the name of the OOC. The name "Office of Compliance" provides legislative branch employees no indication that it exists to protect their workplace rights through its programs of dispute resolution, education, and enforcement. As the Board advised Congress in 2014, changing the name of the office to "Office of Congressional Workplace Rights" would better reflect our mission, raise our public profile in assistance of our mandate to educate the legislative branch, and make it easier for employees to identify us for their needs.

Extending Coverage to Interns, Fellows, and Detailees

The Board supports proposals to extend the coverage and protections of the anti-discrimination, anti-harassment, and anti-retaliation provisions of the CAA to all staff, including interns, fellows and detailees working in any employing office in the legislative branch regardless of how or whether they are paid. Any amendment to the Act should ensure that these individuals are also covered by the anti-retaliation provision of section 207 of the Act – protections which are not reflected in pending House bills. (Unless otherwise noted, references in this statement to "employees" should be understood to refer to these unpaid individuals.)

Climate Survey

The Board supports the use of climate surveys to ensure that the congressional workforce is free of illegal harassment and discrimination. Because harassment and retaliation in the workplace is often underreported, official statistics underrepresent the extent of the problem. Many employing offices are working to address the problem of sexual harassment, but they lack the assessment tools to understand the scope or nature of the problem. Conducting climate surveys is a best-practice response to fill this gap in knowledge. These surveys can serve as a useful tool in assessing both the general knowledge of CAA workplace rights amongst legislative branch employees and the prevalence of discriminatory or harassing conduct in the workplace.

Climate surveys, however, must be carefully and professionally designed and implemented to be effective. The OOC currently does not have the staff, resources, or expertise to conduct such surveys. Although the OOC is certainly willing to provide its assistance should these surveys be mandated, such an undertaking by the Office would not be possible unless cooperation with the survey process is also mandated. In addition, the OOC would need to be provided with sufficient resources to contract with those who have the expertise to perform these tasks.

Whistleblower Protections

The Board has recommended in its section 102(b) reports, and continues to recommend, that Congress provide whistleblower reprisal protections to legislative branch employees comparable to that provided to executive branch employees under 5 U.S.C. 2302(b)(8), and 5 U.S.C. 1221. If the OOC is to be granted investigatory and prosecutorial authority over discrimination complaints (see below), the Board recommends that the Office also be granted investigatory and prosecutorial authority over whistleblower reprisal complaints, by incorporating into the CAA the authority granted to the Office of Special Counsel ("OSC"), which investigates and prosecutes claims of whistleblower reprisal in the executive branch.

The Board's Views on Possible Changes to the Current Dispute Resolution Procedures under the CAA

As stated above, the Board strongly recommends that the Committee consider existing models under comparable statutes in the federal government in its review of potential change to the dispute resolution procedures under the CAA. To assist the Committee in this important work, I will briefly summarize our current dispute resolution procedures below and convey the Board's considered views on suggested changes to them.

Current Procedures Under the CAA

Like most civil rights statutes, the CAA contains an administrative exhaustion requirement. Prior to filing a complaint with the OOC pursuant to section 405 of the Act or in the U.S. District Court pursuant to section 408, subchapter IV of the CAA currently requires that an employee satisfy two jurisdictional prerequisites: mandatory counseling and mandatory mediation. First, the employee must request counseling within 180 days of the date of the alleged violation of our statute. "Counseling" is a statutory term that equates to intake. The CAA also provides that "[t]he period for counseling shall be 30 days unless the employee and the Office agree to reduce the period." Therefore, an employee can request to shorten the 30-day counseling period and is advised by our Office of that option. An employee may also waive confidentiality during the counseling period to permit the OOC to contact the employing office to seek an immediate solution to the employee's concerns, but this is strictly up to the employee.

If a claim is not resolved during the counseling phase and the employee wishes to pursue the matter, the CAA currently requires the employee to file a request for mediation with the OOC. When a case proceeds to mediation, the employing office is notified about the claim and the parties attempt to settle the matter with the assistance of a trained neutral mediator appointed by the OOC. The CAA specifies that the mediation period "shall be 30 days," which may be extended only upon the joint request of the parties.

The CAA currently does not grant the OOC General Counsel the authority to investigate claims alleging violations of the laws applied by subchapter II, part A of the Act, including claims of employment discrimination under Title VII of the Civil Rights Act of 1964. (See discussion below.) Therefore, if the parties fail to resolve their dispute in mediation, a covered employee may elect to proceed directly to the third step in the process, either by filing an administrative complaint with the OOC, in which case the complaint would be decided by an OOC Hearing Officer in a confidential setting, or by filing a lawsuit in a U.S. District Court, in which case the proceedings would be a matter of public record. By statute, this election—which is the employee's alone—must occur not later than 90 days, but not sooner than 30 days, after the end of the period of mediation. This statutory timing requirement creates a 30-day period—sometimes referred to as a "cooling off period"—before the employee can proceed.

A party dissatisfied with the decision of the Hearing Officer may file a petition for review with the OOC Board of Directors, and any decision of the Board may be appealed to the U.S. Court of Appeals for the Federal Circuit. If, instead of filing a request for an administrative hearing, the employee files a civil suit in Federal district court, an appeal of that decision would proceed under the rules of the appropriate U.S. Court of Appeals.

The Board's Views on Possible Changes to the Dispute Resolution Procedures under the CAA

Counseling and Mediation

Part of the Committee's review entails consideration of proposals that the CAA be amended, including proposals to eliminate counseling and mediation as jurisdictional prerequisites and instead make them optional. Other suggestions concern the confidential nature of those proceedings. To assist the Committee, the Board offers the following observations and recommendations:

The OOC Board is mindful of concerns that the CAA's mandatory counseling procedure may serve to delay the availability of statutory relief or to unduly complicate the administrative process. We nonetheless believe that voluntary OOC counseling can provide important benefits to many employees seeking relief through our office. OOC counselors often provide covered employees with their first opportunity to discuss their workplace concerns and to learn about their statutory protections under the CAA. Although we believe that counseling need not remain mandatory under the CAA, nor a jurisdictional requirement, we recommend against any amendment of the CAA that would eliminate the availability of counseling for those employees who voluntarily seek such assistance from our office.

The EEOC provides a valuable model. Although counseling is not mandatory under Title VII, the EEOC nonetheless offers analogous optional assistance to employees who want or need it. Thus, the EEOC's public website advises potential claimants that discussing their employment discrimination concerns with an EEOC staff member in an interview is the best way to assess how to address concerns and to determine whether filing a charge of discrimination is the appropriate path. Similarly, the Board believes that OOC counseling provides employees a valuable opportunity to discuss workplace concerns with an OOC staff member, to learn about their statutory rights and protections, and to gain assistance in processing their claims.

Under the CAA, the 180-day filing deadline is tolled by filing a request for counseling, not a formal complaint. If the CAA were amended to make counseling optional such that employee were not required to make a request for counseling, the CAA must be further amended to provide that the time limit for filing could also be tolled by filing a document similar to an EEOC charge. The EEOC requires that a claimant initiate the process by filing a formal charge. A charge of discrimination is a signed statement by an employee asserting that an employer engaged in employment discrimination. It is the formal request for the EEOC to take remedial action. An EEOC charge must be filed within the statutorily prescribed limit. A similar procedure could be incorporated into the CAA.

Further, the CAA, as amended, should expressly state that filing such a charging document is mandatory. A charging document facilitates framing the issues for subsequent proceedings, such as mediation, hearing, or investigation, should Congress provide the OOC General Counsel with investigative authority. See discussion below.

Moreover, requiring the filing of such a document with the OOC furthers the policy goal of parity between the laws made applicable to legislative branch employees through the CAA and the laws that apply in the private sector and executive branch. For example, in the private sector, an employee is required by statute to exhaust administrative remedies by filing a charge with the EEOC before filing a lawsuit under federal law alleging discrimination or retaliation. Similarly, under the Whistleblower Protection Act, individuals who allege that they experienced retaliation because of whistleblowing may seek corrective action in appeals to the Merit Systems Protection Board ("MSPB") only after first filing a complaint seeking corrective action from OSC. The MSPB appeal may be filed only after OSC closes the matter or 120 days after the complaint is filed with OSC, if OSC has not notified the complainant that it will seek corrective action. Administrative exhaustion also can facilitate voluntary resolution of disputes by the parties themselves, and it can assist in identifying those cases lacking in merit, for example those where there is no jurisdiction under the CAA.

The Board also notes that under the CAA, only claims that are raised in counseling can be raised in an OOC administrative hearing or in a lawsuit in U.S. District Court. It can be difficult to determine which claims were raised in counseling because of the confidential nature of the counseling process, discussed below. The CAA could be amended to permit the OOC counselor to assist employees in the technical aspects of drafting the employees' charging document, minimizing this problem in many cases. Granting OOC counselors this authority would also facilitate framing the legal issues and informing the Office of the matters to be investigated, should Congress provide the OOC General Counsel with investigative authority, as discussed below. Finally, granting OOC counselors this enhanced statutory role could serve to assist those employees who are unrepresented by legal counsel and who seek guidance and support in pursuing their legal claims.

The Board believes that the statutory term, "counseling," has led to some public confusion on the nature of the OOC counseling process. For example, some have misunderstood the term "counseling" to entail a form of employee "therapy,"—thereby prompting the question why the CAA would require "counseling" for the victim of sexual harassment rather than for the harasser. "Counseling" in fact entails "providing the employee with all relevant information with respect to the[ir] rights" including information concerning the applicable provisions of the CAA. Therefore, the Board believes that consideration should be given to amending the CAA to refer to "claims counseling" or "statutory rights counseling."

As with counseling, the Board supports the elimination of mediation as a mandatory jurisdictional prerequisite to asserting claims under the CAA. It nonetheless recommends that mediation be maintained as a valuable option available to those parties who mutually seek to settle their dispute. Again, the EEOC model provides useful guidance. After the EEOC notifies the employer of the filing of a formal charge, it offers eligible parties the option to participate in mediation. Both parties must agree to mediation, and unlike the CAA, the voluntary mediation process takes place *after* the administrative complaint, i.e., the charge, has been filed. A mediator does not impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution. Resolving cases during mediation can save the parties from burdensome litigation, which can be expensive, time consuming, and a drain on resources and workplace productivity. Mediation also gives the parties an opportunity to explore resolving the dispute themselves without having a result imposed upon them. OOC mediators are highly skilled professionals who have the sensitivity, expertise and flexibility to customize the mediation process to meet the concerns of the parties. The OOC seeks to ensure that mediation proceedings are conducted in a manner that is respectful and sensitive to the concerns of the parties.

The effectiveness of mediation as a tool to resolve workplace disputes cannot be understated. Indeed, according to the EEOC, an independent survey showed that 96% of all respondents and 91% of all charging parties who used the EEOC mediation process would use it again if offered. Similarly, the OOC's experience over many years has been that a large percentage of controversies were successfully resolved without formal adversarial proceedings, due in large part to its mediation processes.

The Board is nonetheless aware of concerns that employees may find the mediation process intimidating—especially those who are legally unrepresented but who face an employing office represented by legal counsel. The Board also recognizes that mediation is most successful when both parties feel comfortable and adequately supported in the process. If the Committee determines that unrepresented employees would benefit from the presence of an advocate or ombudsman in a CAA mediation proceeding, the Board recommends that consideration be given to utilizing the OOC counselor or an employee from the OOC General Counsel's office to perform that role. In considering this option, the Committee should understand the protections already built into the OOC mediation process. Specifically, the CAA provides that mediation "shall involve meetings with the parties separately or jointly." As with counseling, an employee may participate in mediation over the telephone, or by similar means, and the employee may be represented by a representative in the employee's absence. Contrary to some media accounts, there is no requirement that the employee be in the same room as the accused during mediation.

Confidentiality Concerns

The Board is aware of suggestions that the confidential nature of the counseling and mediation process be reconsidered. As to the confidential nature of the counseling process, the Board believes that no changes are required. Although counseling between the employee and the OOC is strictly confidential, this means that the employing office is not notified by the OOC that the employee has filed a request for counseling, and counseling between the employee and the OOC is strictly confidential. Thus, the confidentiality obligation is on the OOC, not the employee. An employee remains free to waive the confidentiality requirement in counseling, to permit the OOC to contact the employing office in an attempt to resolve the dispute. The employee also remains free to speak publicly about the underlying employment concern, and about the fact that he or she has filed a claim with our Office. In short, the confidential nature of the counseling process is intended to provide employees with the ability to contact the CAA regarding their statutory rights knowing that we the OOC will not disclose that contact to the employing office or anyone else.

The Board is also of the view that the limited confidentiality requirements associated with the mediation process serve important policy goals, are consistent with mediation models in the private and executive branch sectors, and should be maintained. At the outset of the mediation process, the parties sign an agreement to keep confidential all communications, statements, and documents that are prepared for the mediation. This confidentiality obligation concerns materials *prepared for the mediation process.* It does not prevent an employee from discussing underlying facts or allegations with others. The confidentiality obligation concerning materials prepared specifically for the mediation process encourages the parties to present their positions freely and candidly, which promotes and enhances the mediation process. The concept that information disclosed during mediation is confidential is an essential part of the process and is widely acknowledged. Indeed, under the EEOC model, all parties to voluntary mediation are also required to sign an agreement of confidentiality stating that information disclosed during mediation will not be revealed to anyone, including other EEOC investigative or legal staff.

Finally, with respect to the anti-discrimination and anti-harassment provisions of the CAA, the OOC was created to provide legislative branch employees with full, fair, and confidential proceedings to resolve their workplace disputes. These confidential proceedings are offered to employees as an alternative to the public legal proceedings of a United States courtroom. Many employees have chosen the private and confidential proceedings offered by the OOC precisely because the proceedings are private and confidential. Consequently, care must be taken before considering any proposal that would eliminate or weaken the confidentiality protections of the CAA, as such action may have the unintended effect of discouraging employees from reporting illegal conduct.

Settlement Agreements

The Board is aware of many articulated concerns regarding the confidential nature of certain settlement agreements regarding claims brought under the CAA. These are critical issues for the Committee to consider.

Under the CAA, it is for the parties to decide whether and how to settle a claim, and whether any settlement agreement should be confidential. Currently, the only statutory requirement for settlement agreements in the CAA is that they be in writing. The OOC does not have standardized language that parties are required to include in their settlement agreements. The OOC certainly does not require parties to include nondisclosure or confidentiality provisions in those agreements. The contents of settlement agreements—including any provisions governing disclosure—are solely determined by the parties and their representatives.

Some claimants may desire confidentiality because it protects them from unwanted publicity, whereas others may not because it could impede their ability to speak out against unlawful discrimination. Under no circumstances, however, should a confidentiality agreement be imposed on someone who does not want it. The Board stresses that, even if the parties agree to include a nondisclosure provision in their settlement agreement, that provision would be enforceable only to the extent that it is lawful and otherwise consistent with public policy. The Board is of the view, consistent with the EEOC, that a nondisclosure clause in a settlement agreement (as well as a non-disparagement agreement) cannot be interpreted or enforced to restrict an employee's ability to disclose information or communicate with relevant regulatory agencies, or to cooperate fully with such agencies in any investigation.

Finally, the CAA provides that settlement agreements shall not become effective unless they are approved by OOC Executive Director. Because the Act contains no substantive standards for approval, the OOC Executive Director's role in this process is largely ministerial. If Congress desires that the Executive Director conduct a more substantive review of settlement agreements as part of the approval process, the CAA would have to be amended to set forth substantive standards for review.

Amending the Complaint

We ask the Committee to consider reforming the CAA to allow for the amendment of employee complaints in a manner similar to that available to employees in the private sector and in the executive branch. If new events take place after an employee files an EEOC charge that the employee believes are discriminatory, the EEOC can add these new events to the initial charge by amending it. The EEOC then sends the amended charge to the employer and investigates the new events along with the rest.

The CAA does not currently provide for amending complaints in such a manner. If new events take place after an employee files a request for counseling with the OOC that she believes are unlawful—including alleged retaliation for filing the initial claim—she must file a new request for counseling, complete the mandatory counseling and mediation process again before filing a second formal complaint, and potentially consolidate the two complaints if the first complaint remains pending. The Board is of the view that the CAA should be amended to simplify this process by permitting the amendment of pending complaints to relate back to the initial filing in a manner similar to the process used by the EEOC.

Investigative and Prosecutorial Authority

Currently, the CAA only grants the OOC General Counsel the authority to investigate claims alleging violations of the Occupational Safety and Health Act of 1970, the Federal Service Labor Management Relations Statute, and the public access provisions of the Americans with Disabilities Act ("ADA"). The CAA does not authorize the OOC General Counsel to investigate claims concerning the laws applied by subchapter II, part A of the Act, including claims of employment discrimination under Title VII of the Civil Rights Act of 1964 or the ADA; the Rehabilitation Act of 1973; the Family and Medical Leave Act ("FMLA"); the Fair Labor Standards Act; the Age Discrimination in Employment Act; the Worker Adjustment and Retraining Notification Act; the Employee Polygraph Protection Act; and veterans' employment and reemployment rights under chapter 43 of title 38 of the U.S. Code.

Unlike the OOC, when a private sector or executive branch charge is filed, the EEOC/OSC has statutory authority to investigate whether there is reasonable cause to believe discrimination occurred. As part of its investigation, the EEOC asks the employer to provide a written answer to the charge, called a Position Statement. It may also ask the employer to answer questions about the claims in the charge, interview witnesses and ask for documents. If an employer refuses to cooperate with an EEOC investigation, the EEOC can issue an administrative subpoena to obtain documents or testimony or to gain access to facilities.

The Board supports suggestions to grant the OOC General Counsel similar investigative authority. One suggested approach would be to grant the General Counsel investigatory authority mirroring that of the equivalent executive branch agencies – i.e., the EEOC for discrimination complaints and the OSC for whistleblower reprisal complaints. As discussed above, the mechanism for doing this already exists in the CAA: the General Counsel is granted selected parts of the authority of the Federal Labor Relations Authority for labor-management issues (CAA section 220(c)(2)) and of the Secretary of Labor for OSH issues (CAA section 215(c)(1), (c)(2), and (e)(1)). Amending the CAA in this manner with regard to workplace claims of discrimination, harassment and retaliation under the laws applied by subchapter II, part A of the CAA

would best achieve the Act's policy goal of making the legislative branch subject to the equivalent workplace laws and enforcement mechanisms as the executive branch and the private sector. Further, the Office would benefit from the body of law and expertise already developed by the EEOC and OSC in conducting its investigations.

Any legislation granting the OOC General Counsel investigatory authority should also specify that the Office has the ability to file a complaint if the General Counsel determines that violations have occurred, just as the CAA does with the Occupational Safety and Health Act and Federal Service Labor Management Relations Statute. Such legislation should also include administrative subpoena authority for dealing with employing offices or other parties who refuse to cooperate with the General Counsel's investigations. Empowering the OOC General Counsel to prosecute complaints of discrimination and harassment would address many recently expressed concerns regarding both the intimidation and the litigation challenges faced by employees seeking relief under the current statutory framework —especially those without the resources to retain legal counsel.

Several other important issues must be addressed. First, would the General Counsel's investigation be mandatory or optional on the part of the complaining party? Again, executive branch models should be considered. If, at the close of an EEOC investigation, it is not able to determine that the law was violated, the EEOC provides the complainant with a Notice of Right to Sue, which gives the complainant permission to file a lawsuit in court. However, complainants may also request a Notice of Right to Sue from the EEOC if they wish to file a lawsuit in court before the investigation is completed, which effectively makes the EEOC investigation optional. Other models in the federal government require administrative exhaustion. The OSC process for investigating claims of whistleblower reprisal, for example, requires a complainant to allow the agency a specified period of time to investigate a complaint and to issue a "closure letter" before the complainant has the right to independently litigate the case.

Second, if the employee elects an investigation and the investigation determines the law may have been violated, should the OOC General Counsel try to reach a voluntary settlement with the employing office, as the EEOC would with an employer in the private sector, or as the OSC would with a federal agency in investigating a whistleblower reprisal claim? Allowing the General Counsel to play this representative role on behalf of a covered employee may meet some of the concerns explored above regarding employee discomfort in the mediation process.

If a settlement is not reached, should the OOC General Counsel have the discretion to determine whether or not to file a formal complaint on the employee's behalf, similar to the discretion granted to the EEOC? Many, but not all of these details can be addressed in the regulatory process, which can take into consideration differences from the equivalent executive branch regulations as needed.

Investigating and Prosecuting Claims of Retaliation under the CAA

The Board has also recommended to Congress in its biennial section 102(b) reports that the Office of General Counsel be granted enforcement authority with respect to section 207, the anti-retaliation provision of the CAA, because of the strong institutional interests in protecting employees against intimidation or reprisal for the exercise of their statutory rights or for participation in the CAA's processes. Investigation and prosecution by the Office of General Counsel would more effectively vindicate those rights, dispel the chilling effect that intimidation and reprisal create, and protect the integrity of the Act and its processes. Enforcement authority with respect to intimidation or reprisal is provided to the agencies that administer and enforce the CAA laws in the private sector. In contrast, under the CAA, the rights and protections provided by section 207 are vindicated only if the employee, after counseling and mediation, pursues his or her claim before a hearing officer or in district court.

Experience in the administration and enforcement of the CAA argues that the Office should be granted comparable authority to that exercised by the executive branch agencies that implement the CAA laws in the private sector. Covered employees who have sought information from the Office respecting their substantive rights under the Act and the processes available for vindicating these rights have expressed concern about their exposure in coming forward to bring a claim, as well as a reluctance and an inability to shoulder the entire litigation burden without the support of agency investigation or prosecution. Moreover, employees who have already brought their original dispute to the counseling and mediation processes of the Office and then perceive a reprisal for that action may be more reluctant to use once again the very processes that led to the claimed reprisal.

Whatever the reasons a particular employee does not bring a claim of intimidation or reprisal, such unresolved claims threaten to undermine the efficacy of the CAA. Particularly detrimental is the chilling effect on other employees who may wish to bring a claim or who are potential witnesses in other actions under the CAA. Without effective enforcement against intimidation and reprisal, the promise of the CAA that congressional employees will have the same civil rights and social legislation that ensure fair treatment of workers in the private sector and the executive branch is rendered illusory. Therefore, in order to preserve confidence in the Act and to avoid discouraging legislative branch employees from exercising their rights or supporting others who do, the Board recommends that Congress grant the Office the authority to investigate and prosecute allegations of intimidation or reprisal as they would be investigated and prosecuted in the private sector and the executive branch by the implementing agency.

Under any circumstances, Congress would have to devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Thus, the OOC would

need significant additional resources, including several more FTEs, if investigatory authority were granted.

Eliminating the "Cooling Off" Period

As discussed above, the CAA requires that employees not pursue a formal administrative complaint with the OOC or a lawsuit in a U.S. District Court until not later than 90 days, but not sooner than 30 days, after the end of the period of mediation. This statutory timing requirement creates a 30-day period—sometimes referred to as a "cooling off period"—before the employee can proceed. The Board recommends that the CAA be amended to eliminate this period and instead provide that the employee may proceed with an administrative or judicial complaint any time within 90 days of the issuance of the equivalent of a "right to sue" notice, as discussed above. That notice would be issued to the employee at the conclusion of voluntary counseling, voluntary mediation, the investigation, or at the request of the employee, as the case may be.

Other Recommendations for Improvements to the CAA

Library of Congress

Currently, only certain provisions of the CAA apply to employees of the Library of Congress ("LOC"). The Board supports the proposal contained in the current Senate legislative branch appropriations bill that would amend the CAA to include the LOC within the definition of "employing office," thereby extending CAA protections to LOC employees for most purposes.

Adopt Recordkeeping Requirements under Federal Workplace Rights Laws

The Board, in several section 102(b) reports, has recommended and the Board continues to recommend that Congress adopt all recordkeeping requirements under Federal workplace rights laws, including Title VII. Although some employing offices in the legislative branch keep personnel records, there are no legal requirements under the CAA to do so.

Most federal workplace rights statutes that apply to private and public sector employers require the employer to retain personnel records in a certain manner and for a certain period of time. Title VII requires an employer to maintain certain personnel records, although no particular form of retention is specified. All personnel and employment records made or kept by an employer, including applications and records pertaining to hiring, promotion, demotion, transfer, layoff or termination, pay rates and other compensation terms, and training must be retained for 1 year from the date of making the record or the personnel action involved, whichever is later. Title VII further

requires that once a discrimination claim is filed, all personnel records relevant to the claim must be retained until final disposition of the charge or action.

Personnel records may be essential for congressional employees to effectively assert their rights under the CAA. Such records may also be critical evidence for employers to demonstrate that no violations of workplace rights laws occurred. Accordingly, the Board continues to recommend that Congress adopt all recordkeeping requirements under Federal workplace rights laws, including Title VII.

Approve the Board's Pending Regulations

In an effort to bring accountability to itself and its agencies, Congress passed the CAA, establishing the OOC to, among other roles, promulgate regulations implementing the CAA to keep Congress current and accountable to the workplace laws that apply to private and public employers. The Board is required to amend its regulations to achieve parity, unless there is good cause shown to deviate from the private sector or executive branch regulations. The Board recommended in its 2016 section 102(b) Report to the 115th Congress that it approve its pending regulations that would implement the FMLA, ADA Titles II and III, and USERRA in the legislative branch.

Apply the Wounded Warrior Federal Leave Act of 2015 to the Legislative Branch

In 2015, the 114th Congress unanimously voted to enact the Wounded Warrior Federal Leave Act. The law affords wounded warriors the flexibility to receive medical care as they transition to serving the nation in a new capacity. Specifically, new federal employees, who are also disabled veterans with a 30% or more disability, may receive 104 hours of "wounded warrior leave" during their first year in the federal workforce so that they may seek medical treatment for their service-connected disabilities without being forced to take unpaid leave or forego their medical appointments. The Act amends title 5 of the United States Code and was reportedly passed as a way to show gratitude and deep appreciation for the hardship and sacrifices of veterans and, in particular wounded warriors, in service to the United States. In its 2016 section 102(b) Report, the Board recommended the Congress extend the benefits of that Act to the legislative branch with enforcement and implementation under the provisions of the CAA.

Protect Employees Who Serve on Jury Duty (28 U.S.C. § 1875)

Section 1875 provides that no employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States. This section currently does not cover legislative branch employment. For the reasons set forth in the 1996, 1998, 2000 and 2006 section 102(b) reports, the

Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the Legislative Branch.

Protect Employees and Applicants Who Are Or Have Been In Bankruptcy (11 U.S.C. § 525)

Section 525(a) provides that "a governmental unit" may not deny employment to, terminate the employment of, or discriminate with respect to employment against, a person because that person is or has been a debtor under the bankruptcy statutes. This provision currently does not apply to the legislative branch. For the reasons stated in the 1996, 1998, 2000 and 2006 section 102(b) reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

Prohibit Discharge of Employees Who are or have been Subject to Garnishment (15 U.S.C. § 1674(A))

Section 1674(a) prohibits discharge of any employee because his or her earnings "have been subject to garnishment for any one indebtedness." This section is limited to private employers, so it currently has no application to the legislative branch. For the reasons set forth in the 1996, 1998, 2000 and 2006 section 102(b) reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

Thank you for soliciting our views on these most important matters. The OOC stands ready to work with this Committee to ensure a workplace for legislative branch employees that is free from unlawful harassment, discrimination, and retaliation.

Prepared Statement of Barbara Childs Wallace

Chair, Board of Directors,

Congressional Office of Compliance

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Mr. Chairman and Members of the Committee: On behalf of the Board of Directors and staff of the Congressional Office of Compliance ("OOC"), I thank you for this opportunity to participate in this Committee's review of existing training, policies, and mechanisms in place to guard against, report, and seek remedy for sexual harassment in the U.S. House of Representatives.

In the last few weeks, there have been several media reports that reflect a misunderstanding of the process for legislative branch employees to bring a complaint of discrimination, harassment, or retaliation before the OOC. In particular, the process has been described as cumbersome, lengthy, and one-sided. I welcome this opportunity to clarify the OOC's procedures, explain how they work in practice, and discuss the recommendations that the Board has made to Congress over the years to make them even more effective. As I discuss below, the real problem is that many employing offices are insufficiently aware of their obligations under the Congressional Accountability Act ("CAA") and many employees are unaware of their rights under the CAA, including the right to bring their complaints to the OOC.

Overview

The CAA, enacted more than 20 years ago with nearly unanimous approval, protects over 30,000 employees of the United States Congress and its associated offices and agencies, including the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Accessibility Services, and the OOC. The CAA extends to employees of the legislative branch the protections of Title VII of the Civil Rights Act of 1964, as well as 12 other federal workplace statutes. Congress created the OOC to do the job of multiple agencies in the executive branch, including the Equal Employment Opportunity Commission, the Department of Justice, the Department of Labor, and the Federal Labor Relations Authority.

The OOC is composed of approximately 20 executive and professional staff and has a 5-member, non-partisan Board of Directors. Board members are appointed by unanimous consent of the majority and minority leadership of both the House of Representatives and the Senate, and they are chosen for their expertise in employment and labor law.

Among other functions, the OOC is responsible for adjudicating workplace disputes; carrying out a program to educate and inform Members of Congress, employing

offices, and legislative branch employees of their rights and responsibilities under employment laws made applicable to them through the CAA; and recommending to Congress changes to the CAA to advance the workplace rights of legislative branch employees. This Committee's important work in reviewing the policies and mechanisms in place to guard against, report, and remedy sexual harassment must begin with a clear understanding of these functions.

Dispute Resolution Procedures under the CAA

Subchapter IV of the CAA sets forth a 3-step process that requires counseling and mediation before an employee may file a complaint seeking administrative or judicial relief. Prior to filing a complaint with the OOC pursuant to section 405 of the Act or in the U.S. District Court pursuant to section 408, an employee must do 3 things:

First, the employee must request counseling within 180 days of the date of the alleged violation of a law made applicable by the CAA. "Counseling" is a statutory term that equates to intake. Although the OOC intake counselor does not provide the employee with legal advice, she considers the employee's concerns and "provide[s] the employee with all relevant information with respect to the rights of the employee" including information concerning the applicable provisions of the CAA. The employing office is not notified by the OOC that the employee has filed a request for counseling, and counseling between the employee and the OOC is strictly confidential. Neither the CAA nor the OOC's procedural rules require the employee's in-person attendance at intake counseling. The employee may participate in the counseling process over the telephone, or by similar means, and the employee may be represented at counseling by a representative in the employee's absence. This assists the many employees covered under the CAA who live throughout the United States, far from the Nation's capital where the OOC, with its small staff, maintains its only office.

The CAA also provides that "[t]he period for counseling shall be 30 days unless the employee and the Office agree to reduce the period." Therefore, an employee can request to shorten the counseling period and is advised of that option. An employee may also waive confidentiality during the counseling period to permit the OOC to contact the employing office to seek an immediate solution to the employee's concerns, but this is strictly up to the employee.

Second, if a claim is not resolved during the counseling phase, and the employee wishes to pursue the matter, the CAA requires that the employee file a request for mediation with the OOC. When a case proceeds to mediation, the employing office is notified about the claim and the parties attempt to settle the matter with the assistance of a trained neutral mediator appointed by the OOC. At the outset of the mediation process, the parties sign an agreement to keep confidential all communications, statements, and documents that are prepared for the mediation. This confidentiality obligation concerns

materials prepared *for the mediation process*—it does not prevent an employee from discussing underlying facts or allegations with others. The confidentiality obligation concerning materials prepared specifically for the mediation process encourages the parties to present their positions freely, which promotes and enhances the mediation process.

The CAA further provides that mediation "shall involve meetings with the parties separately or jointly." As with counseling, an employee may participate in mediation over the telephone, or by similar means, and the employee may be represented by a representative in the employee's absence. Contrary to some inaccurate reports in the media, there is no requirement that the employee be in the same room as the accused during mediation.

The CAA also specifies that the mediation period "shall be 30 days," which may be extended only upon the joint request of the parties. Even if mediation fails to settle the matter within 30 days, it is not uncommon for the parties jointly to request such an extension or to revisit negotiations later in the process. Resolving cases during mediation can save the parties from burdensome litigation, which can be expensive, time consuming, and a drain on resources and workplace productivity. Mediation also allows the parties to craft a resolution of the workplace dispute that meets their unique needs.

If the parties fail to resolve their dispute in mediation, a covered employee may elect to proceed to the third step in the process, either by filing an administrative complaint with the OOC, in which case the complaint would be decided by an OOC Hearing Officer in a confidential setting, or by filing a lawsuit in a U.S. District Court, in which case the proceedings would be a matter of public record. By statute, this election—which is the employee's alone—must occur not later than 90 days, but not sooner than 30 days, after the end of the period of mediation. A party dissatisfied with the decision of the Hearing Officer may file a petition for review with the OOC Board of Directors, and any decision of the Board may be appealed to the U.S. Court of Appeals for the Federal Circuit. If, instead of filing a request for an administrative hearing, the employee files a civil suit in Federal district court, an appeal of that decision would proceed under the rules of the appropriate U.S. Court of Appeals.

Although the OOC works with its congressional oversight committees, the CAA explicitly prohibits oversight with respect to the disposition of individual cases. Due to the program's counseling and mediation processes, the OOC's experience has been over many years that a large percentage of controversies were successfully resolved without formal adversarial proceedings. The OOC continues to work with the covered community to encourage compliance with the CAA, and to promote fair, effective, and efficient methods to settle workplace disputes.

Education and Outreach

When it passed the CAA, Congress recognized that ensuring compliance with the incorporated workplace laws would require clear guidance regarding appropriate workplace behavior and the consequences of violating the CAA. The CAA thus requires that the OOC carry out a program of education for Members of Congress and other employing authorities of the legislative branch respecting the laws made applicable to them and a program to inform individuals of their rights under those laws.

For over 20 years, the OOC has been engaged in outreach within the congressional community and in producing educational tools focused on discrimination and retaliation. Generally, the OOC's training programs are tailored to a requestor's needs, ranging from small and informal discussions with employees regarding the CAA to full-fledged training and panel presentations. Training involves staff from all departments in the Office, including the Office of the Executive Director, the Office of General Counsel, and the Office of Alternative Dispute Resolution programs.

All of the OOC educational materials can be accessed at www.compliance.gov, including training videos, online interactive learning modules, hundreds of publications, posters, brochures, Power Point presentations, and a myriad of other information covering all the laws in the CAA. In-person courses listed on the HouseNet include sessions on preventing sexual harassment and other forms of discrimination, requesting family and medical leave, and understanding veterans' rights, to name a few.

Every month, the OOC issues a new publication that highlights an important workplace law incorporated in the CAA and outlines its applicability to the legislative branch. Our most recent OOC Compliance@Work publication features an article written by the Deputy Executive Director for education programs, titled "The Importance of Training."

As a regular presenter at the Congressional Research Service's District/State Staff Institute conferences, the OOC also has an opportunity to connect with hundreds of congressional staffers who live and work outside of Capitol Hill. The OOC also worked with the Congressional Budget Office in 2016 to provide in-person training to their managers and equal employment opportunity counselors. Training included an overview of the CAA processes as well as discussion of the law governing workplace discrimination, sexual harassment, family and medical leave, the Americans with Disabilities Act, and retaliation for exercising workplace rights.

Recognizing that busy schedules, resource constraints, and geography may make in-person training impractical, the OOC has also developed web-based training programs. The OOC's first online interactive training module, entitled "Preventing Sexual Harassment in the Workplace," is intended to foster a safe and productive work

environment by training employees to identify behavior that constitutes sexual harassment and providing them with the resources to prevent and report it. The second online training module covers reasonable accommodation in the workplace for an employee with a qualified disability under the Americans with Disabilities Act. The third module will cover the Family and Medical Leave Act, a fourth will focus on an overview of the OOC, and a fifth will further discuss anti-discrimination and retaliation.

In 2016, the OOC rolled out its Brown Bag Lunch series, which the OOC General Counsel designed to inform legal counsel about the latest case law developments under the laws applied by the CAA, including Title VII disparate treatment and hostile work environment. All of the comprehensive brown bag case law outlines are available on our website and are also accessible through our quarterly electronic newsletter, which is emailed to all legislative branch employees.

The OOC website is frequently updated and enhanced with new features. Current videos on the site cover our claims process and what to expect at mediation or during an appeal of a claim. We use social media platforms to disseminate information as well. Although the OOC has made progress on the education and training front, our challenge has been getting the attention of the legislative branch employees who are very busy and otherwise not engaged on the topic of their workplace rights and responsibilities.

Despite the many educational resources regarding harassment and discrimination available through the OOC, training is not mandatory within the congressional community. Because decisions have been left to the discretion of each employing office, both training and general employee awareness of their rights and responsibilities under the CAA have been inconsistent, at best, throughout the legislative branch. Even a short investment of time with the OOC's resources, however, can help an employing office maintain compliance with workplace laws and promote an inclusive and respectful working environment, and help employees to understand and exercise their rights under the CAA. We look forward to continuing to assist Congress and the legislative branch agencies by providing the necessary educational and informational resources to achieve these goals. Publicizing information about the OOC will result in legislative branch employees realizing that they do have a place to turn when they experience discrimination, harassment, or retaliation, as Congress originally intended.

Board Recommendations to Congress

The CAA was crafted to provide for ongoing review of the workplace laws that apply to Congress. Section 102(b) of the CAA therefore tasks the Board of Directors to do just that. Thus, every Congress, the Board is required to report on: first, whether or to what degree provisions of federal law relating to terms and conditions of employment and access to public services and accommodations are applicable to the legislative branch; and second, with respect to provisions not currently applicable to the legislative

branch, whether such provisions should be made applicable to the legislative branch. We continue to believe that the adoption of the recommendations discussed below will best promote a legislative branch free from unlawful discrimination and retaliation.

Mandatory Anti-Discrimination, Anti-Harassment, and Anti-Retaliation Training for All Congressional Employees and Managers

In its 2016 biennial section 102(b) report, the Board recommended, as it has in prior reports, that Congress mandate anti-discrimination, anti-harassment, and anti-retaliation training for all Members, officers, employees and staff of the United States Congress and employing offices in the legislative branch.

Education directly impacts employee behavior, and in the area of harassment and discrimination prevention, a comprehensive training program continues to be the most effective investment an organization can make in reducing complaints and creating a more productive workforce. In the interests of prevention, the executive branch requires each federal agency to provide employees training regarding their rights and remedies under anti-discrimination and anti-retaliation laws (Section 202(c) of the Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2002 (No FEAR Act)). The No FEAR Act mandates that all current employees and managers be trained by a date certain, and training thereafter must be conducted no less than every 2 years. New employees must receive training as part of a new-hire orientation program, and where there is no new hire orientation program, new employees are to receive the applicable training within 90 days of their appointment.

Unlike in the executive branch, however, there is no current obligation on the part of Congress to inform or train legislative branch employees on their rights and responsibilities under anti-discrimination laws that apply to them through the CAA. Training for new employees on workplace rights is essential to creating and maintaining workplaces in the legislative branch that are free from unlawful discrimination and retaliation. Failing to educate and update employees on workplace behaviors and rights increases the risk of legal violations that could lead to great harm to employees and costly and disruptive litigation. Additionally, many employees of the legislative branch, especially Member office staff, are entering the workforce for the first time. Enhancing their understanding of how federal workplace laws contribute to a fair, safe, and accessible workplace will be invaluable as they become the employers and leaders of the future.

Currently, however, training is voluntary. In the case of some employing offices, the training does not involve or mention the OOC as a resource for information or assistance in resolving workplace disputes. To ensure that the congressional community is aware of the laws affecting the workplace, we recommend mandatory training on the

CAA for every new employee and biennial update training for all employees and supervisory personnel.

The CAA is a unique law and its processes and programs are unique to the legislative branch workforce. Training on the CAA informs managers of their workplace responsibilities and provides them one more avenue to seek information about best practices and how to handle discrimination and retaliation issues. Employing offices must understand the importance of curtailing objectionable behavior at the outset. Training can and does accomplish this goal. Where victims receive training, they may recognize that they do not have to endure a harassing and hostile workplace. Studies have found that sexual harassment in any workforce can be grossly underreported based on the high profile and public nature of an allegation and the backlash that an accuser may suffer, and can lead to increased absence from work, decrease in productivity, and eventual resignation from an otherwise suitable position.

The OOC has the statutory mandate from Congress to carry out a program of education under the CAA, and the practical and subject matter expertise to effectively work with Members, employing offices, and individuals as a neutral and independent educator. Mandatory training for all congressional employees and managers would go far in creating a model workplace free from discrimination and retaliation. To meet this mandate, additional resources will be required. Specifically, the OOC needs three (3) additional full-time employees: an individual to further develop content for various training media, a technical specialist who can provide additional IT expertise and support, and an administrator to manage the increased demand in training for the 30,000 employees of the legislative branch.

Require Notice-Posting of Congressional Workplace Rights in All Employing Offices

In its 2014 biennial section 102(b) report, the Board recommended, as it had in prior reports, that Congress adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA, and no longer exempt itself from the responsibility of notifying employees about their rights through this medium.

Almost all Federal anti-discrimination and other workplace rights laws require that employers prominently post notices of those rights and information pertinent to asserting claims for alleged violations of those rights. Indeed, Title VII requires private sector and Federal executive branch employers to notify employees about Title VII's protections and that personnel actions affecting covered employees shall be free from discrimination or harassment on the basis of race, color, religion, sex, and national origin. Because this legal obligation results in permanent postings, current and new employees remain informed about their rights regardless of their location, employee turnover, or other

changes in the workplace. The notices also serve as a reminder to employers about their workplace responsibilities and the legal ramifications of violating the law.

Even though Federal law imposes notice-posting on private and public sector employers, most notice-posting requirements do not apply to the legislative branch. Although the CAA does require the OOC to distribute informational material "in a manner suitable for posting," it does not mandate the actual posting of the notice. The failure to require notice-postings in the congressional workplace may explain recent findings by the Congressional Management Foundation that most congressional employees have limited to no knowledge of their workplace rights. Exemption from notice-posting limits congressional employees' access to a key source of information about their rights and remedies.

Accordingly, the Board continues to recommend that Congress adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA.

Adopt Recordkeeping Requirements under Federal Workplace Rights Laws

Although some employing offices in the legislative branch keep personnel records, there are no legal requirements under workplace rights laws to do so in Congress. In its 2012 biennial section 102(b) report, the Board recommended that Congress adopt all recordkeeping requirements under Federal workplace rights laws, including Title VII.

Most federal workplace rights statutes that apply to private and public sector employers require the employer to retain personnel records in a certain manner and for a certain period of time. Title VII requires an employer to maintain certain personnel records, although no particular form of retention is specified. All personnel and employment records made or kept by an employer, including applications and records pertaining to hiring, promotion, demotion, transfer, layoff or termination, pay rates and other compensation terms, and training must be retained for 1 year from the date of making the record or the personnel action involved, whichever is later. Title VII further requires that once a discrimination claim is filed, all personnel records relevant to the claim must be retained until final disposition of the charge or action.

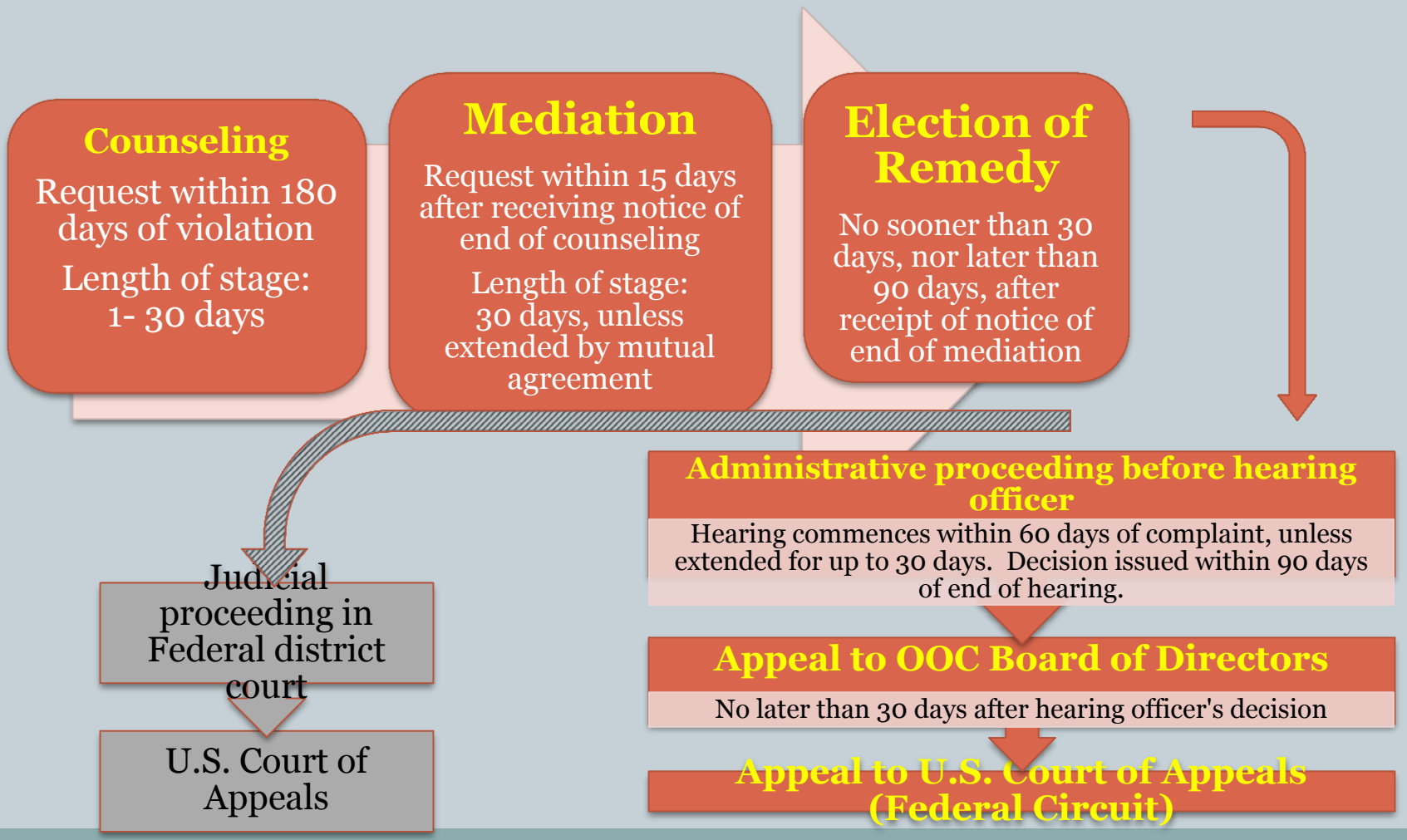
Personnel records may be essential for congressional employees to effectively assert their rights under the CAA. Such records may also be critical evidence for employers to demonstrate that no violations of workplace rights laws occurred. Accordingly, the Board continues to recommend that Congress adopt all recordkeeping requirements under Federal workplace rights laws, including Title VII.

Thank you for soliciting the Board's views on this most important matter. The OOC stands ready to work with this Committee in ensuring a workplace for legislative branch employees that is free from unlawful harassment, discrimination, and retaliation.

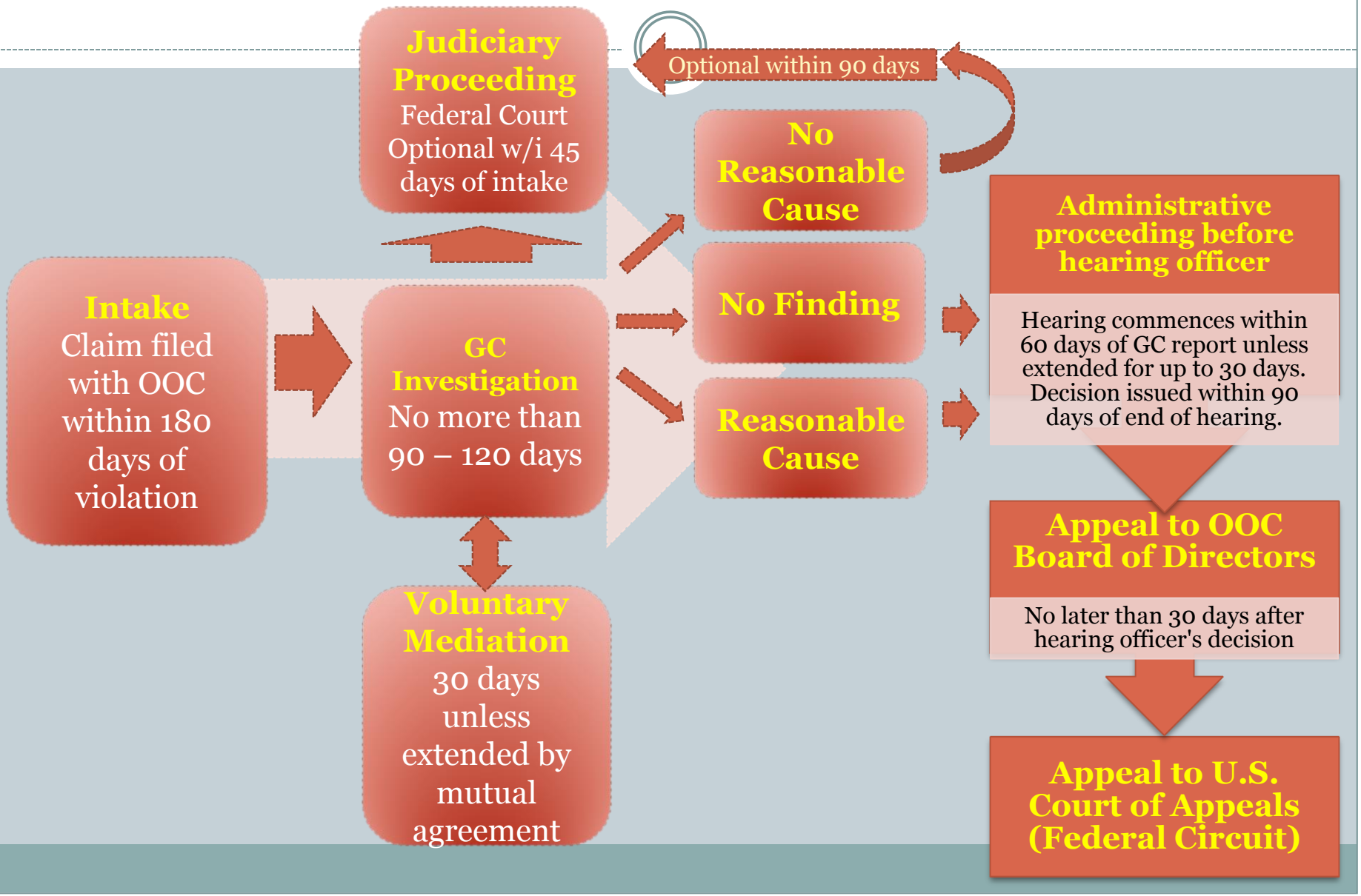
Congressional Office of Compliance

Alternative Dispute Resolution Process

Current Alternative Dispute Resolution Process



Alternative Dispute Resolution Under HR 4924 and S 2401



Training resources from the U.S. Equal Employment Opportunity Commission

- **Respect In The Workplace: Creating a Respectful Environment For All Employees**
- **Leading For Respect: How Supervisors And Managers Can Create Respectful Workplaces**
- **EEOC Checklist for Employers**
- **EEOC Select Task Force On The Study Of Harassment In The Workplace**

RESPECT IN THE WORKPLACE:
CREATING A RESPECTFUL ENVIRONMENT FOR ALL EMPLOYEES

What's different? Rather than dwelling on legal standards and what NOT to do, this training will focus on WHAT TO DO – the words and actions that promote respect and fairness, and participants' responsibility for contributing to respect in the workplace. Using case studies, trainees strategize about bystander intervention and ways to help others who may be behaving in ways that are disrespectful or who are being targeted by disrespect. Finally, they use a feedback model to practice both giving and getting feedback about behavior that is uncivil or disrespectful.

(*Italicized items unique to employee training* – regular font common to both employee and supervisor trainings)

PART 1: RESPECT

Objectives

- Develop a shared and specific understanding of respectful words and behavior.
- Understand the relationship between perceived respect and organizational performance.

Post-training resource: Workplace-Specific Respectful Cues

PART 2: WHAT GOES WRONG – DERAILERS

Objectives

- Understand all forms of conduct that derail respect, including incivility, abusive behavior and unlawful harassment
- Identify behavior that is problematic and/or unlawful
- Define and understand unlawful harassment
- Understand choices when an employee becomes aware of possible unlawful conduct

Post-training resource: Continuum of Behavior Chart

PART 3: POLICY REVIEW

Objectives

- Be familiar with the organization's policy regarding harassing conduct
- Understand rights and responsibilities under the organization's policy
- Understand different options for reporting
- Understand the process after a report of harassment is filed

Post-training resource: Organization's Anti-Harassment Policy and Procedures

PART 4: STEPPING UP AND STEPPING IN

Objectives

- *Understand the value of peer intervention/bystander intervention and develop a sense of collective responsibility*
- *Identify the ways that bystanders can intervene when they observe or learn about problem behavior in the employee's specific workplace*
- *Explore barriers to bystander intervention and how they can be overcome*
- *Practice applying bystander intervention techniques to a simulated situation*

Post-training resource: *Bystander Options*

PART 5: FEEDBACK – GIVING AND GETTING THE GIFT

Objectives

- *Understand the power of peer-to-peer effective feedback in workplace situations*
- *Identify barriers to effective feedback in workplace situations*
- *Learn a model for giving and getting feedback about derailer behaviors*

Post-training resource: *Feedback Model*

PART 6: LEARNING

Objectives

- Commit to making a change or taking action
- Share that commitment with a colleague and hold each other accountable

NOTE: Three hour training also includes:

- Additional case examples and more opportunities to practice and re-enforce skills
- More interactive discussions rather than lecture format
- Explanation of difference between authority and influence
- Opportunity to practice providing and receiving feedback about derailer Behaviors

LEADING FOR RESPECT:
HOW SUPERVISORS AND MANAGERS CAN CREATE RESPECTFUL WORKPLACES

What's different? Rather than dwelling on legal standards and what NOT to do, this training will focus on WHAT TO DO – the words and actions that promote respect and fairness, and participants' responsibility for contributing to respect in the workplace. Supervisors practice skills in responding appropriately to employee complaints and discuss how they can create a sense of respect for their employees, focusing on the employee's perceptions of fairness and the supervisor's responsibility to respond with emotional intelligence. Finally, supervisors are taught simple but effective ways to coach employees whose behavior might be a problem – early intervention to nip problems in the bud before they rise to the level of illegal harassment.

(*Italicized items below unique to supervisor training* – regular font common to both supervisor and employee trainings)

PART 1: RESPECT

Objectives

- Develop a shared and specific understanding of respectful words and behavior
- Understand the relationship between perceived respect and organizational performance
- *Identify specific supervisory activities that promote and sustain respect*

Post-training resource: Workplace-Specific Respectful Cues

PART 2: WHAT GOES WRONG – DERAILERS

Objectives

- Understand all forms of conduct that derail respect, including incivility, abusive conduct and unlawful harassment
- Identify behavior that is problematic and/or unlawful
- Define and understand unlawful harassment
- *Understand responsibilities when a supervisor or manager becomes aware of possible unlawful conduct*

Post-training resource: Continuum of Behavior Chart

PART 3: POLICY REVIEW

Objectives

- Be familiar with the organization's policy regarding harassing conduct
- Understand rights and responsibilities under the organization's policy (*including supervisor's responsibility to report*)
- Understand different options for reporting
- Understand the process after a report of harassment is filed

Post-training resource: Organization's Anti-Harassment Policy and Procedures

PART 4: HANDLING EMPLOYEE COMPLAINTS WITH FAIRNESS

Objectives

- *Understand the importance of fairness*
- *Apply fairness principles to complaint handling*
- *Understand the psychology of employee complaints*
- *Understand how to deal with request for confidentiality*
- *Understand the essential components of an effective response to employee complaints*
- *Understand the things to avoid when receiving an employee complaint*
- *Identify barriers to effective complaint handling*
- *Practice complaint handling*

Post-training resource: *"Always/Never" Responses to Complaints*

PART 5: COACHING FOR RESPECTFUL BEHAVIOR

Objectives

- *Learn a simple coaching model to deal with early problem behavior*
- *Identify challenges to applying the model*
- *Practice applying the model to rude/uncivil behavior*

Post-training resource: *Coaching Model for Respectful Behavior and Problem Solving*

PART 6: LEARNING

Objectives

- Commit to making a change or taking action
- Share that commitment with a colleague and hold each other accountable

NOTE: Four hour training also includes:

- Additional case examples and more opportunities to practice and re-enforce skills
- More interactive discussions rather than lecture format
- Explanation of difference between "performance management" and abusive behavior
- Discussion regarding three types of fairness and obstacles to fairness

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Washington, D.C. 20507

CHECKLISTS FOR EMPLOYERS

Checklist One: Leadership and Accountability

The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated. Check the box if the leadership of your organization has taken the following steps:

☐ Leadership has allocated sufficient *resources* for a harassment prevention effort
☐ Leadership has allocated sufficient *staff time* for a harassment prevention effort
☐ Leadership has *assessed* harassment *risk factors* and has taken steps to *minimize* those risks

Based on the commitment of leadership, check the box if your organization has the following components in place:

☐ A harassment prevention *policy* that is *easy-to-understand* and that is *regularly communicated* to all employees
☐ A harassment reporting *system* that employees *know about* and is *fully resourced* and which accepts reports of harassment experienced and harassment observed
☐ *Imposition of discipline* that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred
☐ *Accountability* for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment
☐ Regular *compliance trainings for all employees* so they can recognize prohibited forms of conduct and know how to use the reporting system
☐ Regular *compliance trainings for mid-level managers and front-line supervisors* so they know how to prevent and/or respond to workplace harassment

Bonus points if you can check these boxes:

☐ The organization conducts *climate surveys* on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace
☐ The organization has implemented *metrics* for harassment response and prevention in supervisory employees' performance reviews
☐ The organization conducts *workplace civility training* and *bystander intervention training*
☐ The organization has *partnered with researchers* to evaluate the organization's holistic workplace harassment prevention effort

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is* not *in compliance.

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CHECKLIST FOR EMPLOYERS

Checklist Two: An Anti-Harassment Policy

An anti-harassment policy is a key component of a holistic harassment prevention effort. Check the box below if your anti-harassment policy contains the following elements:

☐ An unequivocal statement that harassment based on *any* protected characteristic will not be tolerated
☐ An easy-to-understand description of prohibited conduct, including examples
☐ A description of a reporting system - available to employees who experience harassment as well as those who observe harassment - that provides multiple avenues to report, in a manner easily accessible to employees
☐ A statement that the reporting system will provide a prompt, thorough, and impartial investigation
☐ A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation
☐ A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation
☐ An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred
☐ An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors
☐ A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately
☐ Is written in clear, simple words, in all languages commonly used by members of the workforce

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CHECKLIST FOR EMPLOYERS

Checklist Three: A Harassment Reporting System and Investigations

A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.

Check the box below if your anti-harassment effort contains the following elements:

- ☐ A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed
- ☐ Employer representatives who take reports seriously
- ☐ A supportive environment where individuals feel safe to report harassing behavior to management
- ☐ Well-trained, objective, and neutral investigators
- ☐ Timely responses and investigations
- ☐ Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility
- ☐ An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible
- ☐ Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation
- ☐ During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred
- ☐ A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred

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CHECKLIST FOR EMPLOYERS

Checklist Four: Compliance Training

A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Check the box if your organization's compliance training is based on the following structural principles and includes the following content:

- Structural Principles
  - ☐ Supported at the highest levels
  - ☐ Repeated and reinforced on a regular basis
  - ☐ Provided to all employees at every level of the organization
  - ☐ Conducted by qualified, live, and interactive trainers
  - ☐ If live training is not feasible, designed to include active engagement by participants
  - ☐ Routinely evaluated and modified as necessary

- Content of Compliance Training for All Employees
  - ☐ Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment
  - ☐ Includes examples that are tailored to the specific workplace and the specific workforce
  - ☐ Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace
  - ☐ Describes, in simple terms, the process for reporting harassment that is experienced or observed
  - ☐ Explains the consequences of engaging in conduct unacceptable in the workplace

- Content of Compliance Training for Managers and First-line Supervisors
  - ☐ Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods
  - ☐ Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report
  - ☐ Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment

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CHART OF RISK FACTORS FOR HARASSMENT AND RESPONSIVE STRATEGIES

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Homogenous workforce	Historic lack of diversity in the workplace Currently only one minority in a work group (*e.g.*, team, department, location)	Employees in the minority can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others. Employees in the majority might feel threatened by those they perceive as "different" or "other," or might simply be uncomfortable around others who are not like them.	Increase diversity at all levels of the workforce, with particular attention to work groups with low diversity. Pay attention to relations among and within work groups.
Workplaces where some employees do not conform to workplace norms	"Rough and tumble" or single-sex-dominated workplace cultures Remarks, jokes, or banter that are crude, "raunchy," or demeaning	Employees may be viewed as weak or susceptible to abuse. Abusive remarks or humor may promote workplace norms that devalue certain types of individuals.	Proactively and intentionally create a culture of civility and respect with the involvement of the highest levels of leadership. Pay attention to relations among and within work groups.
Cultural and language differences in the workplace	Arrival of new employees with different cultures or nationalities Segregation of employees with different cultures or nationalities	Different cultural backgrounds may make employees less aware of laws and workplace norms. Employees who do not speak English may not know their rights and may be more subject to exploitation.	Ensure that culturally diverse employees understand laws, workplace norms, and policies. Increase diversity in culturally segregated workforces. Pay attention to relations

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
		Language and linguistic characteristics can play a role in harassment.	among and within work groups.
Coarsened Social Discourse Outside the Workplace	Increasingly heated discussion of current events occurring outside the workplace	Coarsened social discourse that is happening outside a workplace may make harassment inside the workplace more likely or perceived as more acceptable.	Proactively identify current events-national and local-that are likely to be discussed in the workplace. Remind the workforce of the types of conduct that are unacceptable in the workplace.
Young workforces	Significant number of teenage and young adult employees	Employees in their first or second jobs may be less aware of laws and workplace norms. Young employees may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable. Young employees may be more susceptible to being taken advantage of by coworkers or superiors, particularly those who may be older and more established in their positions. Young employees may be more likely to engage in harassment because they lack the maturity to understand or care about consequences.	Provide targeted outreach about harassment in high schools and colleges. Provide orientation to all new employees with emphasis on the employer's desire to hear about all complaints of unwelcome conduct. Provide training on how to be a good supervisor when youth are promoted to supervisory positions.
Workplaces with	Executives or senior managers	Management is often reluctant to	Apply workplace rules

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
"high value" employees	Employees with high value (actual or perceived) to the employer, *e.g.*, the "rainmaking" partner or the prized, grant-winning researcher	jeopardize high value employee's economic value to the employer. High value employees may perceive themselves as exempt from workplace rules or immune from consequences of their misconduct.	uniformly, regardless of rank or value to the employer. If a high-value employee is discharged for misconduct, consider publicizing that fact (unless there is a good reason not to).
Workplaces with significant power disparities	Low-ranking employees in organizational hierarchy Employees holding positions usually subject to the direction of others, *e.g.*, administrative support staff, nurses, janitors, etc. Gendered power disparities (*e.g.*, most of the low-ranking employees are female)	Supervisors feel emboldened to exploit low-ranking employees. Low-ranking employees are less likely to understand complaint channels (language or education/training insufficiencies). Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.	Apply workplace rules uniformly, regardless of rank or value to the employer. Pay attention to relations among and within work groups with significant power disparities.
Workplaces that rely on customer service or client satisfaction	Compensation directly tied to customer satisfaction or client service	Fear of losing a sale or tip may compel employees to tolerate inappropriate or harassing behavior.	Be wary of a "customer is always right" mentality in terms of application to unwelcome conduct.
Workplaces where work is monotonous or tasks are low-intensity	Employees are not actively engaged or "have time on their hands" Repetitive work	Harassing behavior may become a way to vent frustration or avoid boredom.	Consider varying or restructuring job duties or workload to reduce monotony or boredom. Pay attention to relations

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
			among and within work groups with monotonous or low-intensity tasks.
Isolated workplaces	Physically isolated workplaces Employees work alone or have few opportunities to interact with others	Harassers have easy access to their targets. There are no witnesses.	Consider restructuring work environments and schedules to eliminate isolated conditions. Ensure that workers in isolated work environments understand complaint procedures. Create opportunities for isolated workers to connect with each other (*e.g.*, in person, on line) to share concerns.
Workplaces that tolerate or encourage alcohol consumption	Alcohol consumption during and around work hours.	Alcohol reduces social inhibitions and impairs judgment.	Train co-workers to intervene appropriately if they observe alcohol-induced misconduct. Remind managers about their responsibility if they see harassment, including at events where alcohol is consumed. Intervene promptly when customers or clients who have consumed too much alcohol act inappropriately.
Decentralized workplaces	Corporate offices far removed physically and/or	Managers may feel (or may actually be) unaccountable for their behavior	Ensure that compliance training reaches all levels of the

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
	organizationally from front-line employees or first-line supervisors	and may act outside the bounds of workplace rules. Managers may be unaware of how to address harassment issues and may be reluctant to call headquarters for direction.	organization, regardless of how geographically dispersed workplaces may be. Ensure that compliance training for area managers includes their responsibility for sites under their jurisdiction Develop systems for employees in geographically diverse locations to connect and communicate.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

REPORT OF CO-CHAIRS
CHAI R. FELDBLUM & VICTORIA A. LIPNIC

JUNE 2016

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PREFACE

Thirty years ago, the U.S. Supreme Court recognized claims for sexual harassment as a form of discrimination based on sex under Title VII of the Civil Rights Act of 1964. In the years that followed, courts have filled in the legal landscape even further.

Six years ago, when we came to EEOC as commissioners, we were struck by how many cases of sexual harassment EEOC continues to deal with every year. What was further striking to us were the number of complaints of harassment on every other basis protected under equal employment opportunity laws the Commission deals with today. We are deeply troubled by what we have seen during our tenure on the Commission.

With legal liability long ago established, with reputational harm from harassment well known, with an entire cottage industry of workplace compliance and training adopted and encouraged for 30 years, why does so much harassment persist and take place in so many of our workplaces? And, most important of all, what can be done to prevent it? After 30 years – is there something we've been missing?

As commissioners of an enforcement agency, we could have taken a cynical approach. We could have assumed that some people will always engage in harassment and that we cannot expect to control how people behave in increasingly diverse workplaces. That is especially so in an environment where every manner of rude, crude, or offensive material can be accessed and shared with others with a few strokes on a phone. We could have suggested that the Commission simply continue to do what it has done well for decades – investigate and settle charges, bring litigation, provide legal guidance, hear complaints from federal employees, and provide outreach and education.

We set cynicism to the side. We want to reboot workplace harassment prevention efforts.

Accordingly, we present this *"Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace*." We offer this report to our fellow commissioners, the EEOC community nationwide, our state partners, employers, employees and labor unions, and academics, foundations, and community leaders across the country. We present this report with a firm, and confirmed, belief that too many people in too many workplaces find themselves in unacceptably harassing situations when they are simply trying to do their jobs.

While we offer suggestions in this report for what EEOC can do to help prevent harassment, we caution that our agency is only one piece of the solution. Everyone in society must feel a stake in this effort. That is the only way we will achieve the goal of reducing the level of harassment in our workplaces to the lowest level possible.

This report, including the recommendations we set forth, could not have been prepared without the work of the Select Task Force on the Study of Harassment in the Workplace that was established by EEOC Chair Jenny Yang over a year ago. The Select Task Force consisted of a select group of outside experts impaneled to examine harassment in our workplaces – its causes, its effects, and what can be better done to prevent it. We served as co-chairs of this task force.

Our experts included management and plaintiffs' attorneys, representatives of employee and employer advocacy groups, labor representatives, and academics who have studied this field for years – sociologists, psychologists, and experts in organizational behavior. Because our group was heavy on lawyers, we deliberately fashioned an interdisciplinary approach that considered the social science on harassment in the workplace. Some of what we learned surprised us; everything we learned illuminated our understanding of this complex human issue.

We thank the members of our Select Task Force for volunteering their expertise over this past year – asking the difficult questions, shaping our discussions, and sharpening our inquiry. This is not a consensus report. It is the report of the two of us as co-chairs, based on the testimony, research, expertise, and guidance we received and reviewed along with our task force members over the past year. Nor is it a report focused on the legal issues concerning workplace harassment. It is a report focused on prevention of unwelcome conduct based on characteristics protected under our employment civil rights laws, even before such conduct might rise to the level of illegal harassment

We thank all of our witnesses for the expertise they offered at our eight meetings over the past year. We could not have written this report without the work they put into educating us and the members of the Select Task Force.

We do not pretend to have all the answers for a reboot of workplace harassment prevention. We need the active engagement of every reader of this report to provide ideas and solutions on an ongoing basis.

With great appreciation to all those who strive to make our workplaces productive places where we can all go, do our jobs, and be free from harassment, and,

With confidence that we can do better by our workforce,

Chai Feldblum
Commissioner & Co-Chair

Victoria A. Lipnic
Commissioner & Co-Chair

EXECUTIVE SUMMARY

As co-chairs of the Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace ("Select Task Force"), we have spent the last 18 months examining the myriad and complex issues associated with harassment in the workplace. Thirty years after the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank v. Vinson* that workplace harassment was an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964, we conclude that we have come a far way since that day, but sadly and too often still have far to go.

Created in January 2015, the Select Task Force was comprised of 16 members from around the country, including representatives of academia from various social science disciplines; legal practitioners on both the plaintiff and defense side; employers and employee advocacy groups; and organized labor. The Select Task Force reflected a broad diversity of experience, expertise, and opinion. From April 2015 through June 2016, the Select Task Force held a series of meetings – some were open to the public, some were closed working sessions, and others were a combination of both. In the course of a year, the Select Task Force received testimony from more than 30 witnesses, and received numerous public comments.

Throughout this past year, we sought to deploy the expertise of our Select Task Force members and our witnesses to move beyond the legal arena and gain insights from the worlds of social science, and practitioners on the ground, on how to prevent harassment in the workplace. We focused on learning everything we could about workplace harassment – from sociologists, industrial-organizational psychologists, investigators, trainers, lawyers, employers, advocates, and anyone else who had something useful to convey to us.

Because our focus was on prevention, we did not confine ourselves to the legal definition of workplace harassment, but rather included examination of conduct and behaviors which might not be "legally actionable," but left unchecked, may set the stage for unlawful harassment.

This report is written by the two of us, in our capacity as Co-Chairs of the Select Task Force. It does not reflect the consensus view of the Select Task Force members, but is informed by the experience and observations of the Select Task Force members' wide range of viewpoints, as well as the testimony and information received and reviewed by the Select Task Force. Our report includes analysis and recommendations for a range of stakeholders: EEOC, the employer community, the civil rights community, other government agencies, academic researchers, and other interested parties. We summarize our key findings below.

Workplace Harassment Remains a Persistent Problem. Almost fully one third of the approximately 90,000 charges received by EEOC in fiscal year 2015 included an allegation of workplace harassment. This includes, among other things, charges of unlawful harassment on the basis of sex (including sexual orientation, gender identity, and pregnancy), race, disability, age, ethnicity/national origin, color, and religion. While there is robust data and academic literature on sex-based harassment, there is very limited data regarding harassment on other protected bases. More research is needed.

Workplace Harassment Too Often Goes Unreported. Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior. The least common response to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint. Roughly *three out of four* individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct. Employees who experience harassment fail to report the harassing behavior or to file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.

There Is a Compelling Business Case for Stopping and Preventing Harassment. When employers consider the costs of workplace harassment, they often focus on legal costs, and with good reason. Last year, EEOC alone recovered $164.5 million for workers alleging harassment – and these direct costs are just the tip of the iceberg. Workplace harassment first and foremost comes at a steep cost to those who suffer it, as they experience mental, physical, and economic harm. Beyond that, workplace harassment affects *all* workers, and its true cost includes decreased productivity, increased turnover, and reputational harm. All of this is a drag on performance – and the bottom-line.

It Starts at the Top – Leadership and Accountability Are Critical. Workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. The importance of leadership cannot be overstated – effective harassment prevention efforts, and workplace culture in which harassment is not tolerated, must start with and involve the highest level of management of the company. But a commitment (even from the top) to a diverse, inclusive, and respectful workplace is not enough. Rather, at all levels, across all positions, an organization must have systems in place that hold employees accountable for this expectation. Accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment should be rewarded for doing that job well (or penalized for failing to do so). Finally, leadership means ensuring that anti-harassment efforts are given the necessary time and resources to be effective.

Training Must Change. Much of the training done over the last 30 years has not worked as a prevention tool – it's been too focused on simply avoiding legal liability. We believe effective training can reduce workplace harassment, and recognize that ineffective training can be unhelpful or even counterproductive. However, even effective training cannot occur in a vacuum – it must be part of a holistic culture of non-harassment that starts at the top. Similarly, one size does *not* fit all: Training is most effective when tailored to the specific workforce and workplace, and to different cohorts of employees. Finally, when trained correctly, middle-managers and first-line supervisors in particular can be an employer's most valuable resource in preventing and stopping harassment.

New and Different Approaches to Training Should Be Explored. We heard of several new models of training that may show promise for harassment training. "Bystander intervention training" – increasingly used to combat sexual violence on school campuses – empowers co-workers and gives them the tools to intervene when they witness harassing behavior, and may

show promise for harassment prevention. Workplace "civility training" that does not focus on eliminating unwelcome or offensive behavior based on characteristics protected under employment non-discrimination laws, but rather on promoting respect and civility in the workplace generally, likewise may offer solutions.

It's On Us. Harassment in the workplace will not stop on its own – it's on all of us to be part of the fight to stop workplace harassment. We cannot be complacent bystanders and expect our workplace cultures to change themselves. For this reason, we suggest exploring the launch of an *It's on Us* campaign for the workplace. Originally developed to reduce sexual violence in educational settings, the *It's on Us* campaign is premised on the idea that students, faculty, and campus staff should be empowered to be part of the solution to sexual assault, and should be provided the tools and resources to prevent sexual assault as engaged bystanders. Launching a similar *It's on Us* campaign in workplaces across the nation – large and small, urban and rural – is an audacious goal. But doing so could transform the problem of workplace harassment from being about targets, harassers, and legal compliance, into one in which co-workers, supervisors, clients, and customers all have roles to play in stopping such harassment.

Our final report also includes detailed recommendations and a number of helpful tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated; ensuring employees are held accountable; and assessing and responding to workplace "risk factors" for harassment.

PART ONE

INTRODUCTION

> *"Not everything that is faced can be changed, but nothing can be changed until it is faced."*
>
> *Robert J. Bies, Professor of Management/Founder, Executive Masters in Leadership Program McDonough School of Business, Georgetown University (quoting James Baldwin)*

On January 14, 2015, the U.S. Equal Employment Opportunity Commission ("EEOC") held a public meeting titled "Harassment in the Workplace" to examine the issue of workplace harassment – its prevalence, its causes, and strategies for prevention and effective response.[1] At the start of that meeting, EEOC Chair Jenny R. Yang announced the formation of EEOC's Select Task Force on the Study of Harassment in the Workplace ("the Select Task Force"). We were honored to be asked to co-chair the Select Task Force.

In Chair Yang's words, the goal of the Select Task Force was to "convene experts across the employer, employee, human resources, academic, and other communities to identify strategies to prevent and remedy harassment in the workplace. Through this task force, we hope to reach more workers so they understand their rights and also to reach more in the employer community so we can understand the challenge that they face and promote some of the best practices that we've seen working."[2]

In the weeks that followed that meeting, we assembled the membership of the Select Task Force, drawing from a range of experts and stakeholders, and reflecting a broad diversity of experience, expertise, and opinion. The Select Task Force was comprised of 16 members from around the country, including representatives of academia from various social science disciplines; legal practitioners on both the plaintiff and defense side; employers and employee advocacy groups; and organized labor. On March 30, 2016, the members of the Select Task Force were announced:

- Sahar F. Aziz, Associate Professor of Law, Texas A&M University
- Meg A. Bond, Professor of Psychology and Director of the Center for Women and Work, University of Massachusetts Lowell
- Jerry Carbo, Associate Professor of Management and Marketing, Shippensburg University

[1] WORKPLACE HARASSMENT, MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (January 14, 2015), https://www.eeoc.gov/eeoc/meetings/1-14-15/index.cfm.

[2] *Opening Statement of Chair Jenny Yang*, WORKPLACE HARASSMENT, MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (January 14, 2015), https://www.eeoc.gov/eeoc/meetings/1-14-15/transcript.cfm#yang.

- Manuel Cuevas-Trisán, Vice President, Litigation, Data Protection & Employment Law, Motorola Solutions, Inc.
- Frank Dobbin, Professor of Sociology, Harvard University
- Stephen C. Dwyer, General Counsel, American Staffing Association
- Brenda Feis, Partner, Feis Goldy LLC
- Fatima Goss Graves, Vice President for Education and Employment, National Women's Law Center
- Ariane Hegewisch, Program Director, Employment & Earnings, Institute for Women's Policy Research
- Christopher Ho, Senior Staff Attorney and Director, Immigration and National Origin Program, Legal Aid Society - Employment Law Center
- Thomas A. Saenz, President & General Counsel, Mexican American Legal Defense and Educational Fund
- Jonathan A. Segal, Partner, Duane Morris and Managing Principal, Duane Morris Institute
- Joseph M. Sellers, Partner, Cohen Milstein LLC
- Angelia Wade Stubbs, Associate General Counsel, AFL-CIO
- Rae T. Vann, General Counsel, Equal Employment Advisory Council
- Patricia A. Wise, Partner, Niehaus, Wise & Kalas; Co-Chair, Society for Human Resource Management Labor Relations Special Expertise Panel

From April 2015 through June 2016, the Select Task Force held a series of meetings – some were open to the public for observation, some were closed working sessions, and others were a combination of both. In the course of a year, the Select Task Force received testimony from more than 30 witnesses, and received numerous public comments. The activities of the Select Task Force on the Study of Harassment in the Workplace are set out in detail in Appendix A.

The first part of this report considers what we know (and do not know) about workplace harassment. The second part turns to potential solutions for responding to, and preventing, workplace harassment. Several sections of the report include recommendations based on the information presented in that section. The recommendations are offered to EEOC, employers and employer associations, employees and employee associations, other government agencies, academic researchers, and foundations.

PART TWO

LOOKING AROUND US: WHAT WE KNOW ABOUT HARASSMENT IN THE WORKPLACE

Throughout the past year, we sought to deploy the expertise of our Select Task Force members and our witnesses to move beyond the legal arena and gain insights from the world of social science and practitioners on the ground on how to prevent harassment in the workplace. We focused on learning everything we could about workplace harassment – from sociologists, industrial-organizational psychologists, investigators, trainers, lawyers, employers, advocates, and anyone else who had something useful to convey to us.

Because our focus was on prevention, we did not confine ourselves to the legal definition of workplace harassment. Instead, we looked at unwelcome or offensive conduct in the workplace that: (a) is based on sex (including sexual orientation, pregnancy, and gender identity), race, color, national origin, religion, age, disability, and/or genetic information; and (b) is detrimental to an employee's work performance, professional advancement, and/or mental health. This includes, but is not limited to, offensive jokes, slurs, epithets or name calling, undue attention, physical assaults or threats, unwelcome touching or contact, intimidation, ridicule or mockery, insults or put-downs, constant or unwelcome questions about an individual's identity, and offensive objects or pictures.

When we use the term "harassment" in this report, therefore, we are referring to the conduct described above. This is not limited to conduct that is legally actionable – *i.e*., conduct that must be endured as a condition of continued employment or conduct that is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Nor, on the other hand, does it include all "rude," "uncivil," or "disrespectful" behavior in the workplace. Rather, the focus of this report is unwelcome or offensive conduct based on a protected characteristic under employment anti-discrimination law.

We start with stories from people who have experienced harassment in the workplace. Our commitment to preventing harassment stems from stories such as these, and the devastating impact harassment has on those who experience it. We then move to what we know about the prevalence of harassment; the ways in which employees who experience harassment respond; the business case for stopping harassment; and finally, factors in a workplace that may put a workplace more at risk for harassment.

A. REAL PEOPLE/REAL LIVES

Laudente Montoya

Laudente Montoya worked as a mechanic at J&R Well Services and Dart Energy. From his first days on the job, Mr. Montoya's supervisor called Mr. Montoya and a co-worker "stupid Mexicans," "dumb Mexicans," and "worthless Mexicans." The supervisor told Mr. Montoya that he didn't like "sp*cs" and that Mexicans were the reason Americans have swine flu.

Mr. Montoya fought back. He told his supervisor that "a person in a management position in a large corporation should not talk to their employees like that." In response, the supervisor said something like "welcome to the oil fields. That's how they talk here." According to Mr. Montoya, the supervisor did not limit his offensive comments to Hispanic employees. Mr. Montoya observed the supervisor calling other co-workers names like "n*gger," "lazy Indian," and "wagon burner." When Mr. Montoya and his co-workers complained to the area manager, a friend of the supervisor, the manager did nothing.

As Mr. Montoya explained, "Working that job was one of the worst times in my life. It became so that I could hardly bring myself to go to work in the morning because I hated working with him so much. People were calling me moody. I even saw my doctor about it."

Finally, Mr. Montoya and his co-workers were fed up and filed a charge of discrimination. After filing the charge, Mr. Montoya was laid off.[3]

Contonius Gill

Contonius Gill worked as a truck driver for A.C. Widenhouse, a North Carolina-based trucking company. On the job, Mr. Gill was repeatedly assaulted with derogatory racial comments and slurs by his supervisor, who was also the facility's general manager; by the company's dispatcher; by several mechanics; and by other truck drivers – all of whom are white.

Mr. Gill was called "n*gger," "monkey" and "boy." On one occasion, a co-worker approached Mr. Gill with a noose and said, "This is for you. Do you want to hang from the family tree?" White employees also asked Mr. Gill if he wanted to be the "coon" in their "coon hunt."

Mr. Gill repeatedly complained about the harassment to the company's dispatcher and general manager but the harassment continued unabated. The end of the story? Mr. Gill was fired for complaining about the harassment.[4]

[3] *Testimony of Laudente Montoya*, WORKPLACE HARASSMENT, MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Jan. 14, 2015), https://www.eeoc.gov/eeoc/meetings/1-14-15/montoya.cfm.

[4] Mr. Gill intervened in the EEOC's lawsuit against A.C. Widenhouse. *See Jury Awards $200,000 in Damages Against A.C. Widenhouse in EEOC Race Harassment Suit,* https://www.eeoc.gov/eeoc/newsroom/release/2-1-13.cfm.

Jacquelyn Hines

Jacquelyn Hines was a single mother, born and raised in Memphis, Tennessee. She didn't finish high school, but she earned her G.E.D. and worked a series of temporary jobs through various staffing agencies to support herself and her family.

In 2008, she found herself working for New Breed Logistics, a supply-chain logistics company with a warehouse in Memphis. Her supervisor made a habit of directing sexually-explicit comments to Jacquelyn and her female coworkers. Indeed, it wasn't only sexually-explicit comments – there were lewd and vulgar gestures, and some days physical harassment as well, like the day he pressed his stomach and private parts into one woman's back. When these women asked him to "stop talking dirty to me" or "leave me alone," his response was that he "wasn't going to get into trouble, he ran the place" and if anyone complained to HR, *they* would be fired.

And sure enough, that's what happened. One of Jacquelyn's coworkers was fired when she complained about the harassment by way of the company's anonymous hotline. When Jacquelyn herself stood up to her supervisor and asked him to stop, suddenly she was contacted by the temporary agency concerning alleged attendance issues (which had never been mentioned before). Her hours were cut, she lost pay, and within a week she was fired. The male coworker who had stood up to the supervisor on behalf of his colleagues, and told him to stop making comments because the women didn't like it? He was fired, too.

And it didn't stop there. Some time later, Jacquelyn applied for and was hired at a different branch of the company, in Mississippi. She worked there for a few weeks and the job was going well, until one day she was abruptly escorted off the premises. The HR manager would later explain that she had recognized Jacquelyn's name from the Memphis plant and had her fired from her job in Mississippi.[5]

* * *

We could continue to chronicle stories of harassment we heard, including harassment based on disability, religion, age, sexual orientation, and gender identity. EEOC's website is replete with such stories. But in this report, we focus on the social science describing the scope of the problem of workplace harassment and our proposed solutions.

B. THE PREVALENCE OF HARASSMENT IN THE WORKPLACE

Real people, like Mr. Montoya, Mr. Gill, and Ms. Hines, are the reason that all of us must do everything we can to prevent workplace harassment. No one in this country – *no one* – should

[5] Testimony of Anica Jones, Trial Attorney, Memphis District Office, EEOC, and Jacquelyn Hines, Claimant, *EEOC v. New Breed Logistics*, RETALIATION IN THE WORKPLACE: CAUSES, REMEDIES, AND STRATEGIES FOR PREVENTION (June 15, 2015), https://www.eeoc.gov/eeoc/meetings/6-17-15/jones.cfm and https://www.eeoc.gov/eeoc/meetings/6-17-15/hines.cfm; *see also EEOC v. New Breed Logistics*, No. 13-6250, 2015 U.S. App. LEXIS 6650 (6th Cir. Apr. 22, 2015) (detailing allegations).

have to experience what they did. But for purposes of crafting a strategic approach to preventing harassment, we obviously need to move beyond the anecdotal evidence so that we know the scope of the problem with which we are dealing.

We started our study with the assumption that harassment is a persistent problem, at least based on the continuing number of harassment-based charges EEOC receives from employees who work for private employers or state and local government employers (162,872 charges since FY2010), and the continuing number of harassment complaints filed by federal employees (39,473 complaints since FY2010).[6] We therefore started by learning what we could from the private sector charges and the federal sector complaints filed each year.[7]

During the course of fiscal year 2015, EEOC received approximately 28,000 charges alleging harassment from employees working for private employers or state and local government employers.[8] This is almost a full *third* of the approximately 90,000 charges of employment discrimination that EEOC received that year. Many of the charges alleged other forms of discrimination as well, but harassment constituted either all of, or part of, the alleged discrimination in these charges. During that same year, federal employees filed 6,741 complaints alleging harassment as all of, or part of, alleged discrimination.[9] These complaints made up 43% of all complaints filed by federal employees that year.[10]

[6] U.S. Equal Employment Opportunity Commission, *Enforcement & Litigation Statistics, All Charges Alleging Harassment (FY 2010-FY 2015)*, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm; U.S. Equal Employment Opportunity Commission, *Annual Reports on the Federal Work Force (Part I), EEO Complaint Processing, Fiscal Years 2010-2015*, https://www.eeoc.gov/federal/reports/.

[7] Before an applicant or employee can file a claim of discrimination against such an entity, the individual must file a *charge* with EEOC. EEOC investigates the charge to determine whether there is reasonable cause to believe that discrimination has occurred. If such cause is found, EEOC attempts to end the alleged unlawful practice through a process of conciliation with the entity that has been charged (called a "respondent" in this system). EEOC does not have legal authority to require a respondent to undertake any actions; it has authority only to negotiate with the respondent to effectuate voluntary resolutions during this administrative process. If a respondent does not agree to a voluntary resolution during this process, EEOC (or the charging party) may sue the respondent in court and a court may order relief if the respondent is found to have violated the law. All allegations of discrimination brought under this administrative system are called "*charges*." As a matter of terminology, these are often called "*private sector charges*," even though they encompass charges brought against state and local employers as well as private employers and labor unions. *See* 42 U.S.C. §2000e (covered entities); §2000e-2 (prohibitions); 2000e-5 (enforcement provisions); 29 C.F.R. §1601 (procedural regulations). The federal government is also covered under federal employment anti-discrimination laws. Before an applicant or employee can file a claim of discrimination against a federal agency, the individual must file a *complaint* with the agency alleged to have engaged in the discriminatory practice. The agency is responsible for investigating such complaints and determining whether discrimination has occurred. A federal applicant or employee who disagrees with the agency's conclusion can appeal to EEOC. EEOC issues administrative conclusions in such appeals. If EEOC determines that an agency has engaged in discrimination and orders relief, the agency is required to comply with EEOC's decision and does not have the right to appeal EEOC's decision in court. All allegations of discrimination brought under this administrative system are called "*complaints*." As a matter of terminology, they are called "*federal sector complaints.*" *See* 42 U.S.C. §2000e-16 (prohibitions and enforcement); 29 C.F.R. §1614 (procedural regulations).

[8] EEOC, *All Charges Alleging Harassment*, *supra* n. 6.

[9] U.S. Equal Employment Opportunity Commission, *Annual Report on the Federal Work Force (Part I), EEO Complaint Processing, Fiscal Year 2015* (forthcoming).

[10] *Id.*

Of the total number of charges received in FY2015 that alleged harassment from employees working for private employers or for state and local government employers, approximately:

- 45% alleged harassment on the basis of sex,
- 34% alleged harassment on the basis of race,
- 19% alleged harassment on the basis of disability,
- 15% alleged harassment on the basis of age,
- 13% alleged harassment on the basis of national origin, and
- 5% alleged harassment on the basis of religion.[11]

Of the total number of complaints filed in FY2015 by federal employees alleging harassment approximately:

- 36% alleged harassment on the basis of race,
- 34% alleged harassment on the basis of disability,
- 26% alleged harassment on the basis of age,
- 12% alleged harassment on the basis of national origin,
- 44% alleged harassment on the basis of sex, and
- 5% alleged harassment on the basis of religion.[12]

The numbers of charges (in the private sector) and complaints (in the federal sector) that were filed in FY2015 provide a snapshot of the number of people who sought a formal process to complain about harassment that year. This number is both an over-inclusive and under-inclusive data source for determining the prevalence of harassment in our workplaces. It is presumably over-inclusive because not all charges and complaints of harassment include the type of behavior

[11] Information provided by the EEOC's Office of Field Programs.
[12] EEOC, *Annual Report on the Federal Work Force (Part I), supra* n. 6. The percentages do not total 100%, as individuals sometimes file charges or complaints of harassment on the basis of more than one protected characteristic.

we consider harassment for purposes of this report.[13] Conversely, the number is presumably under-inclusive because approximately 90% of individuals who say they have experienced harassment never take formal action against the harassment, such as filing a charge or a complaint.[14]

Given the limitations of EEOC charge data, we sought out empirical data on the prevalence of harassment in workplaces in the United States. An important fact caught our attention in this review. *There are significantly fewer academic articles on harassment on protected bases other than sex as compared to those about sex-based harassment.* There is an extensive literature on *discrimination* on the basis of various protected characteristics (such as race and ethnicity), but those studies do not disaggregate harassment from other forms of discrimination. In this section, therefore, we explain what we have found with regard to the prevalence of sex-based harassment, and then what little we found on the prevalence of other types of harassment.

Sex-Based Harassment

Based on testimony to the Select Task Force and various academic articles, we learned that anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace. Given these widely divergent percentages, we dug deeper to understand what these numbers could tell us about the scope of harassment based on sex.

We found that when employees were asked, in surveys using a randomly representative sample (called a "probability sample"), if they had experienced "sexual harassment," without that term being defined in the survey, approximately one in four women (25%) reported experiencing "sexual harassment" in the workplace. This percentage was remarkably consistent across probability surveys. When employees were asked the same question in surveys using convenience samples (in lay terms, a convenience sample is not randomly representative because it uses respondents that are convenient to the researcher (*e.g.*, student volunteers or respondents from one organization)), with sexual harassment not being defined, the rate rose to 50% of women reporting they had been sexually harassed.[15]

We then found that when employees were asked, in surveys using probability samples, whether they have experienced one or more specific sexually-based behaviors, such as unwanted sexual attention or sexual coercion, the rate of reported harassment rose to approximately 40% of

[13] For example, some charges may allege objectionable behavior, but not behavior based on a protected characteristic under employment non-discrimination laws. Similarly, not all charges and complaints of harassment based on a protected characteristic ultimately prove to have legal merit. That is, harassing behavior on the basis of a protected characteristic may have occurred, but the behavior alleged may not meet the legal standards for severity or pervasiveness to constitute actionable, unlawful harassment.

[14] Lilia M. Cortina and Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 469-96 (J. Barling & C. L. Cooper eds., 2008).

[15] Remus Ilies *et al.*, *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 PERSONNEL PSYCHOL. 607 (2003). In this article, the researchers reviewed 96 estimates of sexual harassment incidence from 84 independent samples reported in 71 studies. The researchers considered a survey sample to be in the *probability* category if it was based on "(a) a national probability sample (random or stratified random) or (b) a probability sample across multiple organizations or in a multiple-site organization (*e.g.*, government or state employees), or (c) a sample that resulted from the sampling of the entire sampling frame (as defined by the study) in a single-site organization."

women.[16] When respondents were asked in surveys using convenience samples about such behaviors, the incidence rate rose to 75%.[17] Based on this consistent result, researchers have concluded that many individuals do not label certain forms of unwelcome sexually based behaviors – even if they view them as problematic or offensive – as "sexual harassment."[18]

The most widely used survey of harassment of women at work, the Sexual Experiences Questionnaire (SEQ), not only asks respondents whether they have experienced unwanted sexual attention or sexual coercion, but also asks whether they have experienced sexist or crude/offensive behavior.[19] Termed "gender harassment" in the SEQ, these are hostile behaviors that are devoid of sexual interest. Gender harassment can include sexually crude terminology or displays (for example, calling a female colleague a ''c*nt'' or posting pornography) and sexist comments (such as telling anti-female jokes or making comments that women do not belong in management.) These behaviors differ from unwanted sexual attention in that they aim to insult and reject women, rather than pull them into a sexual relationship. As one researcher described it, the difference between these behaviors is analogous to the difference between a ''come on'' and a ''put down.''[20]

When sex-based harassment at work is measured by asking about this form of gender harassment, almost 60% of women report having experienced harassment in surveys using

[16] *Id.* Three of the studies included in the review by Ilies and her colleagues were probability surveys conducted by the Merit Systems Protection Board (MSPB) of federal employees in 1980, 1987 and 1994. U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges* (1994) *available at* http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948; U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Government Update* (1988) *available at* http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=252435&version=252720&application=ACROBAT; U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Is it a Problem?* (1981) *available at* http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=240744&version=241014&application=ACROBAT. Instead of asking respondents whether they had experienced "sexual harassment," the MSPB surveys asked respondents if they had experienced one or more of the following six behaviors: letters, phone calls or materials of a sexual nature; pressure for sexual favors; touching, leaning over, cornering or pinching (these were denoted as severe behaviors); pressure for dates; sexually suggestive looks or gestures; and sexual teasing, jokes, remarks or questions (these were denoted as less severe behaviors). While the MSPB studies were conducted nearly 20 years ago, they remain the only set of surveys using probability samples taken over a period of 14 years of largely the same type of workforce.

[17] Ilies *et al.*, *supra* n. 15. In the case of one convenience sample, the incidence rate rose to 90%. *Id.*

[18] Vicki J. Magley *et al.*, *Outcomes of Self-Labeling Sexual Harassment*, 84 J. APPLIED PSYCHOLOGY, 390 (1999).

[19] Emily A. Leskinen *et al.*, *Gender harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, 35 LAW AND HUMAN BEHAVIOR 25 (2011) (stating that the Sexual Experiences Questionnaire (SEQ), developed by Professor Louise Fitzgerald and her colleagues in 1988, is the most validated and widely used measure of sexual harassment experiences). *See also* Louise F. Fitzgerald *et al.*, *Measuring Sexual Harassment in the Military: The Sexual Experiences Questionnaire (SEQ-DoD)*, 11 MIL. PSYCHOL. 243 (1998).

[20] Professor Fitzgerald and her colleagues developed this description to explain the different forms of sex-based harassment. Louise F. Fitzgerald *et al.*, *Why Didn't She Just Report Him? The Psychological and Legal implications of Women's Responses to Sexual Harassment*, 51 JOURNAL OF SOCIAL ISSUES 1, 117-138 (1995). *See also* Louise F. Fitzgerald *et al.*, *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 JOURNAL OF VOCATIONAL BEHAVIOR 152–175 (1988) (describing gender-based harassment). In 2007, Professor Berdhal recommended use of the term ''sex-based harassment'' in lieu of ''sexual harassment,'' a recommendation adopted by most researchers in the field. Jennifer L. Berdahl, *The Sexual Harassment of Uppity Women*, 92 J. APPLIED PSYCH, 425 (2007) [hereinafter Berdahl (2007)]. Berdahl's study provided evidence that sexual harassment is primarily targeted at women who violated gender ideals.

probability samples.[21] Indeed, when researchers disaggregate harassment into the various subtypes (unwanted sexual attention, sexual coercion, and gender harassment), they find that gender harassment is the most common form of harassment.[22]

Whether or not women label their unwanted experiences as sexual harassment appears to have little influence on the negative consequences of these experiences.[23] As one group of researchers pointed out, data from three organizations "demonstrate that whether or not a woman considers her experience to constitute sexual harassment, she experiences similar negative psychological, work, and health consequences."[24]

Most of the surveys of sex-based harassment at work have focused on harassment experienced by women. One exception has been the surveys conducted by the Merit Systems Protection Board of federal employees in 1980, 1987, and 1994. When respondents were asked whether they had experienced unwanted sexual attention or sexual coercion, 42% of women and 15% of men responded in the affirmative in 1981; as did 42% of women and 14% of men in 1988; and 44% of women and 19% of men in 1994.[25]

Gender Identity-Based and Sexual Orientation-Based Harassment

There are few nationally representative surveys of harassment experienced by transgender and lesbian, gay or bisexual (LGB) employees.[26] Such harassment may include sexually-based behaviors (such as unwanted sexual touching or demands for sexual favors) as well as gender-based harassment (such as calling a lesbian a "d*ke" or a gay man a "f*g").

In one survey using a probability sample and studying social and demographic trends, 35% of LGB-identified respondents who reported being "open" at work reported having been harassed in the workplace.[27] In another survey using a probability sample, LGBT respondents were asked specifically whether they heard derogatory comments about sexual orientation and gender identity in their workplaces. In that survey, 58% of LGBT respondents said they had heard such

[21] Ilies, *supra* n. 15. When responding to the SEQ, across a variety of work environments and based on 86,578 respondents from 55 independent probability samples, 58% of women report having experienced sex-based harassment.
[22] Leskinen *et al*, *supra* n. 19. In a study of approximately 10,000 women in the military, of those who reported harassment, 89.4% reported gender-based harassment. *Id.*
[23] Magley *et al*., *supra* n. 18; Liberty J. Munson *et al*., *Labeling Sexual Harassment in the Military: An Extension and Replication*, 86 J. APPLIED PSYCHOL. 293 (2011).
[24] Magley *et al*., *supra* n. 18.
[25] MSPB surveys, *supra* n. 16.
[26] It is EEOC's position that harassment based on sexual orientation or gender identity is a form of sex-based harassment. *See* Equal Employment Opportunity Commission, *What You Should Know About EEOC and Enforcement Protections for LGBT Workers*, available at: https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.
[27] Christie Mallory & Brad Sears, *Documented Evidence of Employment Discrimination and Its Effects on LGBT People*, The Williams Institute (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf (citing finding from the 2008 General Social Survey, a national probability survey representative of the U.S. population.).

comments.[28] A review of nine other surveys using convenience samples of LGBT individuals found that between 7% and 41% of respondents were verbally and/or physically abused at work or had their work spaces vandalized, with transgender individuals generally experiencing higher rates of harassment than LGB people.[29]

In a large-scale survey of transgender individuals (albeit not a probability sample), 50% of respondents reported being harassed at work.[30] In addition, 7% reported being physically assaulted at work because of their gender identity, and 6% reported being sexually assaulted.[31] 41% reported having been asked unwelcome questions about their transgender or surgical status, and 45% reported having been referred to by the wrong pronouns "repeatedly and on purpose" at work.[32]

Race-Based and Ethnicity-Based Harassment

Race-based and ethnicity-based harassment are significantly understudied.[33] Most studies of race- and ethnicity-based discrimination fail to distinguish between harassment and other forms of discrimination, and hence we did not find any nationally representative surveys on such harassment *per se*.

Researchers have combined the concepts of race-based harassment and ethnicity-based harassment into one construct called "racial and ethnic harassment." In one of the first studies of racial and ethnic harassment based on a convenience sample, between 40% and 60% of respondents (some of whom were working undergraduate or graduate students, others who worked for a school district) reported experiencing some form of racial or ethnic harassment. In this study, harassment was defined to include threatening verbal conduct, such as comments, jokes, and slurs related to one's ethnicity or race, as well as exclusionary behaviors, such as being excluded from a social event, not being given necessary information because of one's ethnicity or race, or being pressured to "give up" one's ethnic/racial identity in order to "fit in."[34]

[28] Human Rights Campaign, *Degrees of Equality Report: A National Study Examining Workplace Climate for LGBT Employees* (2009), *available at* http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/DegreesOfEquality_2009.pdf.

[29] Mallory and Sears, *supra* n. 27.

[30] Jaime M. Grant *et al.*, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), *available at* http://endtransdiscrimination.org/report.html. The survey was based on 6,000 online surveys and 500 paper surveys. The survey is not based on a probability sample because the surveys did not come from a random sample of transgender individuals, but rather from individuals who were reached through various community venues.

[31] *Id.*

[32] *Id.*

[33] Tamara A. Bruce, *Racial and Ethnic Harassment in the Workplace in* GENDER, RACE, AND ETHNICITY IN THE WORKPLACE: ISSUES AND CHALLENGES FOR TODAY'S ORGANIZATIONS (Margaret Foegen Karsten, ed., 2006). While Title VII prohibits discrimination on the basis of national origin, the research generally looks at harassment based on ethnicity, rather than national origin.

[34] Kimberly T. Schneider *et al.*, *An Examination of the Nature and Correlates of Ethnic Harassment Experiences in Multiple Contexts*, 85 J. APPLIED PSYCHOL. 3 (2000). This was a study based on four convenience samples of predominantly Hispanic men and women.

In another survey based on a convenience sample measuring racial and ethnic harassment, researchers found that 70% of the respondents reported experiencing some form of verbal harassment and 45% reported experiencing exclusionary behaviors.[35] In addition, 69% of respondents reported *witnessing* at least one ethnically-harassing behavior in the last two years at work and 36% of respondents who reported that they had not experienced direct harassment indicated that they had knowledge about the harassment of other co-workers.[36]

There has also been some research on the prevalence of racial harassment in particular industries. For example, in a 2011 survey based on a convenience sample of restaurant workers in Los Angeles, 35% of respondents reported having experienced verbal abuse perceived as motivated by race.[37] The study found that language and national origin were among the major motivations that workers attributed to their experience of verbal abuse.[38]

Disability-Based Harassment

Evidence on the prevalence of disability-based harassment in the workplace was even harder to find than studies of racial and ethnic harassment. In a survey based on a convenience sample of one university's faculty and staff, 20% of respondents with disabilities reported experiencing harassment or unfair treatment at work because of their disability.[39] In addition, 6% of all respondents reported having observed harassment or similar unfair treatment of a coworker with a disability.[40] In a similar study, conducted at a different university, 14% of respondents with disabilities reported experiencing harassment or similar unfair treatment at work because of their disability, and 5% of all respondents reported having observed harassment or similar unfair treatment of coworkers with disabilities.[41]

The only other research on disability-based harassment in the workplace analyzed EEOC charge data – not to determine the prevalence of disability-based harassment in the workplace, but to discern what disabilities were more likely to show up in such charges. In the most recent analysis, the odds of a person with behavioral disabilities (anxiety disorder, depression, bipolar

[35] K.S. Douglas Low *et al.*, *The Experience of Bystanders of Workplace Ethnic Harassment*, 37 J. APPLIED SOCIAL PSYCHOL. 2261 (2007).
[36] *Id.*
[37] Restaurant Opportunities Center of Los Angeles, Restaurant Opportunities Centers United, and the Los Angeles Restaurant Industry Coalition, *Behind the Kitchen Door: Inequality and Opportunity in Los Angeles, the Nation's Largest Restaurant Industry*, 48-49 (Feb. 14, 2011) *available at* http://rocunited.org/wp-content/uploads/2011/06/ROC-LA-Behind-the-Kitchen-Door.pdf. Although the researchers conducted a convenience sample survey, they used stratification to ensure that the sample was as representative as possible of the Los Angeles County restaurant industry.
[38] *Id.*
[39] University of Missouri Persons with Disabilities Committee, *2009 Faculty/Staff Survey on Disability Prevalence, Awareness and Accessibility at MU*: *A Report to the Chancellor and Provost on Findings and Recommendations by The Chancellor's Committee for Persons with Disabilities* (2010), http://committees.missouri.edu/persons-disabilities/docs/2009%20Faculty_Staff%20Disability%20Survey%20Findings.doc.
[40] *Id.*
[41] Jennifer Vanderminden & Carol Swiech, *Report on the Status of People with Disabilities: A Survey of Faculty and Staff at the University of New Hampshire*, Fall 2011, https://www.unh.edu/sites/www.unh.edu/files/departments/presidents_commission_on_the_status_of_people_with_disabilities/PDFs/2011_cspd_survey_full_report_with_appendix_2012.pdf.

disorder, and other psychiatric impairments) filing a harassment charge were close to 1.5 times greater than the odds of a person with another type of disability filing a harassment charge.[42] People with speech impairments, learning disabilities, disfigurements, intellectual disabilities, dwarfism, traumatic brain injuries, and hearing impairments also filed more disability harassment charges than people with other disabilities.[43]

Age-Based and Religion-Based Harassment

We identified two surveys on age-based harassment in the workplace, both of which were conducted by AARP. In a survey based on a convenience sample of workers older than 50, 8% of respondents reported having been exposed to unwelcome comments about their age.[44] When the same question was asked in a survey based on a convenience sample of workers older than 50 in New York City, close to 25% reported that they or a family member had been subjected to unwelcome comments about their age in the workplace.[45]

We received anecdotal information chronicling different types of religion-based harassment in the workplace.[46] We also identified numerous articles describing how religious harassment manifests itself in the workplace, but we were not able to identify empirical data based on probability or convenience samples on the prevalence of such harassment.[47]

Intersectional Harassment

As people hold multiple identities, they can also experience harassment on the basis of more than one identity group. For instance, an African-American woman may experience harassment because she is a woman, but also because of her racial identity.[48] There is increasing evidence that targets of harassment often experience mistreatment in multiple forms, such as because of one's race and gender, or ethnicity and religion.[49]

[42] Linda Shaw et al., *Employee and Employer Characteristics Associated with Elevated Risk of Filing Disability Harassment Charges*, 36 J. VOCATIONAL REHAB.187 (2012).
[43] *Id.*
[44] Dawn Nelson, AARP, *AARP Bulletin Poll on Workers 50+: Executive Summary*, AM. ASS'N RETIRED PERSONS (2007), *available at* http://assets.aarp.org/rgcenter/econ/workers_poll_1.pdf.
[45] AARP New York, NYC's Most Powerful Voting Group to Carry Concerns & Worries into Primary (2013), https://states.aarp.org/nycs-most-powerful-voting-group-to-carry-concerns-worries-into-primary/.
[46] *See, e.g.*, *Oral Testimony of Zahra Billoo*, FACES OF WORKPLACE HARASSMENT AND INNOVATIVE SOLUTIONS, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Dec. 7, 2015),
[47] As with studies on racial and ethnic harassment, studies of workplace discrimination based on religion do not disaggregate harassment from other forms of discrimination. *See* Sonia Ghumman *et al.*, *Religious Discrimination in the Workplace: A Review and Examination of Current and Future Trends*, 28 J. BUS. PSYCHOL. 439 (2013) ("Empirical research on religious harassment in the workplace is surprisingly sparse… Often, harassment is lumped in with general measures of discrimination, making it more difficult to sort out the antecedents and consequences of harassment from differential treatment in personnel actions.").
[48] Jennifer L. Berdahl & Celia Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, 91 J. APPLIED PSYCHOL. 42 (2006).
[49] Jana L. Raver and Lisa H. Nishii, *Once, Twice, or Three Times as Harmful? Ethnic Harassment, Gender Harassment, and Generalized Workplace* Harassment, 95:2 J. of Applied Psychol. 236 (2010).

In a 2010 study, researchers hypothesized and found that members of racial minority groups report higher levels of harassment than whites, and that women experience higher levels of harassment than men.[50] When the target of harassment is both a member of a racial minority group and a woman, the individual is more likely to experience higher rates of harassment than white women.[51] Moreover, when the target of harassment is both a member of a racial minority group and a woman, the individual is more likely to experience harassment than men who are members of a racial minority group.[52] One study focusing primarily on gender-based harassment noted that interviews with participants inevitably led to discussions of related race-based harassment, further reinforcing the intersectional nature of harassing behavior.[53] Despite studies on particular aspects of intersectional harassment, a significant amount of research on topics such as sexual harassment is based on the experiences of white women. Similarly, much research on ethnic harassment is based on the experiences of men who are members of racial minority groups. As a result, current research may underestimate the extent and nature of intersectional harassment.[54]

* * *

The bottom line is that there is a great deal we do not know about the prevalence of harassment that occurs because of an employee's race, ethnicity, religion, age, disability, gender identity, or sexual orientation. This is so, despite the fact that there is no shortage of private sector charges and federal sector complaints that are filed claiming harassment on such grounds. We hope that an outcome of this report will be a focus by funders and researchers on collecting better prevalence data on harassment based on these characteristics.

***In light of what we have learned in this area, we recommend the following*:**

- EEOC should work with the Bureau of Labor Statistics or the Census Bureau, and/or private partners, to develop and conduct a national poll to measure the prevalence of workplace harassment based on sex (including pregnancy, sexual orientation and gender identity), race, ethnicity/national origin, religion, age, disability, and genetic information over time.[55]

- Academic researchers should compile baseline research on the prevalence of workplace harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity.[56]

[50] *Id*. at 240-49.
[51] *Id*.
[52] Berdahl, *supra* n. 48, at 432.
[53] Joan C. Williams, *Double Jeopardy? An Empirical Study with Implication for the Debates over Implicit Bias and Intersectionality*, 37 Harv. J. L. & Gender 185 (2014).
[54] Berdahl, *supra* n. 48, at 433.
[55] The 2005 Gallup Organization poll regarding discrimination in the workplace, conducted by Gallup with input from EEOC, would serve as a ready model for a harassment poll. The Gallup Organization, Public Opinion Poll, *Employee Discrimination in the Workplace* (2005), http://media.gallup.com/government/PDF/Gallup_Discrimination_Report_Final.pdf. Notably, since 2002, Australia has conducted a national poll on sexual harassment every five years. https://www.humanrights.gov.au/our-work/sex-discrimination/projects/sexual-harassment-know-where-line.
[56] EEOC's Research and Data Plan for 2016-2019 authorized the agency's research division to study EEOC charge data as well as federal sector hearing and appeal statistics, along with EEO survey and Census data, to determine

- EEOC should confer with the Merit Systems Protection Board to determine whether it can repeat its study of harassment of federal employees and expand its survey to ask questions regarding harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity in the federal government, and to disaggregate sexually-based harassment and gender-based harassment.

- EEOC should work within the structure established by the Office of Personnel Management to offer specific questions on workplace harassment in the Federal Employee Viewpoint Survey.

C. EMPLOYEE RESPONSES TO HARASSMENT

What do employees do when they experience harassment in the workplace? Based on the volume of charges and complaints filed each year, one might presume that many such individuals seek legal relief.

That presumption is incorrect. In fact, based on the empirical data, the extent of non-reporting is striking. As with all the evidence we discuss in this report, almost all of the data on responses to harassment come from studies of sex-based harassment.

Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser (33% to 75%); deny or downplay the gravity of the situation (54% to 73%); or attempt to ignore, forget or endure the behavior (44% to 70%).[57] In many cases, therefore, targets of harassment do not complain or confront the harasser, although some certainly do.[58]

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which private sector and federal, state and local government employers and industries were most frequently subject to allegations of harassment. *See* https://www.eeoc.gov/eeoc/plan/research_data_plan.cfm. Researchers are often dependent on outside funding from private and public sources to conduct their research. Thus, this recommendation is directed toward such funders as well.

[57] Cortina & Berdahl, *supra* n. 14. The range of percentages results from five studies reviewed by Cortina & Berdhal. Three of the studies surveyed women only; two of the studies surveyed men and women. The five studies were: (1) Lilia M. Cortina, *Hispanic Perspectives on Sexual Harassment and Social Support*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 570 (2004) (working Latina women from different companies); (2) Caroline C. Cochran *et al*., *Predictors of Responses to Unwanted Sexual Attention*, 21 PSYCHOL. OF WOMEN Q. 207 (1997) (male and female university staff and students); (3) Amy L. Culbertson & Paul Rosenfield, *Assessment of Sexual Harassment in the Active-Duty Navy*, 6 MIL. PSYCHOL. 69 (1994) (exploring experiences of women in the Navy); (4) Kimberly T. Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. OF APPLIED PSYCHOL. 401 (1997) (working women from different companies); and (5) MSPB 1994, *supra* n. 16 (male and female federal employees). Because these percentages come from a review of five studies, they include surveys in which respondents were asked if they had experienced "sexual harassment" (without the term being defined), had experienced any behavior from a list of sexually-based behaviors ("come-ons"), or had experienced any of those sexually-based behaviors and/or any gender-based derogatory comments ("put downs").

[58] The percentages in the four studies for targets of harassment confronting their harasser in some way were wide-ranging: 25% (Cochran – university staff and students); 33% to 57% (Schneider – working women in different companies); and 41% of women and 23% of men (MSPB – federal employees). The highest percentages were in the Navy study by Culbertson *et al.*: 54% of officers and 72% of enlisted personnel.

The most common response taken by women generally is to turn to family members, friends, and colleagues. One study found that 27% to 37% of women who experienced harassment discussed the situation with family members, while approximately 50% to 70% sought support from friends or trusted others.[59]

The least common response of either men or women to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint.[60] Two studies found that approximately 30% of individuals who experienced harassment talked with a supervisor, manager, or union representative. In other words, based on those studies, *approximately 70%* of individuals who experienced harassment never even talked with a supervisor, manager, or union representative about the harassing conduct.[61]

The incidence of reporting appears to be related to the type of harassing behavior. One study found that gender-harassing conduct was almost never reported; unwanted physical touching was formally reported only 8% of the time; and sexually coercive behavior was reported by only 30% of the women who experienced it.[62]

In terms of filing a formal complaint, the percentages tend to be quite low. Studies have found that 6% to 13% of individuals who experience harassment file a formal complaint.[63] That means that, on average, anywhere from 87% to 94% of individuals did *not* file a formal complaint.

Employees who experience harassment fail to report the behavior or to file a complaint because they anticipate and fear a number of reactions – disbelief of their claim; inaction on their claim; receipt of blame for causing the offending actions; social retaliation (including humiliation and ostracism); and professional retaliation, such as damage to their career and reputation.[64]

The fears that stop most employees from reporting harassment are well-founded. One 2003 study found that 75% of employees who spoke out against workplace mistreatment faced some form of retaliation.[65] Other studies have found that sexual harassment reporting is often followed by organizational indifference or trivialization of the harassment complaint as well as

[59] Cortina & Berdhahl, *supra* n. 14.
[60] *Id.*
[61] *Id.*
[62] *Written Testimony of Lilia M. Cortina*, WORKPLACE HARASSMENT: EXAMINING THE SCOPE OF THE PROBLEM AND POTENTIAL SOLUTIONS, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 15, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/testimony_cortina.cfm (*citing* K. A. Lonsway *et al*., *Sexual Harassment in Law Enforcement: Incidence, Impact and Perception*, 16 POLICE QUARTERLY 117 (Jun. 2013)).
[63] Cortina & Berdhahl, *supra* n. 14. In the Navy study by Culbertson *et al*., 6% to 8% filed a formal complaint; in the survey by Schneider of women in different companies, 6% to 13% had filed a complaint. Two of the studies had very disparate results. Cortina's study of Latina women in different companies showed a 17% to 20% rate for filing a formal complaint, while the study by Cochran *et al.* of university staff and students showed a 2% rate. The MSPB study found that, in 1987, 5% of both female and male employees took some type of formal action. MSPB 1988, *supra* n. 16. In 1994, for the study included in the Cortina and Berdhahl review, the rate had increased to 6%. MSPB 1994, *supra* n.16.
[64] Cortina testimony, *supra* n. 62.
[65] Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003).

hostility and reprisals against the victim.[66] Such responses understandably harm the victim in terms of adverse job repercussions and psychological distress.[67] Indeed, as one researcher concluded, such results suggest that, in many work environments, the most "reasonable" course of action for the victim to take is to avoid reporting the harassment.[68]

These findings raise serious concerns. We discuss the need for a comprehensive strategy to remedy this problem in Part Three of this report.

* * *

Our journey into the academic literature on the prevalence of, and responses to, harassment was illuminating. It taught us some things we did not know at all – for example, how radically different prevalence rates of sex-based harassment can be based on whether respondents are a probability sample or a convenience sample, and based on how survey questions are framed. It reinforced some information we already knew, such as the low level of formal reporting, although the high percentage of those who never talk to a supervisor or file a legal complaint was striking. And it laid bare the absence of empirical data regarding the prevalence of harassment based on protected characteristics other than sex.

D. THE BUSINESS CASE FOR STOPPING AND PREVENTING HARASSMENT

Let there be no mistake: Employers should care about stopping harassment because *harassment is wrong* – and, in many cases, it is *illegal*. Workplace harassment can produce a variety of harms – psychological, physical, occupational, and economic harms that can ruin an employee's life. These effects of harassment – on victims – are primarily why harassment must be stopped. So, again: Employers should care about preventing harassment because it is the right thing to do, and because stopping illegal harassment is required of them.

Moral obligation and legal duty are not the complete story, though. Based on what we have learned, employers should also care about stopping harassment because it makes good business sense.

The business case for preventing harassment is sweeping. At the tip of the iceberg are direct financial costs associated with harassment complaints. Time, energy, and resources are diverted from operation of the business to legal representation, settlements, litigation, court awards, and

[66] Mindy Bergman *et al., The (Un)Reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87(2) J.APPLIED PSYCHOLOGY 230 (2002); MSPB 1994, *supra* n. 16.
[67] Bergman *et al., supra* n. 66; Cortina and Magley, *supra* n. 65.
[68] *Written Testimony of Mindy E. Bergman*, WORKPLACE HARASSMENT: EXAMINING THE SCOPE OF THE PROBLEM AND POTENTIAL SOLUTIONS, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 15, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/testimony_bergman.cfm. As Bergman notes: "It is actually *unreasonable* for employees to report harassment to their companies because minimization and retaliation were together about as common as remedies and created further damage to people who had already been harassed. Further, because remediating the situation did not make the person whole – that is, did not overcome the damage caused by harassment – and helpful vs. hurtful responses were each found about 50% of the time, reporting is a gamble that is not worth taking in terms of individual well-being."

damages. These are only the most visible and headline-grabbing expenses. They also only address employees who report harassment, which, as we explained, may account for only a fraction of the harassment that occurs.

The business case extends far deeper. It encompasses employees who endure but never report harassment, as well as coworkers and anyone else with an interest in the business who witness or perceive harassment in the workplace. When accounting for all those affected by it, harassment becomes more insidious and damaging. In addition to the costs of harassment complaints, the true cost of harassment includes detrimental organizational effects such as decreased workplace performance and productivity, increased employee turnover, and reputational harm.

Direct Financial Costs of Harassment

When employers consider the costs of workplace harassment, they often focus on tangible, monetary costs associated with charges filed with EEOC, and with good reason. As previously noted, nearly one in three charges filed with the Commission in fiscal year 2015—27,893 of 89,385 charges – alleged some form of harassment.[69] That averages to approximately 76 harassment charges filed *daily* – a number that has, unfortunately, remained steady over the years. Indeed, since 2010, employees have filed 162,872 charges alleging harassment.[70]

Charges of harassment come at a steep cost for employers. The Commission resolved 28,642 harassment allegations in 2015. Of those, 5,518 charges involving allegations of harassment were resolved in favor of the charging party through the administrative process, resulting in $125.5 million in benefits for employees. Since 2010, employers have paid out $698.7 million to employees alleging harassment through the Commission's administrative enforcement pre-litigation process alone.[71] While we do not have strictly comparable cost data with respect to the various agencies of the federal government, we surmise it would likely be similar, given the diverse and varied nature of the federal workforce and its worksites.[72]

[69] *See* U.S. Equal Employment Opportunity Commission, Enforcement & Litigation Statistics, All Statutes (FY 1997 – FY 2015), http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm; U.S. Equal Employment Opportunity Commission, Enforcement & Litigation Statistics, All Charges Alleging Harassment (FY 2010 - FY 2015) http://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.

[70] *See* U.S. Equal Employment Opportunity Commission, Enforcement & Litigation Statistics, All Charges Alleging Harassment (FY 2010 – FY 2015), http://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.

[71] *Id.*

[72] As we heard from one witness at the first public meeting of the Task Force: "The federal government is the most diverse workforce in the world. We have federal grocery stores – over two hundred federal grocery stores, federal butchers, federal cashiers. We have park rangers who spend two months surveying the wilderness and VA hospitals that have the full range of medical professionals, doctors, and nurses. We have police departments, we have fire departments, so when people think of the federal government you think of bureaucracy you don't think of the traditional employment." *Oral Testimony of Dexter Brooks*, WORKPLACE HARASSMENT: EXAMINING THE SCOPE OF THE PROBLEM AND POTENTIAL SOLUTIONS, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 17, 2015).

EEOC 2015 Statistics in the Private Sector

- *27,893 charges received (31%) alleged harassment*
- *28,642 charges resolved (31%) alleged harassment*
- *$125.5 million secured for employees alleging harassment in EEOC's pre-litigation process*
- *33 lawsuits filed by EEOC (23% of all suits filed) alleged harassment*
- *42 lawsuits resolved by EEOC (27% of all suits resolved) alleged harassment*
- *$39 million in monetary benefits secured for employees in EEOC lawsuits involving harassment*

A recent study by Hiscox, a liability insurance provider, paints the picture of the costs of employment disputes (albeit not only harassment claims) more broadly.[73] Studying a representative sample of closed employment dispute claims from smaller- and mid-sized companies, they found that 19% of the matters resulted in defense and settlement costs averaging $125,000 per claim.[74] And of course, for the 81% of studied charges that did not result in a payment by the insurance company, precious time, energy, and resources were still required to handle them internally – for 275 days, on average.[75] Beyond their study of the closed claims, Hiscox estimated, based on 2014 data, that U.S. employers had at least an 11.7% chance of having an EEO charge filed against them.[76] While this data applies to a broader range of employment disputes, not just harassment claims, the time, energy, and resources devoted to those claims would apply to harassment claims, as well.

Litigation of harassment claims tends to be even more expensive. One estimate of settlement payments and court judgments solely in 2012 for harassment lawsuits clocked in at over $356 million.[77] The largest sexual harassment jury award in 2012 totaled $168 million.[78]

Harassment litigation initiated by EEOC has also cost employers. In fiscal year 2015, the Commission filed 33 lawsuits containing a harassment allegation.[79] During the same time, it resolved 42 lawsuits involving harassment, recovering over $39 million in monetary benefits for

[73] *See* Hiscox, The 2015 Hiscox Guide to Employee Lawsuits: Employee Charge Trends Across the United States, *available at* http://www.hiscox.com/shared-documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf.
[74] *Id.* at 6.
[75] *Id.*
[76] *Id.* at 4.
[77] eBossWatch, *National Boss Day Report: Employers paid over $356 million for workplace harassment and discrimination complaints* (Oct. 16, 2012), http://blog.ebosswatch.com/2012/10/national-boss-day-report-employers-paid-over-356-million-for-workplace-harassment-and-discrimination-complaints/.
[78] *Id.*
[79] Data provided by EEOC Office of General Counsel.

employees.[80] Simply put, the direct financial costs of workplace harassment are significant. But by no means are financial costs the only repercussions.

Indirect Costs: Decreased Productivity, Increased Turnover, and Reputational Damage

Direct costs tied to harassment complaints are largely visible. An employer consciously moves resources away from its business plan to respond to the complaints. However, there are a host of indirect costs that, while often invisible, can tower over the direct costs.

It begins with the reality that harassment causes personal harm to the victim. Numerous studies have identified the damaging effects of mistreatment in the workplace, mainly focusing on sexual harassment. Employees experiencing sexual harassment are more likely to report symptoms of depression, general stress and anxiety, posttraumatic stress disorder (PTSD), and overall impaired psychological well-being.[81]

The Personal Effects of Harassment:
Selections from Stories Shared with the Select Task Force

"I have faced sexual discrimination as well as unwanted sexual harassment on my job and retaliation by my employer for addressing the issue. The distress and mental anguish that I have endured has affected my health. I was recently diagnosed with hypertension on July 13, 2015, and I am only 36 years old."

"[The harassment has] caused devastating loss of income, reputation, missed opportunities, mental health and physical health problems."

One study found that the psychological effects of sexual harassment can rise to the level of diagnosable Major Depressive Disorder or PTSD.[82] Sexual harassment has also been tied to psychological effects such as negative mood, disordered eating, self-blame, reduced self-esteem, emotional exhaustion, anger, disgust, envy, fear, lowered satisfaction with life in general, and abuse of prescription drugs and alcohol.[83]

Physical harm can also result. Studies have linked sexual harassment to decreased overall health perceptions or satisfaction, as well as headaches, exhaustion, sleep problems, gastric problems,

[80] *Id.* To be clear, many of these suits involved allegations in addition to harassment. As a result, not all of the $39 million in monetary benefits may be directly tied to allegations of harassment.
[81] *See* Cortina testimony, *supra* n. 62; Cortina & Berdahl, *supra* n. 14; Lilia M. Cortina & Emily A. Leskinen, *Workplace Harassment Based on Sex: A Risk Factor for Women's Mental Health Problems*, *in* VIOLENCE AGAINST WOMEN AND MENTAL HEALTH 139 (C. GarcÍa- Moreno & A. Riecher-Rössler eds., 2013).
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[82] *See* Cortina & Leskinen, *supra* n. 81 (citing B. S. Dansky & D. G. Kilpatrick, *Effects of Sexual Harassment, in* SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 152 (W. O'Donohue ed., 1997)).
[83] *Id.*

nausea, weight loss or gain, and respiratory, musculoskeletal, and cardiovascular issues.[84] These potential effects, both mental and physical, become increasingly likely when the harassment occurs over time.[85]

The damaging personal effects of harassment are not limited to victims. There is growing understanding that employees who observe or perceive mistreatment in their workplace can also suffer mental and physical harm. One study found that employees, female and male alike, who observed hostility directed toward female coworkers (both incivility and sexually harassing behavior) were more likely to experience lower psychological well-being.[86] These declines in mental health were, in turn, linked to lower physical well-being.[87] According to the study, the drivers of these effects can stem from empathy and worry for the victim, concern about the lack of fairness in their workplace, or fear of becoming the next target.[88] Whatever the case, if there is harassment in the workplace, more people than just the victim can be harmed.

It follows, then, that when employees are suffering harassment, the work can suffer. It is well-established that workplace harassment and conflict can result in decreased productivity. Studies – again, focusing largely on sexual harassment – have found that harassment is associated with debilitating job dissatisfaction and work withdrawal.[89] This largely takes form as disengagement from work, which is manifested as distraction, neglecting a project, malingering, tardiness, or even excessive absenteeism.[90] Often, work time is spent talking about the harassment with others, seeking personal treatment or assistance, reporting the harassment, and navigating the complaint and investigation processes.[91]

Work withdrawal and disengagement due to harassment can also go beyond the individual to affect team and group relationships.[92] The mere awareness of sexual harassment among a work group can create a tense environment,[93] negatively influencing the group's day-to-day functioning.[94] At the most basic interactional level, one study found that three-quarters of U.S. workers have avoided a coworker merely because of a "disagreement" [95] – let alone because of harassment. Ultimately, this kind of response to workplace conflict can become a contagion and

[84] *See* Cortina & Berdahl, *supra* n. 14 at 481.
[85] *See* Jennifer L. Berdahl & Jana L. Raver, *Sexual Harassment*, 3 APA HANDBOOK INDUS. & ORGANIZATIONAL PSYCHOL. 641 (2011).
[86] *See* Kathi Minder-Rubino & Lilia Cortina, *Beyond Targets: Consequences of Vicarious Exposure to Misogyny at Work*, 92 J. APPLIED PSYCH. 1254, 1264 (2007).
[87] *Id.*
[88] *Id.*
[89] *See* Cortina & Berdahl, *supra* n. 14 at 481 (summarizing studies); Berdahl & Raver, *supra* n. 85, at 649; Laurent LaPierre *et al*., *Sexual Versus Nonsexual Workplace Aggression and Victims' Overall Job Satisfaction*, 10 J. Occupational Health Psych. 155 (2005).
[90] *See* Cortina & Berdahl, *supra* n. 14 at 481 (summarizing studies); Donald Zauderer, *Workplace Incivility and the Management of Human Capital*, THE PUBLIC MANAGER 38 (Spring 2002).
[91] *See* MSPB 1994, *supra* n. 16.
[92] *See* Jana Raver & Michele Gelfand, *Beyond the Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance*, 48 Academy of Mgmt. J. 387, 388 (2005).
[93] *See id.* (citing T.M. Glomb *et al*., *Ambient Sexual Harassment: An Integrated Model of Antecedents and Consequences*, 71 Org. Behavior and Human Decision Processes 309-28 (1997)).
[94] *See id.* at 394.
[95] CPP Global, *Workplace Conflict and How Businesses Can Harness It to Thrive* 6 (2008), *available at* https://www.cpp.com/pdfs/CPP_Global_Human_Capital_Report_Workplace_Conflict.pdf.

an "organization stressor."[96] It can pervade and break down a work group, damaging its ability to function.[97] All of this is a drag on performance – and the bottom line.

A Sketch of the Cost of Lost Time Due to Harassment in the Federal Workplace

[I]magine an employee who's being bothered by a coworker who leers at her or makes comments full of innuendo or double entendres, or who tells jokes that are simply inappropriate in a work setting. The time this employee spends worrying about the coworker, the time she spends confiding in her office mate about the latest off-color remark, the time she spends walking the long way to the photocopier to avoid passing his desk, is all time that sexual harassment steals from all of us who pay taxes.

Adding up those minutes and multiplying by weeks and months begins to paint a picture of how costly sexual harassment is. Increase this one individual's lost time by the thousands of cases like this in a year, and the waste begins to look enormous. And this may well be a case that doesn't even come close to being considered illegal discrimination by the courts. Whether or not they're illegal, these situations are expensive.

U.S. Merit Systems Protections Board, Sexual Harassment in the Federal Workplace (1994).

Perhaps most costly of all, workplace harassment can lead to increased employee turnover. Some have hypothesized that turnover costs are the largest single component of the overall cost of sexual harassment.[98] Even conduct that is not harassment can lead to employee turnover. To summarize one commentator: Acts of incivility can incite people to exit the scene.[99]

Combining these various factors can add up to a significant sum of money. In 1994, the Merit Systems Protection Board conservatively estimated that over two years, as a result of sexual harassment, job turnover ($24.7 million), sick leave ($14.9 million), and decreased individual ($93.7 million) and workgroup ($193.8) productivity had cost the government a total of $327.1 million.[100]

An additional cost to consider is the damage workplace harassment can inflict on a firm's reputation. For example, studies have linked sexual harassment to negative effects on a firm's ability to attract employees.[101] A 2008 study of the impact of sexual harassment on a consumer brand found that prospective employees' perceived sexual harassment in a sales workplace was negatively related to their intentions to work for the firm.[102] Indeed, fostering an organization's image through internal brand strategies aimed at alleviating workplace sexual harassment may lead to the attraction and retention of qualified employees.[103]

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[96] *Id.*
[97] *Id.*
[98] *See* Rebecca Merkin & Muhammad Kamal Shah, *The Impact of Sexual Harassment on Job Satisfaction, Turnover Intentions, and Absenteeism: Findings from Pakistan Compared to the United States*, Springer Plus 4 (2014), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4028468/.
[99] *See* Zauderer, *supra* n. 90, at 41.
[100] *See* MSPB 1994, *supra* n. 16, at 26.
[101] *See, e.g.*, Jeremy Sierra *et al*., *Brand Response-Effects of Perceived Sexual Harassment in the Workplace*, 14 J. OF BUS. & MGMT. 157 (2008).
[102] *Id.* at 185.
[103] *Id.* at 190 (referencing John Sullivan, *Measuring Employment Brand*, 2 STRATEGIC HUM. RES. REV. 7 (2003)).

Even behavior that doesn't rise to the level of harassment can adversely affect the ability of employers to attract talent. In the 2007 Level Playing Field Institute study, roughly one-fourth (27%) of respondents who experienced "unfairness" at work within the past year, and over 70% who suffered bullying, said their experience strongly discouraged them from recommending their employer to potential employees.[104] And approximately 58% who experienced unfairness said that their experience would "to some degree" cause them to discourage potential employees.[105]

The ability of a firm to retain customers and clients, or attract new ones, could also be affected. Studies demonstrate that perceived sexual harassment in the workplace has a negative effect on attitudes toward the brand and brand image.[106] Conversely, when internal stakeholders understand, embrace, and execute organizational brand values, the company has an opportunity to gain a competitive advantage in the marketplace and the brand has an opportunity to flourish. In this sense, internal brand strategies are critical for overall business success.[107]

Again, even behavior that does not n't rise to the level of harassment can adversely affect a brand. A majority of respondents in the Level Playing Field Institute's study replied that "unfairness" they had suffered in the workplace led them "to some degree" to discourage others from purchasing products or services from their employer.[108] Studies have also shown that "incivility" among employees in a workplace, when merely observed by a consumer, can lead the consumer to feel anger.[109] That anger then "fosters rapid, negative generalizations about the firm and other employees that extend into the future."[110] As a result, consumers observing uncivil forms of behavior among employees become "less likely to repurchase from the firm and express less interest in learning about the firm's new services."[111]

[104] *See* Corporate Leavers Study, Level Playing Field Institute, *The Cost of Employee Turnover Due Solely to Unfairness in the Workplace* (2007) at 7, http://www.lpfi.org/corporate-leavers-survey/.
[105] *Id.* Much of the research in this area examines the negative effects of incivility or rudeness in the workplace, not specifically harassment. However, we believe this research still merits consideration, as, arguably, the negative effects of incivility would similarly emerge were the focus squarely on harassing behavior.
[106] Sierra *et al.*, *supra* n. 102.
[107] *Id.* at 190 (citing Rodney Peter Gapp & Bill Merrilees, *Important Factors to Consider When Using Internal Branding as a Management Strategy: A Healthcare Case Study*, 14 J. BRAND MGMT. 162 (2006)).
[108] Christine Porath *et al.*, *It's Unfair: Why Customers Who Merely Observe an Uncivil Employee Abandon the Company*, J. SERV. RES. 1 (2011); Christine Porath *et al.*, *Witnessing Incivility Among Employees: Effects on Consumer Anger and Negative Inferences about Companies*, 37 J. CONSUMER RES. 292 (2010). The studies generally define "incivility" as insensitive, disrespectful, or rude behaviors directed at another person that display a lack of regard.
[109] *See* Christine Porath, Debbie MacInnis, & Valerie Folkes, *It's Unfair: Why Customers Who Merely Observe an Uncivil Employee Abandon the Company*, Journal of Service Research (Feb. 22, 2011); Christine Porath, Debbie MacInnis, & Valerie Folkes, *Witnessing Incivility Among Employees: Effects on Consumer Anger and Negative Inferences about Companies*, Journal of Consumer Research (Vol. 37) 292-303 (Aug. 2010). The studies generally define "incivility" as insensitive, disrespectful, or rude behaviors directed at another person that display a lack of regard.
[110] Porath, *et al.*, 2010, *supra* n. 110, at 301.
[111] Porath, *et al.*, 2011, *supra* n, 110, at 3.

The Case of the "Superstar" Harasser

Finally, an often competing economic consideration bears discussion. Employers may find themselves in a position where the harasser is a workplace "superstar."[112] By superstar, think of the high-earning trader at an investment bank, the law firm partner who brings in lucrative clients, or the renowned professor or surgeon.[113] Some of these individuals, as with any employee, may be as likely to engage in harassment as others. Often, however, superstars are privileged with higher income, better accommodations, and different expectations.[114] That privilege can lead to a self-view that they are above the rules, which can foster mistreatment.[115] Psychologists have detailed how power can make an individual feel uninhibited and thus more likely to engage in inappropriate behaviors.[116] In short, superstar status can be a breeding ground for harassment.

When the superstar misbehaves, employers may perceive themselves in a quandary. They may be tempted to ignore the misconduct because, the thinking goes, losing the superstar would be too costly. They may wager that the likelihood or cost of a complaint of misbehavior is relatively low and outweighed by the superstar's productivity. Some employers may even use this type of rationale to cover or retaliate for a harasser.

Employers should avoid the trap of binary thinking that weighs the productivity of a harasser *solely* against the costs of his or her being reported. As a recent Harvard Business School study found, the profit consequences of so-called "toxic workers" – *specifically including* those who are "top performers" – is a net negative.[117] Analyzing data on 11 global companies and 58,542 hourly workers, the researchers found that roughly one in 20 workers was fired for egregious company policy violations, such as sexual harassment.[118] Avoiding these toxic workers, they found, can save a company more than twice as much as the increased output generated by a top performer.[119] As a result, the study urged employers to "consider toxic and productivity outcomes together rather than relying on productivity alone as the criterion of a good hire."[120] No matter who the harasser is, the negative effects of harassment can cause serious damage to a business. Indeed, the reputational costs alone can have serious consequences, particularly where

[112] Michael Housman & Dylan Minor, *Toxic Workers*, Harvard Business School, Working Paper 16-057, 3 (Nov. 15) (defining "superstar" as "workers in the top 1% of productivity"), *available at* http://www.hbs.edu/faculty/Publication%20Files/16-057_d45c0b4f-fa19-49de-8f1b-4b12fe054fea.pdf.
[113] *Written Testimony of Fran Sepler*, INDUSTRY SPECIFIC HARASSMENT ISSUES, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Sept. 18, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/sepler.cfm; *see also* Michael Housman & Dylan Minor, *Toxic Workers*, HARV. BUS. SCH. (2015), at 22 ("For example, an investment bank with a rogue trader who is making the firm millions in profits might be tempted to look the other way when the trader is found to be overstepping the legal boundaries.")
[114] Sepler testimony, *supra* n. 114.
[115] *Id.*
[116] Dacher Keltner *et al.*, *Power, Approach, and Inhibition*, 110 PSYCHOL. REV. 265 (2003).
[117] Housman & Minor, *supra* n. 113, at 23. The authors define a "toxic worker" as "a worker that engages in behavior that is harmful to an organization, including either its property *or people*." *Id.* at 2 (emphasis added). Further, the term "toxic" includes "both the basic definition of toxic as being something harmful and also the notion that toxic workers tend to infect others with such behavior." *Id.* at n.1.
[118] *Id.* at 10, 12.
[119] *Id.* at 20.
[120] *Id.* at 23.

it is revealed that managers for years "looked the other way" at a so-called "superstar" harasser.[121]

E. RISK FACTORS FOR HARASSMENT

Our efforts over the past year with the Select Task Force focused broadly on unwelcome conduct in the workplace based on characteristics protected under anti-discrimination statutes. We wanted to find ways to help employers and employees prevent such conduct before it rose to the level of illegal harassment.

Several members of the Select Task Force suggested that we identify elements in a workplace that might put a workplace more at risk for harassment. The thought was that if we could identify "risk factors," that might give employers a roadmap for taking proactive measures to reduce harassment in their workplaces. Indeed, as we delved into the question, we found that academic research and practical knowledge gained on the ground by investigators, trainers, diversity leaders, and human resources personnel have identified a number of such risk factors.

Some of the findings around risk factors (both from academic work and practical work) look at the characteristics of those who might be more prone to engage in harassment or to be the victims of harassment. We decided to focus instead on a number of environmental risk factors – organizational factors or conditions that may increase the likelihood of harassment. Indeed, numerous studies have shown that organizational conditions are the most powerful predictors of whether harassment will happen.[122]

Most if not every workplace will contain at least some of the risk factors we describe below. In that light, to be clear, we note that the existence of risk factors in a workplace does not mean that harassment is occurring in that workplace. Rather, the presence of one or more risk factors suggests that there may be fertile ground for harassment to occur, and that an employer may wish to pay extra attention in these situations, or at the very least be cognizant that certain risk factors may exist. Finally, we stress that the list below is neither exclusive nor exhaustive, but rather a number of factors we felt were readily identifiable.

[121] For just a sampling of news stories on such situations, *see, e.g.*, Rick Rojas, *Columbia Business Professor Files Sexual Harassment Lawsuit Against University*, N.Y. Times, Mar. 24, 2016, at A23; Tamar Lewin, *Seven Allege Harassment by Yale Doctor at Clinic*, N.Y. Times, April 14, 2015, at A11. *See also* Katie J.M. Baker, *Ethics and the Eye of the Beholder*, BuzzFeedNews (May 20, 2016, 2:56 PM), https://www.buzzfeed.com/katiejmbaker/yale-ethics-professor?utm_term=.skpralLvX#.dm1YJWA4K; Katie J.M. Baker & Adam Serwer, *Administrator at Iconic Comedy Theater Fired Over Harassment Allegations*, BuzzFeedNews (Feb. 19, 2016, 7:30 PM), https://www.buzzfeed.com/katiejmbaker/administrator-at-iconic-comedy-theater-fired-over-sexual-har?utm_term=.rso68Y0zM#.ij30DLbPe.

[122] Cortina testimony, *supra* n. 62; Chelsea R. Willness *et al.*, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60:1 PERSONNEL PSYCHOL. 127 (2007).

Homogenous Workforces

Perhaps not surprisingly, harassment is more likely to occur where there is a lack of diversity in the workplace.[123] For example, sexual harassment of women is more likely to occur in workplaces that have primarily male employees, and racial/ethnic harassment is more likely to occur where one race or ethnicity is predominant.[124] Workers with different demographic backgrounds than the majority of the workforce can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others.[125] They may speak a different language, observe different customs, or simply interact in ways different from the majority. Conversely, workers in the majority might feel threatened by those they perceive as "different" or "other." They might be concerned that their jobs are at risk or that the culture of the workplace might change, or they may simply be uncomfortable around others who are not like them.[126]

Workplaces Where Some Workers Do Not Conform to Workplace Norms

Harassment is more likely to occur where a minority of workers does not conform to workplace norms based on societal stereotypes.[127] Such workers might include, for example, a "feminine" acting man in a predominantly male work environment that includes crude language and sexual banter, or a woman who challenges gender norms by being "tough enough" to do a job in a traditionally male-dominated environment.[128] Similarly, a worker with a manifest disability may engender harassment or ridicule for being perceived as "different," as might a worker in a "rough and tumble" environment who for any number of reasons chooses not to participate in "raunchy" banter.

Cultural and Language Differences in the Workplace

It might seem ironic (given the first risk factor of homogenous workforces) that workplaces that are extremely diverse also pose a risk factor for harassment.[129] This has been found to be the case especially when there has been a recent influx of individuals with different cultures or nationalities into a workplace, or where a workplace contains significant "blocs" of workers from

[123] Cortina testimony, *supra* n. 62; Sepler testimony, *supra* n. 114; Meg A. Bond, *Prevention of Sexism* in ENCYCLOPEDIA OF PRIMARY PREVENTION AND HEALTH PROMOTION (Thomas Gullotta & Martin Bloom eds., 2014).
[124] Sepler testimony, *supra* n. 114.
[125] *Id*.
[126] *See generally* Alistair Bell, *Americans Worry That Illegal Migrants Threaten Way of Life, Economy*, REUTERS (Aug. 7, 2014), http://www.reuters.com/article/us-usa-immigration-worries-idUSKBN0G70BE20140807 (reporting that 70% of Americans believe that undocumented immigrants threatened U.S. beliefs and customs); Cristina Silva, *Undocumented Immigrants Taking Jobs From US Citizens? Most Americans Believe Immigration Is Bad For Economy*, INT'L BUS. TIMES (Aug. 14, 2015), http://www.ibtimes.com/undocumented-immigrants-taking-jobs-us-citizens-most-americans-believe-immigration-2054509 (citing survey data that 51% of Americans believe they are competing for jobs against immigrants living in the county without work permits).
[127] Bond, *supra* n. 124.
[128] Cortina & Berdahl, *supra* n. 14.
[129] *Written Testimony of Sindy Warren*, INDUSTRY SPECIFIC HARASSMENT ISSUES, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Sept. 18, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/warren.cfm.

different cultures.[130] Alternately, different cultural backgrounds may cause employees to be less aware of laws and workplace norms, which can affect both their behavior and their ability to recognize prohibited conduct.[131] Workers who do not speak English may not know their rights, and may be more subject to exploitation. The Select Task Force heard testimony from one expert who discussed how language and linguistic characteristics can play a role in cases of harassment or discrimination.[132]

Coarsened Social Discourse Outside the Workplace

In both homogenous and diverse workforces, events and coarse social discourse that happen outside the workplace may make harassment inside a workplace more likely or perceived as more acceptable. For example, after the 9/11 attacks, there was a noted increase in workplace harassment based on religion and national origin. Thus, events outside a workplace may pose a risk factor that employers need to consider and proactively address, as appropriate.

Workforces with Many Young Workers

Workplaces with many teenagers and young adults may raise the risk for harassment.[133] Workers in their first or second jobs may be less aware of laws and workplace norms – *i.e.*, what is and is not appropriate behavior in the workplace.[134] Young workers who engage in harassment may lack the maturity to understand or care about consequences.[135] Young workers who are the targets of harassment may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable.[136] Finally, young workers who are in unskilled or precarious jobs may be more susceptible to being taken advantage of by coworkers or superiors, particularly those who may be older and more established in their positions.

Workplaces with "High Value" Employees

As noted in the discussion regarding the business case, there are workforces in which some employees are perceived to be particularly valuable to the employer – the "rainmaking" partner or prized, grant-winning researcher.[137] These workplaces provide opportunities for harassment, since senior management may be reluctant to challenge the behavior of their high value employees, and the high value employees, themselves, may believe that the general rules of the workplace do not apply to them.[138] In addition, the behavior of such individuals may go on outside the view of anyone with the authority to stop it.

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[130] Mary M. Meares *et al.*, *Employee Mistreatment and Muted Voices in the Culturally Diverse Workplace*, 32 J. OF APPLIED COMM. RES. 4 (2004).
[131] *Id.*
[132] *Testimony of Guadalupe Valdés*, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Mar. 11, 2016), https://www.eeoc.gov/eeoc/task_force/harassment/3-11-16/valdes.cfm.
[133] *Written Testimony of Michael A. Robbins*, INDUSTRY SPECIFIC HARASSMENT ISSUES, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Sept. 18, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/robbins.cfm; Warren testimony, *supra* n. 130.
[134] Robbins testimony, *supra* n. 134.
[135] *Id.*
[136] *Id.*
[137] Sepler testimony, *supra* n. 114.
[138] *Id.*

Workplaces with Significant Power Disparities

The reality is that there are significant power disparities between different groups of workers in most workplaces. But such significant power disparities can be a risk factor.[139] For example, workplaces where there are executives and administrative support staff, factories where there are plant managers and assembly line workers, and all branches of the military pose opportunities for harassment.[140]

Low-status workers may be particularly susceptible to harassment, as high-status workers may feel emboldened to exploit them. Low-status workers may be less likely to understand internal complaint channels, and may also be particularly concerned about the ramifications of reporting harassment (*e.g.*, retaliation or job loss).[141] Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.[142] Finally, research shows that when workplace power disparities are gendered (*e.g.*, most of the support staff are women and most of the executives are men), more harassment may occur.[143]

Workplaces that Rely on Customer Service or Client Satisfaction

Few employers would say that their business does *not* rely on excellent customer service and client satisfaction. As a risk factor, we are specifically speaking about those workplaces where an employee's compensation may be directly tied to customer satisfaction or client service. For example, a tipped worker may feel compelled to tolerate inappropriate and harassing behavior rather than suffer the financial loss of a good tip.[144] A commissioned salesperson may stay silent in the face of harassment so as to ensure he or she makes the sale. Finally, in order to ensure customer happiness, management may, consciously or subconsciously, tolerate harassing behavior rather than intervene on the workers' behalf.[145]

Workplaces Where Work is Monotonous or Consists of Low-Intensity Tasks

We heard that workplaces where workers are engaged in monotonous or low-intensity tasks may be more likely to see workplace harassment. In jobs where workers are not actively engaged or have "time on their hands," harassing or bullying behavior may become a way to vent frustration or avoid boredom.[146]

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[139] Warren testimony, *supra* n.130.
[140] *Id.*; Sepler testimony, *supra* n. 114.
[141] *Written Testimony of Daniel Werner*, RETALIATION IN THE WORKPLACE: CAUSES, REMEDIES, AND STRATEGIES FOR PREVENTION, (June 17, 2015), https://www.eeoc.gov/eeoc/meetings/6-17-15/werner.cfm.
[142] Southern Poverty Law Center, *Injustice on our Plates: Immigrant Women in the U.S. Food Industry* 1, 22-25 (2010); Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the U.S. to Sexual Violence and Sexual Harassment* 1 (2012).
[143] Meg A. Bond, *Prevention of Sexism, in* ENCYCLOPEDIA OF PRIMARY PREVENTION AND HEALTH PROMOTION (Thomas Gullotta & Martin Bloom eds., 2014).
[144] Restaurant Opportunities Centers United, *The Glass Floor, Sexual Harassment in the Restaurant Industry*, (October 7, 2014), *available at* http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf.
[145] *Id.*
[146] Sepler testimony, *supra* n. 114.

Isolated Workspaces

Harassment is also more likely to occur in isolated workspaces, where the workers are physically isolated or have few opportunities to work with others.[147] Harassers have easy access to such individuals, and there generally are no witnesses to the harassment.[148] For example, janitors working alone on the nightshift, housekeepers working in individual hotel rooms, and agricultural workers in the fields are all particularly vulnerable to sexual harassment and assault.[149]

Workplace Cultures that Tolerate or Encourage Alcohol Consumption

Alcohol reduces social inhibitions and impairs judgment. Not surprisingly, then, workplace cultures that tolerate alcohol consumption during and around work hours provide a greater opportunity for harassment.[150] Workplaces where alcohol is consumed by clients or customers are also at higher risk of harassment.[151] In some workplaces, alcohol consumption may become an issue once or twice a year – holiday parties, for example. In other workplaces, particularly those where social interaction or client entertainment is a central component of the job (sales, for example), alcohol use may be more ritualized and thus present more of a potential risk factor.

Decentralized Workplaces

Decentralized workplaces, marked by limited communication between organizational levels, may foster a climate in which harassment may go unchecked.[152] Such workplaces include retail stores, chain restaurants, or distribution centers – those enterprises where corporate offices are far removed physically and/or organizationally from front-line employees or first-line supervisors, or representatives of senior management are not present. In such workplaces, some managers may feel (or may actually be) unaccountable for their behavior and may act outside the bounds of workplace rules. Others may simply be unaware of how to address workplace harassment issues, or for a variety of reasons may choose not to "call headquarters" for direction.[153]

* * *

We close this section by observing once more that, obviously, every workplace has some of these risk factors, and some workplaces have many of them. But the instinct of our Select Task Force members that we should devote time and resources to exploring and categorizing possible risk factors is borne out by what we have learned. The objective of identifying risk factors is not

[147] Robbins testimony, *supra* n. 134.
[148] *Id*.
[149] *Rape on the Night Shift* (PBS Frontline Broadcast June 23, 2015); *Rape in the Fields* (PBS Frontline Broadcast June 25, 2013).
[150] Samuel B. Bacharach *et al.*, *Harassing Under the Influence: The Prevalence of Male Heavy Drinking, the Embeddedness of Permissive Workplace Drinking Norms, and the Gender Harassment of Female Coworkers*, 12 J. OCCUP. HEALTH PSYCHOL. 232 (2007).
[151] Restaurant Opportunities Center United, *supra* n. 145.
[152] Sepler testimony, *supra* n. 114.
[153] *Id*.

to suggest that having these risk factors will necessarily result in harassment in the workplace. A single risk factor may make a particular workplace more susceptible to harassment; more broadly, industries with numerous risk factors may be at greater risk of harassment in their workplaces and greater risk of the harassment not being identified and remedied.

The objective of identifying and describing these risk factors is to provide a roadmap for employers that wish to take proactive actions to ensure that harassment will not happen in their workplaces. We stress that employers need to maintain "situational awareness" – an employer noting surprise that women were being sexually assaulted on the night shift when they worked in isolation and their schedules were controlled by men is cold comfort to the victims of these assaults. The next Part of our report describes a number of actions that employers can take to prevent harassment, including an assessment of these risk factors. In addition, Appendix C includes a chart with suggestions for addressing each of these risk factors in a proactive manner.

PART THREE

MOVING FORWARD: PREVENTING HARASSMENT IN THE WORKPLACE

Harassment in the workplace can sometimes feel like an intractable problem. The question is whether there is anything we can do to prevent harassment to a significant degree. We believe the answer to that is "yes."

We also believe that it will not be easy to achieve this goal. If it were easy, it would have happened a long time ago.

The following sections lay out our analysis, based on what we have learned over the past year, for achieving what some may see as a quixotic goal, but which we see as a moral and legal imperative.

A. IT STARTS AT THE TOP

Over and over again, during the course of our study, we heard that workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. We heard this from academics who testified to the Select Task Force; we heard it from trainers and organizational psychologists on the ground; and we read about it during the course of our literature review.

Two things – perhaps two faces of the same coin – became clear to us. First, across the board, we heard that leadership and commitment to a diverse, inclusive, and respectful workplace in which harassment is simply not acceptable is paramount. And we heard that this leadership must come from the very top of the organization.

Second, we heard that a commitment (even from the top) for a diverse, inclusive, and respectful workplace is not enough. Rather, at all levels, across all positions, an organization must have *systems* in place that hold employees *accountable* for this expectation. These accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment, directly or indirectly, are rewarded for doing that job well, or penalized for failing to do so.

These two sides of the coin – leadership and accountability – create an organization's culture.

An organization's culture is set by the values of an organization. To achieve a workplace without harassment, the *values* of the organization must put a premium on diversity and inclusion, must include a belief that all employees in a workplace deserve to be respected, regardless of their race, religion, national origin, sex (including pregnancy, sexual orientation, or gender identity), age, disability, or genetic information, and must make clear that part of respect means not harassing an individual on any of those bases. In short, an organization's commitment to a harassment-free workplace must not be based on a compliance mindset, and instead must be part of an overall diversity and inclusion strategy.

Organizational culture manifests itself in the specific behaviors that are expected and formally and informally rewarded in the workplace. As one of our witnesses explained, "[O]rganizational climate is an important driver of harassment because it is the norms of the workplace; it basically guides employees . . . to know what to do when no one is watching."[154]

Organizational cultures that tolerate harassment have more of it, and workplaces that are not tolerant of harassment have less of it. This common-sense assumption has been demonstrated repeatedly in research studies.[155] If leadership values a workplace free of harassment, then it will ensure that harassing behavior against employees is prohibited as a matter of policy; that swift, effective, and proportionate responses are taken when harassment occurs; and that everyone in the workplace feels safe in reporting harassing behavior.[156] Conversely, leaders who do not model respectful behavior, who are tolerant of demeaning conduct or remarks by others, or who fail to support anti-harassment policies with necessary resources, may foster a culture conducive to harassment.[157]

Leadership

What steps can an organization's leadership take to ensure that its organizational culture reflects the leadership's values of not tolerating harassment and promoting civility and respect?

First, leadership must establish a *sense of urgency* about preventing harassment. That means taking a visible role in stating the importance of having a diverse and inclusive workplace that is free of harassment, articulating clearly the specific behaviors that will not be acceptable in the workplace, setting the foundation for employees throughout the organization to make change (if change is needed), and, once an organizational culture is achieved that reflects the values of the leadership, commit to ensuring that the culture is maintained.[158]

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[154] Bergman testimony, *supra* n. 68 (*citing* work of Charles A. O'Reilly & Jennifer A. Chatman, *Culture as Social Control: Corporations, Cults, and Commitment*, 18 ORGANIZATIONAL BEHAV. 157 (1996). We note that there is an extensive academic and lay literature detailing the differences between organizational "culture" and "climate." *See, e.g.*, Edgar H. Schein, *Sense and Nonsense About Culture and Climate*, *Commentary for* Handbook of Culture and Climate (1999); JOHN P. KOTTER & JAMES L. HESKETT, CORPORATE CULTURE AND PERFORMANCE (1992). See also http:/www.cultureuniversity.com/workplace-culture-vs-climate-why-most-focus-on-climate-and-may-suffer-for-it/. An in-depth analysis of the distinction between organizational "culture" and organizational "climate" is beyond the scope of this report. For our purposes, we posit that an organization's *values* – its "culture" – is demonstrated through the *actions and behaviors it encourages and fosters, or conversely, discourages and sanctions* – its "climate."

[155] Bergman *et al.*, *supra* n. 66 (citing numerous studies).

[156] *Id.*

[157] Cortina testimony, *supra* n. 62; Bergman testimony, *supra* n. 68.

[158] *Oral Testimony of Robert J. Bies*, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Mar. 11, 2016). Stephen Paskoff, the founder of a group called Employment Learning Innovations, notes that many organizations have a values statement with regard to respect, non-discrimination, and/or anti-harassment. But for purposes of workplace culture, Paskoff explains, leaders must be able to articulate the *specific behaviors* that are expected of employees to carry out those values. Paskoff, *Foundations of a Civil Workplace*, Employment Learning Innovations, Inc. (2010), http://cdn2.hubspot.net/hub/139296/file-17758962-pdf/downloads/foundations_of_a_civil_workplace.pdf.

One way to effectuate and convey a sense of urgency and commitment is to assess whether the workplace has one or more of the risk factors we describe above and take proactive steps to address those. For example, if employees tend to work in isolated workspaces, an employer may want to explore whether it is possible for the work to get done as effectively if individuals worked in teams. In a workplace where an employee's compensation is directly tied to customer satisfaction or client service, the employer may wish to emphasize that harassing conduct should be brought immediately to a manager's attention and that the worker will be protected from retaliation. In workplaces with many teenagers and young adults entering the workforce, the employer may wish to have an orientation in which conduct that is not acceptable is clearly described and workers are encouraged to come forward quickly with any concerns.

Another way to communicate a sense of urgency is to conduct a climate survey of employees to determine whether employees feel that harassment exists in the workplace and is tolerated. Several researchers have developed such climate surveys, and the military has adopted them on a widespread scale in recent years.[159] After a holistic approach to prevention has been put into place (as described in the remainder of this section), such climate surveys can be repeated to ensure that change has occurred and is being maintained.

Second, an organization must have *effective policies and procedures* and must conduct *effective trainings* on those policies and procedures. Anti-harassment policies must be communicated and adhered to, and reporting systems must be implemented consistently, safely, and in a timely fashion. Trainings must ensure that employees are aware of, and understand, the employer's policy and reporting systems. Such systems must be periodically tested to ensure that they are effective. Our detailed recommendations concerning these policies and trainings are discussed in the following sections.

Third, leadership must back up its statement of urgency about preventing harassment with two of the most important commodities in a workplace: *money and time*. Employees must believe that their leaders are authentic in demanding a workplace free of harassment. Nothing speaks to that

[159] In the study done by Professor Magley and her colleagues, the researchers used various tools to determine the climate of the employer: the *Sexual Experiences Questionnaire-SE*, an approach to the measurement of sexual harassment experiences which inquires into the behaviors that comprise a single harassment incident (see Suzanne E. Mazzo *et al.*, *Situation-Specific Assessment of Sexual Harassment*, 59 J. VOCATIONAL BEHAV., 120, 121-22 (2001); the *Organizational Tolerance for Sexual Harassment Inventory* (OTSHI) to assess employees' perceptions of the degree to which an organization tolerates sexual harassment of female employees by other organizational members (either a co-worker or supervisor. The measure consists of brief scenarios depicting sexual harassment followed by three questions about (1) the risk to the victim for reporting the incident; (2) the likelihood that a complaint would be taken seriously; and (3) the likelihood that the harasser would receive meaningful sanctions by the organization; and the *Intolerance for Sexual Harassment Inventory* that measures employees' personal attitudes about the seriousness of sexual harassment in organizations. It uses a 7-point scale, with higher scores indicating a stronger belief that harassment *is* a "big deal."). Vicki Magley *et al.*, *Evaluating the Effectiveness of Sexual Harassment Training*, in Burke & Cooper ed. THE ORGANIZATION'S ROLE IN ACHIEVING INDIVIDUAL AND ORGANIZATIONAL HEALTH (2013). In the armed services, Air Force active duty, Air Force National Guard, Air Force Reserve and civilian personnel take the Total Force Climate Survey. http://www.belvoir.army.mil/climate_survey/military_survey.asp. *See* Air Force Personnel Center Public Affairs, 2015 Total-Force Climate Survey (Mar. 2, 2015), http://www.af.mil/News/ArticleDisplay/tabid/223/Article/572259/2015-total-force-climate-survey-slated-for-march.aspx.

credibility more than what gets paid for in a budget and what gets scheduled on a calendar. For example, complaint procedures must be adequately funded in the organization's budget and sufficient time must be allocated from employee schedules to ensure appropriate investigations. Similarly, sufficient resources must be allotted to procure training, trainings must be provided frequently, and sufficient time must be allocated from employee schedules so that all employees can attend these trainings. Moreover, if an organization has a budget for diversity and inclusion efforts, harassment prevention should be part of that budget.

Finally, in working to create change, the leadership must ensure that any team or coalition leading the effort to create a workplace free of harassment is vested with enough power and authority to make such change happen.[160]

Accountability

Because organizational culture is manifested by what behaviors are formally and informally rewarded, it all comes down to accountability – and accountability must be demonstrated. An employer that has an effective anti-harassment program, including an effective and safe reporting system, a thorough workplace investigation system, and proportionate corrective actions, communicates to employees by those measures that the employer takes harassment seriously. This in turn means that more employees will be likely to complain if they experience harassment or report harassment they observe, such that the employer may deal with such incidents more effectively.[161] This creates a positive cycle that can ultimately reduce the amount of harassment that occurs in a workplace.

With regard to *individuals who engage in harassment*, accountability means being held responsible for those actions. We heard from investigators on the ground, and we read in the academic literature, that sanctions are often not proportionate to the inappropriate conduct that had been substantiated.[162] If weak sanctions are imposed for bad behavior, employees learn that harassment is tolerated, regardless of the messages, money, time, and resources spent to the contrary. Similarly, if high-ranking and/or highly-valued employees are not dealt with severely if they engage in harassment, that sends the wrong message loud and clear.[163]

[160] Bies testimony, *supra* n. 159.
[161] Robbins testimony, *supra* n. 134.
[162] *Written Testimony of Heidi-Jane Olguin*, WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/olguin.cfm; Sepler testimony, *supra* n. 114; Magley, *et al.*, *supra*, n. 160.
[163] Bergman testimony, *supra* n. 68; Bies testimony, *supra* n. 159.

> *One organization I worked with several years ago asked me if I had new courseware for use with some previously trained managers. When I asked them what they wanted to accomplish, they indicated that several individuals were continuing to tell off-color jokes and make inappropriate comments. While I welcomed the opportunity to be of service, it seemed to me that the issue was not what training to do next but rather why these decision-makers hadn't taken steps to deal with these individuals' behavior and failure to perform to clear standards.*
>
> *Stephen Paskoff,* 8 Fundamentals of a Civil Treatment Workplace

With regard to *mid-level managers and front-line supervisors,* accountability means that such individuals are held responsible for monitoring and stopping harassment by those they supervise and manage.

For example, if a supervisor fails to respond to a report of harassment in a prompt and appropriate fashion, or if a supervisor fails to protect from retaliation the individual who reports harassment, that supervisor must be held accountable for those actions. Similarly, if those responsible for investigations and corrective actions do not commence or conclude an investigation promptly, do not engage in a thorough or fair investigation, or do not take appropriate action when offending conduct is found, that person must be held accountable.

> *When C-level employees [i.e., senior headquarters executives] take a critical look at, and aggressively deal with, supervisors that are involved in or not reporting harassment, we have seen this translate into higher morale and higher productivity among the rest of the workforce. Everyone notices what the C-Suite notices.*
>
> *Heidi Olguin*
> *CEO and Founder, Progressive Management Resources, Inc.*

Accountability also includes reward systems. If leadership incentivizes and rewards responsiveness to anti-harassment efforts by managers, that speaks volumes.[164] When the right behaviors (*e.g.*, creating civil and respectful workplaces, promptly reporting and investigating harassment claims, aggressively managing employees involved in or not adequately responding to harassment) are rewarded, that sends a message about what an organization's leadership cares about. For example, a number of witnesses noted that companies who were successful in creating a culture of non-harassment were those that acknowledged and "owned" its well-handled complaints, instead of burying the fact that there had been a complaint and that discipline had been taken.[165]

[164] Bies testimony, *supra* n. 159.
[165] *See, e.g., Written Testimony of Patti Perez,* WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/perez.cfm.

Perhaps counter-intuitively, rewards can also be given to managers when – at least initially – there is an increase in complaints in their division. We heard that using the metric of the number of complaints lodged within a particular division, with rewards given to those with the fewest number of complaints, might have the counterproductive effect of managers suppressing the filing of complaints through formal and informal pressure. In contrast, if employees are filing complaints of harassment, that means the employees have faith in the system. Thus, using the metric of the number of complaints must be nuanced. Positive organizational change can be reflected in an initial increase of complaints, followed by a decrease in complaints and information about the lack of harassment derived from climate surveys.

Before moving on to detailed recommendations, we pause to highlight a radically different accountability mechanism that we find intriguing, and solicited testimony regarding at one of our public meetings. A number of large companies, such as McDonald's and Wal-Mart, have begun to hold their tomato growers accountable by buying tomatoes only from those growers who abide by a human rights based Code of Conduct, which, among other elements, prohibits sexual harassment and sexual assault of farmworkers. This effort, called the Fair Food Program, was developed and is led by the Coalition of Imokalee Workers (CIW), a farmworker-based human rights organization in Florida. The companies agreed to the program because of consumer-driven market pressures, and most of the agricultural companies that entered the program did so because of the resulting financial pressures.[166]

As part of the program, the CIW conducts worker-to-worker education programs. There is also a worker-triggered complaint resolution mechanism, which can result in investigations, corrective action plans, and if necessary, suspension of a farm's "participating grower" status, which means the farm could lose its ability to sell to participating buyers.[167] There are currently 14 businesses and 17 growers participating in the program.[168]

* * *

The most important lesson we learned from our study is that employers must have a holistic approach for creating an organizational culture that will prevent harassment. If employers put a metric in a manager's performance plan about responding appropriately to harassment complaints, but then do nothing else to create an environment in which employees know the employer cares about stopping harassment and punishing those who engage in it – it is doubtful that the metric on its own will have much effect. If an employer has a policy clearly prohibiting

("At this company, an increase in complaints is viewed positively – as a testament to the comfort and trust employees put in the system. This is a workforce who believes the process works – they feel they are awarded procedural justice at work.").

[166] *Written Testimony of Judge Laura Safer Espinoza*, WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/espinoza.cfm. Some growers affirmatively embraced the program and have championed it. We heard from one of those forward-thinking growers, Jon Esformes, the Chief Executive Officer of Pacific Tomato Growers of Sunripe Certified Brands, at the public meeting held by the Select Task Force in Los Angeles, CA.

[167] FAIR FOOD STANDARDS COUNCIL, http://www.fairfoodstandards.org/about/.

[168] *Id.* The 17 growers do not include sub-growers.

harassment that is mentioned consistently at every possible employee gathering, but does not have a system that protects those who complain about harassment from retaliation, the policy itself will do little good. It is not that policies and metrics are not important. To the contrary, they are essential components of a harassment prevention effort. But holistic refers to the whole system. Every activity must come together in an integrated manner to create an organizational culture that will prevent harassment.

In light of what we have learned in this area, we offer the following recommendations:

- Employers should foster an organizational culture in which harassment is not tolerated, and in which respect and civility are promoted. Employers should communicate and model a consistent commitment to that goal.

- Employers should assess their workplaces for the risk factors associated with harassment and explore ideas for minimizing those risks.

- Employers should conduct climate surveys to assess the extent to which harassment is a problem in their organization.

- Employers should devote sufficient resources to harassment prevention efforts, both to ensure that such efforts are effective, and to reinforce the credibility of leadership's commitment to creating a workplace free of harassment.

- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the severity of the infraction. In addition, employers should ensure that where harassment is found to have occurred, discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.

- Employers should hold mid-level managers and front-line supervisors accountable for preventing and/or responding to workplace harassment, including through the use of metrics and performance reviews.

- If employers have a diversity and inclusion strategy and budget, harassment prevention should be an integral part of that strategy.

B. POLICIES AND PROCEDURES

Policies, reporting procedures, investigations, and corrective actions are essential components of the holistic effort that employers must engage in to prevent harassment. In this section, we set forth what we have learned about how to make each of these components as successful as possible.

Anti-Harassment Policies

An organization needs a stated policy against harassment that sets forth the behaviors that will not be accepted in the workplace and the procedures to follow in reporting and responding to harassment. Employees in workplaces without policies report the highest levels of harassment.[169]

EEOC's position, which after our study we believe remains sound, is that employers should adopt a robust anti-harassment policy, regularly train each employee on its contents, and vigorously follow and enforce the policy.[170] EEOC recommends that a policy generally include:

- A clear explanation of prohibited conduct, including examples;
- Clear assurance that employees who make complaints or provide information related to complaints, witnesses, and others who participate in the investigation will be protected against retaliation;
- A clearly described complaint process that provides multiple, accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior which may not be legally-actionable "harassment" but which, left unchecked, may lead to same.

An employer's policy should be written in clear, simple words, in all the languages used in the workplace. The points we note above describe the content of an effective policy, but the words of the policy itself should be simple and easy to understand. Similarly, an effective policy should make clear that harassment on the basis of *any* protected characteristic will not be tolerated.

It is also not sufficient simply to have a written policy, even one written in the most user-friendly fashion. The policy must be communicated on a regular basis to employees, particularly information about how to file a complaint or how to report harassment that one observes, and how an employee who files a complaint or an employee who reports harassment or participates in an investigation of alleged harassment will be protected from retaliation.[171]

Finally, we urge employers who may read this and conclude that their policies are currently effective and in line with EEOC's recommendations to consider this report as an opportunity to take a fresh and critical look at their current processes and consider whether a "reboot" is

[169] James Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301 (1998).
[170] https://www.eeoc.gov/policy/docs/harassment.html
[171] Olguin testimony, *supra* n. 163; Warren testimony, *supra* n. 130.

necessary or valuable. Appendix B includes a checklist for an effective harassment prevention policy.

Social Media

An additional wrinkle for employers to consider, as they write and update anti-harassment policies, is the proliferation of employees' social media use. The Pew Research Center recently found that 65% of all adults – 90% of those 18-29 years olds, 77% of those 30-49 – use social media.[172] Safe to say, employers can expect a time when virtually the *entirety* of their workforce is using social media.

Arguably, the use of social media among employees in a workplace can be a net positive. As noted by a witness at the Commission's 2014 meeting on social media, social media use in the workplace can create a space for "less formal and more frequent communications." Via social media, employees can share information about themselves, learn about and understand better their colleagues, and engage each others' personal experiences through photos, comments, and the like.[173] If this leads to improved work relationships and collegiality, social media can benefit a workplace.

Unfortunately, social media can also foster toxic interactions. Nearly daily, news reports reflect that, for whatever reasons, many use social media to attack and harass others.[174] During the Commission meeting on social media, witnesses talked about social media as a possible means of workplace harassment.[175] For that reason, harassment should be in employers' minds as they draft social media policies and, conversely, social media issues should be in employers' minds as they draft anti-harassment policies.

For example, an anti-harassment policy should make clear that mistreatment on social media carries the weight of any other workplace interaction. Supervisors and others with anti-harassment responsibilities should be wary of their social media connections with employees. And, procedures for investigating harassment should carefully delineate how to access an employee's social media content when warranted.

In context, social media – specifically its use in the workplace – is relatively new. Plus, it seemingly changes at an exponential pace. For now, however, the constant for employers is that

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[172] http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/.

[173] *Written Testimony of Renee Jackson*, SOCIAL MEDIA IN THE WORKPLACE: EXAMINING THE IMPLICATIONS FOR EQUAL EMPLOYMENT OPPORTUNITY LAW (Mar. 12, 2014), https://www.eeoc.gov/eeoc/meetings/3-12-14/jackson.cfm.

[174] *See, e.g.*, Juliet Macur, *Social Media, Where Sports Fans Congregate and Misogyny Runs Amok*, THE NEW YORK TIMES (Apr. 28, 2016), http://www.nytimes.com/2016/04/29/sports/more-than-mean-women-journalists-julie-dicaro-sarah-spain.html?_r=0. for workplace point; Petula Dvorak, *Was a Virginia Firefighter Humiliated by Co-Workers Online Before She Killed Herself?*, THE WASH. POST (Apr. 25, 2016), https://www.washingtonpost.com/local/was-a-va-firefighter-humiliated-by-co-workers-online-before-she-killed-herself/2016/04/25/c.

[175] *See* SOCIAL MEDIA IN THE WORKPLACE: EXAMINING THE IMPLICATIONS FOR EQUAL EMPLOYMENT OPPORTUNITY LAW, MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Mar. 12, 2014), https://www.eeoc.gov/eeoc/meetings/3-12-14/.

social media platforms are potential vehicles for workplace-related interactions. And wherever that exists, employers must be aware that harassment may occur.

"Zero Tolerance" Policies

Finally, we have a caution to offer with regard to use of the phrase "a 'zero tolerance' anti-harassment policy." We heard from several witnesses that use of the term "zero tolerance" is misleading and potentially counterproductive. Accountability requires that discipline for harassment be proportionate to the offensiveness of the conduct. For example, sexual assault or a demand for sexual favors in return for a promotion should presumably result in termination of an employee; the continued use of derogatory gender-based language after an initial warning might result in a suspension; and the first instance of telling a sexist joke may warrant a warning. Although not intended as such, the use of the term "zero tolerance" may inappropriately convey a one-size-fits-all approach, in which every instance of harassment brings the same level of discipline. This, in turn, may contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-worker to lose their job over relatively minor harassing behavior – they simply want the harassment to stop. Thus, while it is important for employers to communicate that absolutely no harassment will be permitted in the workplace, we do not endorse the term "zero tolerance" to convey that message.

Reporting Systems for Harassment; Investigations; Corrective Actions

Effective reporting systems for allegations of harassment are among the most critical elements of a holistic anti-harassment effort. A reporting system includes a means by which individuals who have *experienced* harassment can report the harassment and file a complaint, as well as a means by which employees who have *observed* harassment can report that to the employer.

Ultimately, how an employee who reports harassment (either directly experienced or observed) fares under the employer's process will depend on how management and its representatives act during the process. If the process does not work well, it can make the overall situation in the workplace worse. If one employee reports harassment and has a bad experience using the system, one can presume that the next employee who experiences harassment will think twice before doing the same.[176] Finally, ensuring that the process that commences following a report is fair to an individual accused of harassment contributes to *all* employees' faith in the system.

For employers that have a unionized workplace, the role of the union in the employer's reporting system is significant. If union representatives take reports of harassment seriously, and support complainants and witnesses during the process, that will make a difference in how employees who are union members view the system. Similarly, because unions have obligations towards all

[176] Bergman testimony, *supra* n. 68; Cortina & Berdahl, *supra* n. 14 (*citing* Cortina & Magley, *supra* n. 65; Barbara A. Gutek, *Sexual Harassment Policy Initiatives, in* SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 185 (William O'Donohue ed., 1997); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures,* 46 AM. PSYCHOL. 497 (1991); Paula McDonald *et al.*, *Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment,* ASIA PACIFIC J. HUMAN RESOURCES 53 (2015)).

union members, the union must work with the employer to have a system that works in a fair manner for any individual accused of harassment.

There is a significant body of research establishing the many concerns that employees have with current reporting systems in their workplaces. [177] In response to some of those concerns, we heard broad support for reporting systems that are multifaceted, including a choice of procedures, and choices among multiple "complaint handlers."[178] Such a robust reporting system might include options to file complaints with managers and human resource departments, via multi-lingual complaint hotlines, and via web-based complaint processing.[179] In addition, a multi-faceted system might offer an employee who complains about harassment various mechanisms for addressing the situation, depending on the type of conduct and workplace situation.[180] For example, an employee may simply need someone in authority to talk to the harasser in order to stop the behavior. In other situations, the employer may need to do an immediate intervention and begin a thorough investigation.

Of course, the operational needs and resources of small businesses, start-up ventures, and the like, will differ significantly from large, established employers with dedicated human capital systems or "C Suites" of senior leadership. But the principle of offering an accessible and well-running reporting system remains the same.[181]

As noted in the previous section, a safe and timely reporting system that operates well also communicates to employees the leadership's commitment to the words it has set forth in its anti-harassment policy. We heard some innovative ideas for making that commitment clear. One witness described a company that established a small internal group of key "C-Suite" personnel who were informed immediately regarding any harassment complaint (unless a conflict of interest existed). The small group of senior leaders was then regularly updated regarding investigation outcomes and prevention analysis. In a smaller business, this "group of senior

[177] McDonald *et al.*, *supra* n. 177 (collecting sources).

[178] Cortina testimony, *supra* n. 62; Olguin testimony, *supra* n. 163: Perez testimony, *supra* n. 166; Cortina and Berdahl, *supra* n. 14 (*citing* Gutek, *supra* n. 177; Riger, *supra* n. 177; Laura A. Reese & Karen A. Lindenberg, *Employee Satisfaction with Harassment Policies: The Training Connection*, 33 PUB. PERSONNEL MGMT. 99 (2004); Mary P. Rowe, *Dealing with Harassment: A Systems Approach*, *in* SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVE, FRONTIERS, AND RESPONSE STRATEGIES, WOMEN AND WORK 241 (Margaret S. Stockdale ed., 1996); and Pamela P. Stokes *et al.*, *The Supreme Court Holds Class on Sexual Harassment: How to Avoid a Failing Grade*, 12 EMP. RESPS. & RTS. J. 79 (2000)).

[179] Olguin testimony, *supra* n. 163.

[180] One interesting approach brought to our attention in the course of our study was the implementation of "information escrow" systems designed to address a harassment victim's possible reluctance to be the initial individual to allege harassing behavior by a co-worker. Information escrow systems allow claims to be transmitted to a designated, confidential intermediary who subsequently submits the claim to relevant authorities if – and only if – certain pre-specified conditions are met (such as a certain number of claims filed) regarding the same accused harassing party. Given the relative novelty, and the lack of data as to the utility and success of these "information escrow" systems, we do not have sufficient information to endorse them at this time. We do, however, encourage employers and other stakeholders to seek out and explore new and creative methods like these for the prevention of harassment, and encourage researchers to further examine escrow systems and gather evidence of their utility. *See* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 Mich. L. Rev. 145 (2012).

[181] We commend EEOC for the work it has done, and continues to do, with respect to the special needs of small employers, specifically, through its Small Business Task Force, discussed in greater detail in this report's discussion of outreach, *infra*.

leaders" may be the business's owner or the highest-ranking members of management.

We heard strong support for the proposition that workplace investigations should be kept as confidential as is possible, consistent with conducting a thorough and effective investigation. We heard also, however, that an employer's ability to maintain confidentiality – specifically, to request that witnesses and others involved in a harassment investigation keep all information confidential – has been limited in some instances by decisions of the National Labor Relations Board ("NLRB") relating to the rights of employees to engage in concerted, protected activity under the National Labor Relations Act ("NLRA"). In light of the concerns we have heard, we recommend that EEOC and NLRB confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA.

Based on what we have learned over the last year, we believe there are several elements that will make reporting systems work well and will provide employees with faith in the system. These are largely consistent with the recommendations made above regarding the content of an effective anti-harassment policy:

- Employees who receive harassment complaints must take the complaints seriously.[182]
- The reporting system must provide timely responses and investigations.[183]
- The system must provide a supportive environment where employees feel safe to express their views and do not experience retribution.[184]
- The system must ensure that investigators are well-trained, objective, and neutral, especially where investigators are internal company employees.[185]
- The privacy of both the accuser and the accused should be protected to the greatest extent possible, consistent with legal obligations and conducting a thorough, effective investigation.[186]
- Investigators should document all steps taken from the point of first contact, prepare a written report using guidelines to weigh credibility, and communicate the determination to all relevant parties.[187]

The bottom line, however, is that we need better empirical evidence on what type of reporting systems are effective. Many witnesses told us it would be extraordinarily valuable for employers to allow researchers into their workplaces to conduct empirical studies to determine what makes

[182] *See* McDonald *et al.*, *supra* n. 177; Barry M. Goldman, *Toward an Understanding of Employment Discrimination Claiming: An Integration of Organizational Justice and Social Information Processing Theories*, 54 PERSONNEL PSYCHOL. 361 (2001); Karen Harlos, *When Organizational Voice Systems Fail: More on the Deaf-Ear Syndrome and Frustration Effects*, 37 J. APPLIED BEHAV. SCI. 324 (2001). A study of federal management personnel who handle EEO complaints found that managers often recast harassment complaints as personality clashes or interpersonal difficulties. Howard S. Erlanger *et al.*, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 L. & SOC'Y REV. 497 (1993).
[183] Goldman, *supra* n. 183; Harlos, *supra* n. 183; Amy Oppenheimer, *Investigating Workplace Harassment and Discrimination*, 29 EMP. REL. L. J. 56 (2004).
[184] Harlos, *supra* n. 183.
[185] *Id*.
[186] Cortina & Berdhal, *supra* n. 14.
[187] McDonald *et al.*, *supra* n. 177.

a reporting system effective. We agree with that suggestion, although we are cognizant of the concerns that employers may have in welcoming researchers into their domains. For example, we recognize that employers will want to have control over how data derived from its workplace will be used, and equally important, not used.

In light of what we have learned in this area, we offer the following recommendations:

- Employers should adopt and maintain a comprehensive anti-harassment policy (which prohibits harassment based on any protected characteristic, and which includes social media considerations) and should establish procedures consistent with the principles discussed in this report.

- Employers should ensure that the anti-harassment policy, and in particular details about how to complain of harassment and how to report observed harassment, are communicated frequently to employees, in a variety of forms and methods.

- Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.

- Employers should be alert for any possibility of retaliation against an employee who reports harassment and should take steps to ensure that such retaliation does not occur.

- Employers should periodically "test" their reporting system to determine how well the system is working.

- Employers should devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Investigations should be kept as confidential as possible, recognizing that complete confidentiality or anonymity will not always be attainable.

- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations, and the permissible scope of policies regulating workplace social media usage.

- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the behavior(s) at issue and the severity of the infraction. Employers should ensure that discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.

- In unionized workplaces, the labor union should ensure that its own policy and reporting system meet the principles outlined in this section.

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined above.

- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the impact and efficacy of the policies, reporting systems, investigative procedures, and corrective actions put into place by that employer. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.[188]

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of their policies, reporting systems, investigative procedures, and corrective actions put into place by those employers, in a manner that would allow research data to be aggregated in a manner that would not identify individual employers.

C. ANTI-HARASSMENT COMPLIANCE TRAINING

There are many reasons why employers offer anti-harassment trainings. Employers who care deeply about stopping harassment use training as a mechanism to do so. After EEOC's 1980 guidelines suggested methods for preventing sexual harassment, many employers started to offer training as one of those methods.[189] Trainings got a boost after the Supreme Court's decisions in *Ellerth* and *Faragher* provided employers an incentive to demonstrate they had taken appropriate steps to prevent harassment.[190] Finally, requiring employers to put training into place is a staple of the conciliation agreements and consent decrees that EEOC and private plaintiff attorneys negotiate every year. California and Connecticut have mandated such training for employers with 50 or more supervisors, and Maine has mandated such training for employers with 15 or more supervisors. supervisors.[191]

[188] In addition, as we noted above, we recognize that employers may be reluctant to have their workplaces turned into a research experiment, that data collection will require the willingness of an employer to participate in this research, and that this in turn may necessitate spelling out the purposes for which this data will and will not be used.
[189] EEOC's 1980 guidelines suggested that to prevent harassment an employer should: (a) express strong disapproval of harassment; (b) develop appropriate sanctions for those who engage in harassment; (c) inform employees how to complain about harassment; and (d) develop means to sensitize employees. 29 C.F.R. §1611(f).
[190] *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). *See* Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession,* 24 U. ARK. LITTLE ROCK L. REV. 147 (2001); Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, *22* BERKELEY J. EMP. & LAB. L. 1 (2001) (raising concerns regarding employers' use of training programs as a means to avoid liability, when empirical evidence supporting the effectiveness of such programs is mixed or non-existent).
[191] Cal. Gov't Code § 12950.1(a) (West 2016); Conn. Gen. Stat. § 46a-54-204 (2016); Me. Rev. Stat. tit. 26, § 807(3) (2016).

Given the amount of resources employers devote to training, and the fact that training is one of the primary mechanisms used to prevent harassment, we explored whether training is effective in preventing harassment, and if so, whether there are some forms of training that have better outcomes than others.

We came to two overarching conclusions:

- There are deficiencies in almost all the empirical studies done to date on the effectiveness of training standing alone. Hence, *empirical* data does not permit us to make declarative statements about whether training, standing alone, is or is not an effective tool in preventing harassment.

- The deficiencies notwithstanding, based on the practical and anecdotal evidence we heard from employers and trainers, we conclude that training *is* an essential component of an anti-harassment effort. However, to be effective in stopping harassment, such training *cannot stand alone but rather must be part of a holistic effort* undertaken by the employer to prevent harassment that includes the elements of leadership and accountability described above. In addition, the training must have specific goals and must contain certain components to achieve those goals.

Research on the Effectiveness of Training

Witnesses who provided testimony to the Select Task Force, and our own reading of the literature, exposed the problems of the empirical evidence to date regarding the effectiveness of training programs standing alone.

First, most of the studies use researcher-designed training, and each of those trainings has different content, lengths, and leaders. It is hard to know if something works when the "what" that you are studying is not the same.

Second, our research (which was thorough, if admittedly not an exhaustive review of all literature over the past three decades) discovered only two studies based on large-scale evaluations of anti-harassment training designed by employers (not researchers) that were given to a significant number of employees who were taking the trainings in their actual workplaces. A set of studies, conducted in the late 1990s by Professor Magley and her colleagues, evaluated trainings at two large employers – a large regulated utility with one location and a large agribusiness with several worksites.[192] Another study, published in 2001 by Professors Bingham

[192] Magley *et al.*, *supra* n. 160. The researchers studied trainings that had been put in place by employers as a result of settlement agreements and included two employers. The first employer was a large regulated utility organization in the Northwest that did a half-day training on sensitizing employees. The overall sample was nearly 90 percent Caucasian. The second employer was an agribusiness organization in the intermountain region that did trainings at several worksites. That employer did a two-day training for managers and supervisors and a three-hour educational and sensitization training for employees. Nearly half of the workforce at this organization was Hispanic.

and Scherer, evaluated an anti-sexual harassment program provided to employees at a medium-sized university.[193]

Third, because it is difficult for researchers to gain access to workplaces to study (which is why there are so few research studies of this kind), many researchers design experiments using student-volunteer samples or other small volunteer samples in organizational settings. In many studies, the researchers survey participants pre- and post-training and evaluate the effectiveness of the training based on self-reported answers immediately following the training. These studies are not to be discounted, but their limitations must be acknowledged.[194]

Finally, all of the evidence regarding the effectiveness of training is based on studies of sexual harassment training, not general harassment training.

What can we learn from these studies, limited as they are?

First, it appears that training can increase the ability of attendees to understand the type of conduct that is considered harassment and hence unacceptable in the workplace. The most interesting study in this regard was of federal employees. Rather than conducting a large-scale evaluation of a particular training, researchers compared results from the three surveys done by the Merit Systems Protection Board of federal employees over the course of a decade and a half – in 1980, 1987, and 1994.[195] Their analysis found that participation in training was associated with an increased probability, particularly for men, of considering unwanted sexual gestures, remarks, touching, and pressure for dates to be a form of sexual harassment. The training seemed particularly successful in clarifying for men that unwanted sexual behavior from co-workers, and not just from supervisors, can be a form of sexual harassment.[196]

Ensuring that employees know what an employer considers to be harassment is obviously an essential element for effective implementation of an employer's anti-harassment policy. In the 2001 study by Professors Bingham and Scherer of a 30-minute training, participants demonstrated more knowledge about sexual harassment than those who had not participated in the training.[197] In the 1997 study by Professor Magley and her colleagues, some attendees of the trainings (but not all) evidenced increased knowledge of sexual harassment. Given that Hispanic employees in that study did not evidence increased knowledge, the researchers observed that

[193] Shereen G. Bingham & Lisa L. Scherer, *The Unexpected Effects of a Sexual Harassment Educational Program*, 37 J. APPLIED BEHAV. SCI. 125 (2001). The study evaluated a thirty-minute anti-harassment program consisting of three components: a 3-minute videotaped speech by the chancellor; a hand-out and oral presentation by mixed-sex, two person teams of the university staff and faculty; and a 5-minute discussion. Bingham and Scherer pointed out that other studies done in actual workplaces, as of 2001, were not of the same scale as their study.
[194] Cortina & Berdhal, *supra* n. 14; Magley, *et al*., *supra* n. 160.
[195] See *supra* n. 16 for a fuller description of the MSPB surveys.
[196] Heather Antecol & Deborah Cobb-Clark, *Does Sexual Harassment Training Change Attitudes? A View from the Federal Level*, 84 SOC. SCI. Q. 826 (2003). The researchers also found that the proportion of agency staff receiving training was positively related to the propensity that an individual employee had a definition of sexual harassment that includes these forms of unwanted sexual behavior. In addition, widespread training within the agency had an effect over and above that attributable to the individual's receipt of training itself.
[197] Bingham & Scherer, *supra* n. 194.

culturally-appropriate training might have made a difference.[198] Other studies also suggest that trainings have a positive impact on knowledge acquisition.[199]

Second, it is less probable that training programs, on their own, will have a significant impact on changing employees' attitudes, and they may sometimes have the opposite effect. The 2001 study by Professors Bingham and Scherer evaluated a 30-minute training focused on sensitizing attendees to sexual harassment. Men who completed the training were more likely to say that sexual behavior at work was wrong, but they were also more likely to believe that both parties contribute to inappropriate sexual behavior.[200] Other experiments indicate that participants who come into the training with more of a tendency to harass or with gender role conflicts (based on questionnaires completed prior to the training) are more likely to have a negative reaction to the training.[201]

In the 1997 study conducted by Professor Magley and her colleagues, there was no evidence of any backlash to the trainings. However, the personal attitudes of participants toward sexual harassment were minimally changed or completely unchanged.[202] Finally, a few lab-based

[198] Magley, *et al.*, *supra* n. 160. In the agribusiness employer, which had greater diversity, non-Hispanic employees who took the training answered more of the knowledge questions correctly than did untrained non-Hispanic employees. However, training did not improve Hispanic employees' knowledge about sexual harassment. With regard to this finding, the researchers observed the need for culturally appropriate training programs and evaluation tools. In addition, in this worksite, some participants displayed decreased knowledge of an employer's practices in responding to harassment following the training.

[199] Kathleen Beauvais, *Workshops to Combat Sexual Harassment: A Case Study of Changing Attitudes*, 12 SIGNS 130 (1986) (increased ability on the part of resident hall staff at a university to recognize sexual harassment); Robert S. Moyer & Anjan Nath, *Some Effects of Brief Training Interventions on Perceptions of Sexual Harassment*, 28 J. APPLIED SOCIAL PSYCH. 333 (1998) (men were less likely than women to recognize sexual harassment before training, but after training, men and women were equally likely to do so). *See also* Gerald L. Blakely *et al.*, *The Effects of Training on Perceptions of Sexual Harassment Allegations*, 28 J. APPLIED PSYCHOL. 71 (1998); Kenneth M. York *et al.*, *Preventing Sexual Harassment: The Effect of Multiple Training Methods*, 10 EMP. RESPS. & RTS. J. 277 (1997). One study found no effect of training on the capacity of attendees to recognize harassment. James M. Wilkerson, *The Impact of Job Level and Prior Training on Sexual Harassment Labeling and Remedy Choice*, 29 J. APPLIED PSYCHOL. 1605 (1999).

[200] Bingham and Scherer, *supra* n. 194. The study revealed that men who participated in the training were also "significantly less likely to view coercion of a subordinate or a student as sexual harassment than were nonparticipating males . . . or females."

[201] Lisa K. Kearney *et al.*, *Male Gender Role Conflict, Sexual Harassment Tolerance, and the Efficacy of a Psychoeducative Training Program*, 5.1 Psychol. of Men & Masculinity 72 (defining gender role conflict as "a psychological state in which socialized gender roles have negative consequences on the person or others.") (internal quotations omitted) (*citing* J. M. O'Neil *et al.*, *Fifteen Years of Theory and Research on Men's Gender Role Conflict: New Paradigms for Empirical Research* (1995) *in* A NEW PSYCHOLOGY OF MEN, 164-206 (R.F. Levant & W.S. Pollack eds.) (1996)). This study revealed that for men who scored high on Gender Role Conflict, the training reinforced their tolerant attitudes toward harassment. *Id.* In another study, researchers first assessed men's likelihood to sexually harass (LSH). After watching a one-hour video, high LSH men showed greater acceptance of harassment, while low LSH men showed lesser acceptance. Lori A. Robb & Dennis Doverspike, *Self-Reported Proclivity to Harass as a Moderator of the Effectiveness of Sexual Harassment-Prevention Training*, 88 PSYCHOL. REP. 85 (2001)

[202] Magley, *et al. supra* n. 160. An in-depth examination of the social science research on attitudes, attitude/behavior consistency, and attitude change generally is beyond the scope of this report. For a summary of available research in this area, *see* Robert B. Cialdini, INFLUENCE: SCIENCE AND PRACTICE (Carolyn Merrill *et al.* eds., 4th ed. 2001), http://www.cfs.purdue.edu/richardfeinberg/csr%20331%20consumer%20behavior%20%20spring%202011/cialdini/robert_cialdini-influence-science_and_practice.pdf.

experiments have shown some positive effects on attitudes or behaviors following training.[203]

Third, in the study by Professor Magley and her colleagues (the only study to test for this result), there was no evidence that the training affected the frequency of sexual harassment experienced by the women in the workplace or the perception by women that certain sexual conduct was sexual harassment. However, on the positive side, complaints to the human resources department did increase after the training. The researchers postulated that the increase was the result of a multi-faceted approach taken by the employer and not the result of the training alone. For example, prior to the training, the employer had provided employees with a number of additional resources to lodge complaints (including hotlines) and had begun improving its procedures for complaint follow-up.[204]

As Professor Magley and her colleagues have pointed out, a common theme among the research studies is that effective training does not occur within a vacuum. Researchers have suggested a range of ideas for creating harassment-free and supportive work environments in which non-training factors are included together with training.[205]

In sum, the existing empirical evidence is conflicting and sometimes surprising. It leaves us with a few conclusions:

- Many anti-harassment trainings offered today seek to achieve two goals – give employees information about the employer's anti-harassment policy (including how to file complaints) and change employees' attitudes about what type of behaviors in the workplace are wrong.

- The limited empirical data we have to date indicates that training can increase knowledge about what conduct the employer considers unacceptable in the workplace. In particular, training may help men understand that certain forms of sexual conduct are unwelcome and offensive to women.

[203] In one study, training heightened participants' sensitivity to the sexual harassment, with men in particular responding positively to the training experience. Beauvais, *supra* n. 200. Another study found that for attendees who demonstrated increased proclivity for engaging in unwanted sexual behavior (based on a questionnaire completed prior to the training), training reduced that proclivity. It was unclear, however, whether that result held beyond the short-term. Elissa L. Perry *et al.*, *Individual Differences in the Effectiveness of Sexual Harassment Awareness Training*, 28 J. APPLIED PSYCHOL. 698 (1998).

[204] Magley *et al.*, *supra* n. 160.

[205] Magley, *et al.*, *supra* n. 160, at 243 (*citing* Bell, Quick and Cycyota (2002); Elissa L. Perry *et al.*, *Sexual Harassment Training: Recommendations to Address Gaps Between the Practitioner and Research Literatures*, 48 HUM. RESOURCE MGMT. 817 (2009). Professor Magley and her colleagues have also stressed that cynicism and motivation on the part of attendees influence the effectiveness of sexual harassment training. Lisa M. Kath & Vicki J. Magley, *Development of a Theoretically Grounded Model of Sexual Harassment Awareness Training Effectiveness, in* 3 WELLBEING: A COMPLETE REFERENCE GUIDE 319 (P. Cohen & C. Cooper eds., 20140) (making case that "cynicism and motivation are critical factors" that can influence effectiveness of sexual harassment awareness training and "identifying possible training design, individual factors, and contextual factors that may influence trainees' cynicism, motivation, and outcomes").

- The limited empirical data we have to date indicates that sensitivity training (as currently done) in some instances might be mildly positive, often is neutral, and in some circumstances actually may be counterproductive.

- It is possible that individuals who receive training may be more likely to file a complaint, if the training does not stand alone and the employer has taken other steps to convince employees that the employer will be intolerant of sexual harassment.

We cautioned above, and we caution again, that the results of these studies implicate only the effectiveness of the specific trainings that were evaluated. The data cannot be extrapolated to support general conclusions about the effectiveness of training.

Indeed, our most important conclusion is that we need better empirical evidence on what types of training are effective and what components, beyond training, are needed to make the training itself most effective. As we noted above, many witnesses told us that it would be extraordinarily valuable for employers to allow researchers into their workplaces to conduct empirical studies to determine what makes training effective. We agree with that suggestion, although as we noted above, we are cognizant of the concerns that employers may have in welcoming researchers into their domains. For example, we recognize that employers will want to have control over how data derived from their workplaces will be used, and equally important, not used.

Experience on the Ground

Regardless of the empirical data from research studies, we heard from practitioners with decades of experience that training – especially compliance training – is a key component of any harassment prevention effort.[206] We also heard that training must have certain components to be successful. We provide below the insights we learned from these practitioners.

[206] See Sepler testimony, *supra* n. 114; Warren testimony, *supra* n. 130; Robbins testimony, *supra* n. 134; Olguin testimony, *supra* n. 163; Perez testimony, *supra* n. 166.

> *"[Compliance training] is not training to change your mind. It's training to keep your job."*
>
> *Jonathan A. Segal, Select Task Force Member*

Compliance Training for All Employees

Compliance training is training that helps employers comply with the legal requirements of employment non-discrimination laws by educating employees about what forms of conduct are not acceptable in the workplace and about which they have the right to complain. We do not believe that such trainings should be limited to the legal definition of harassment. Rather the trainings should also describe conduct that, *if left unchecked*, might rise to the level of illegal harassment. For example, some instances of gender-based harassment or sexually-motivated harassment will be legally actionable only if they are sufficiently pervasive to create a hostile work environment, as defined by the law. But compliance training should focus on the unacceptable behaviors themselves, rather than trying to teach participants the specific legal standards that will make such conduct "illegal." In addition, compliance training should explain the consequences of engaging in conduct that is unacceptable in the workplace, including that corrective action will be proportionate to the severity of the conduct.

Compliance training that teaches employees what conduct is not acceptable in the workplace should not be a canned, "one-size-fits-all" training. Effective compliance trainings are those that are tailored to the specific realities of different workplaces. Using examples and scenarios that realistically involve situations from the specific worksite, organization, and/or industry makes the compliance training work much better than if the examples are foreign to the workforce. In addition, depending on the makeup of the workforce, employers may wish to consider conducting training in multiple languages, or providing for different learning styles and levels of education.

Compliance training should also clarify what conduct is not harassment and is therefore acceptable in the workplace. For example, it is not harassment for a supervisor to tell an employee that he or she is not performing a job adequately. Of course, the supervisor may not treat employees who are similar in their work performance differently because of an employee's protected characteristic. But telling an employee that she must arrive to work on time, or telling an employee that he must submit his work in a timely fashion, is not harassment. Nor do we suggest that occasional and innocuous compliments – "I like your jacket" – constitute workplace harassment, but rather reflect the reality of human experience and common courtesy.

Compliance training should also educate employees about their rights and responsibilities if they experience conduct that the employer has stated is not acceptable in the workplace. Again, the training need not focus on legal issues regarding notice and liability. Rather, the training should make clear to employees the (hopefully) multiple avenues offered by the employer to report unwelcome conduct based on a protected characteristic, regardless of whether the individual

might or might not describe that conduct as "harassment." Compliance training should also describe, in simple terms, how an employee who witnesses harassment can report that information.

Finally, compliance training should describe, in simple terms, how the formal complaint process will proceed. This includes information on how an investigation will take place and what confidentiality a complainant can expect. The training should make clear that the employer will take all reports seriously, investigate them in a timely fashion, and ensure that complainants or those who report observing harassment will not experience retaliation for using the reporting system. (Of course, for participants to believe this, the employer's reporting system must indeed operate in this fashion).

Compliance Training for Middle-Management and First-Line Supervisors

All employees need the compliance training described above. But managers and supervisors need additional training if the employer wants to address conduct before it rises to the level of illegal harassment and wants to ensure compliance with employment non-discrimination laws.

As noted previously, to create an organizational culture in which employees believe that the organization will not tolerate harassment, managers, and supervisors must receive clear messages of accountability. Compliance training translates those expectations into concrete actions that managers and supervisors are expected to take – either to prevent harassment or to stop and remedy harassment once it occurs.

Compliance training provides managers and supervisors with easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information. This includes practical suggestions on how to respond to different levels and types of offensive behavior, and clear instructions on how to report harassing behavior up the chain of command. It should also stress the affirmative duties of supervisors to respond to harassing behavior, even in the absence of a complaint. Again, this training should be tailored to the specific worksite, organization, and/or industry, so that the examples used are helpful to managers and supervisors.

Managers and supervisors are the heart of an employer's prevention system. As one witness with decades of experience in the practice of workplace training and investigation noted succinctly:

> If I had limited assets to improve the climate of any organization, I would invest ninety-five percent of them in middle managers. These are the people who make all of the difference in the day-to-day lives of organizations and people. When we train middle managers, we don't just train them about how to spot and address problem behavior –we teach them empirically sound things to do and say when an employee seeks them out to discuss a problem.[207]

[207] Sepler testimony, *supra* n. 114.

What we set forth above concerns the *content* of effective compliance training. There are also principles for the *structure* of successful compliance trainings.[208]

- *Training should be supported at the highest levels*. As noted previously, employees must believe that the leadership is serious about preventing harassment in the workplace. Training alone is not sufficient to establish the credibility of the leadership in this regard – but compliance training provides a moment at which the focus is on achieving this goal and thus, leadership should take advantage of that moment. The strongest expression of support is for a senior leader to open the training session and attend the entire training session. At a minimum, a video of a senior leader might be shown at the beginning of the training and a memo from leadership to all employees sent prior to the training can underscore the importance and purpose of the training. Similarly, if all employees at every level of the organization are trained, that both increases the effectiveness of the training and communicates the employer's commitment of time and resources to the training effort.

- *Training should be conducted and reinforced on a regular basis for all employees*. Again, as we noted earlier, employees understand that an organization's devotion of time and resources to any effort reflects the organization's commitment to that effort. Training is no different. If anti-harassment trainings are held once a year (or once every other year), employees will not believe that preventing harassment is a high priority for the employer. Conversely, if anti-harassment trainings are regularly scheduled events in which key information is reinforced, that will send the message that the goal of the training is important. While this is one area where, in general, repetition is a good thing, we caution against simply repeating the same training over and over, which risks becoming a rote exercise. Rather, we urge employers to consider training that is varied and dynamic in style, form, and content.

- *Training should be conducted by qualified, live, and interactive trainers*. Live trainers who are dynamic, engaging, and have full command of the subject matter are the most likely to deliver effective training. Since one of the goals of compliance training is to provide employees information about the type of conduct the employer finds unacceptable in the workplace, it is important for a trainer to provide examples of such conduct, or have individuals portray scenarios of such conduct, and then be able to answer questions. In addition, compliance training teaches supervisors and managers how to respond to a report or observance of harassment. These can be difficult situations and a live trainer is most suited to work through questions with the participants.

    - For some employers, however, providing live trainers will not be feasible because they are cost prohibitive or because employees are physically dispersed. In such cases, online or video-based trainings should still be tailored to specific workplaces and workforces and should be designed to include active engagement by participants.

[208] Similar principles have been identified in research about prevention programs in other issue areas, such as youth violence and substance abuse. Maury Nation *et al.*, *What Works in Prevention: Principles of Effective Prevention Programs*, 58 AM. PSYCHOLOGIST 449 (2003).

- *Training should be routinely evaluated.* Employers should obviously not keep doing something that does not work. Trainers should not only do the training, but should evaluate the results of the training, as well. By this, we mean more than handing a questionnaire to participants immediately after the training asking if they found the training to be helpful. Evaluations are most effective if they are done some time after the training and participants are asked questions such as whether the training changed their own behaviors or behaviors they have observed in the workplace. The evaluation should occur on a regular basis so that the training can be modified, if need be. Similarly, training evaluation should incorporate feedback from all levels of an organization, most notably, the rank-and-file employees who are being trained, lest "evaluation" becomes a senior leadership "echo chamber."

Based on our year of examination – and cognizant of the limitations of empirical, academic data – we still conclude that effective compliance training is a necessary tool to prevent harassment in the workplace. Every employer should have in place, at a minimum, compliance training that includes the content and structure described above. However, since compliance training only goes so far, the following section presents additional ideas for training that may help the holistic effort of preventing harassment in a workplace.

In light of what we have learned in this area, we make the following recommendations:

- Employers should offer, on a regular basis and in a universal manner, compliance trainings that include the content and follow the structural principles described in this report, and which are offered on a dynamic and repeated basis to all employees.

- Employers should dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information – even before such harassment reaches a legally-actionable level.

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that employers adopt and maintain compliance training that comports with the content and follows the structural principles described in this report.

- EEOC should, as a best practice in cases alleging harassment, seek as a condition of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer to assess the climate and level of harassment in respondent workplaces pre- and post-implementation of compliance trainings, and to study the impact and efficacy of specific training components. Where possible, this research should focus not only on the efficacy of training in large organizations, but also smaller employers and newer or "start up" firms. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or

that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.[209]

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of trainings, particularly in the context of holistic harassment prevention efforts, in a manner that would allow research data to be aggregated and not identify individual employers.

- EEOC should compile a resource guide for employers that contains checklists and training modules for compliance trainings.

- EEOC should review and update, consistent with the recommendations contained in this report, its anti-harassment compliance training modules used for Technical Assistance Seminars, Customer Specific Trainings, trainings for Federal agencies, and other outreach and education programs.

D. WORKPLACE CIVILITY AND BYSTANDER INTERVENTION TRAINING

Employees need to know what conduct is unacceptable in the workplace (whether or not they might describe such conduct as harassment), and managers and supervisors need effective tools to respond to observation or reports of harassment. But regardless of the level of knowledge in a workplace, we know from the research that organizational *culture* is one of the key drivers of harassment. We therefore explored trainings that might have an impact on shaping organizational cultures in a way that would prevent harassment in a workplace.

Among the trainings we explored, two stood out for us as showing significant promise for preventing harassment in the workplace: (1) workplace civility training; and (2) bystander intervention training.

Workplace civility training is not new to the workplace. Many employers have put such trainings into place, often in response to concerns about bullying or conflict in the workplace. Bystander intervention training, by contrast, is not prevalent in workplaces. Such training has proliferated in recent years in colleges and high schools as a means of stopping sexual assault. We hope the information presented in this report will encourage employers to consider implementing these trainings as a means of preventing workplace harassment.

Workplace Civility Training

Employers have offered workplace civility training as a means of reducing bullying or conflict in the workplace. Thus, such training does not focus on eliminating unwelcome behavior based on characteristics protected under employment non-discrimination laws, but rather on promoting respect and civility in the workplace generally.

[209] In addition, as we noted above, we recognize that employers may be reluctant to have their workplaces turned into a research experiment, that data collection will require the willingness of an employer to participate in this research, and that this in turn may necessitate spelling out the purposes for which this data will and will not be used.

According to researchers, incivility is often an antecedent to workplace harassment, as it creates a climate of "general derision and disrespect" in which harassing behaviors are tolerated.[210] For example, in studies of attorneys and court employees, researchers found significant correlations between incivility and gender harassment.[211] Researchers also have found that uncivil behaviors can often "spiral" into harassing behaviors.[212]

Incivility can also sometimes represent covert manifestations of gender and racial bias on the job.[213] In other words, facially neutral, uncivil behaviors may actually be rooted in animus against members of a protected class and may subtly contribute to a hostile work environment.[214] We fully recognize that Title VII was not meant, and should not be read, to be "a general civility code for the American workplace."[215] But promoting civility and respect in a workplace may be a means of preventing conduct from rising to the level of unlawful harassment.

Workplace civility trainings focus on establishing expectations of civility and respect in the workplace, and on providing management and employees the tools they need to meet such expectations. The training usually includes an exploration of workplace norms, including a discussion of what constitutes appropriate and inappropriate behaviors in the workplace. The training also includes a heavily skills-based component, including interpersonal skills training, conflict resolution training, and training on effective supervisory techniques.[216]

The beauty of workplace civility training is that it is focused on the positive – what employees and managers *should* do, rather than on what they should not do. In addition, by appealing to all individuals in the workplace, regardless of social identity or perceived proclivity to harass, civility training might avoid some of the resistance met by interventions exclusively targeting harassment.[217]

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[210] Cortina testimony, *supra* n. 62; Lilia M. Cortina, *Unseen Injustice: Incivility as Modern Discrimination in Organizations*, 33 ACADEMY OF MANAGEMENT REVIEW 55 (2008)*;* Lynne M. Andersson & Christine M. Pearson, *Tit for Tat? The Spiraling Effect of Incivility in the Workplace*, 24 ACAD. OF MGMT. REV. 452 (1999).
[211] Cortina testimony, *supra* n. 62; S. Lim & Lilia M. Cortina, *Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment*, 90 J. APPLIED PSYCHOL. 483 (2005).
[212] Andersson & Pearson, *supra* n. 211.
[213] Cortina testimony, *supra* n. 62.
[214] *Id.*
[215] *Oncale v. Sundower Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). (Noting that Title VII cannot be interpreted as a general "civility code" because "[a]s we emphasized in *Meritor* and *Harris*, the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex . . . it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment.")
[216] Christine M. Pearson & Christine L. Porath, *On the Nature, Consequences and Remedies of Workplace Incivility: No Time for "Nice"? Think Again*, 19 ACAD. OF MGMT. EXEC. 7 (2005); *The Academy of Management Symposium on New Directions to Understanding Motivation to Learn*, J.S. Shapiro, *What Makes Civility Training Effective? Engagement, Cynicism and Motivation to Learn* (Aug. 2012).
[217] Cortina, *supra* n. 212. We learned in a meeting with directors and staff of federal EEO offices that many agencies have a contract with a training company called ELI to conduct "Civil Treatment Training for the Federal Government." The EEO officials found that the civility training was helping in reducing the incidents of harassment in their agencies.

We heard some concern that a focus on workplace civility might reinforce stereotypes (*e.g.*, that women need to be treated with special care and concern). Empirical data to support this concern appears lacking. In contrast, there is some empirical data (and many anecdotes) to support the effectiveness of civility training in enhancing workplace cultures of respect that are subsequently incompatible with harassment.[218]

Workplace civility training has not been rigorously evaluated as a harassment prevention tool *per se*,[219] but we believe that such training could provide an important complement to the compliance training described in the previous section. Moreover, it would be helpful to have additional research on the possible effects of workplace civility training in reducing the level of workplace harassment based on EEO protected characteristics.

Finally, we recognize that broad workplace "civility codes" which may be read to limit or restrict certain forms of speech may raise issues under the NLRA, which is outside of the jurisdiction of EEOC.[220] In light of that potential tension, we recommend that EEOC and NLRB confer and consult, and attempt to jointly clarify and harmonize the interplay of the NLRA and the federal EEO statutes.

Case Study: Los Angeles Department of Water and Power

In response to a significant number of workplace harassment allegations, LADPW established a proactive strategy to safeguard the personal dignity of its employees and empower them to contribute to a workplace free of harassment and discrimination.

- *LADPW began with an eight-hour, instructor-led, mandatory training for all its employees that focused on mutual respect in the workplace. The training included a discussion regarding individual differences related to diversity and cultural characteristics, focused on identifying and resolving workplace interpersonal conflict, set forth the roles and expectations of employees and leaders, and provided an overview of EEO laws, employment policies, and procedures.*

- *That training was followed by a mandatory training for all executives, supervisors, and lead personnel that focused on the practical implications of EEO laws and provided tools and techniques to address inappropriate behavior.*

- *LADPW also established a "boot camp team" to quickly address inappropriate conduct and provide one-on-one coaching and group training.*

LADPW continues to provide department-wide training to its employees on a regular basis, including training on topics such as "A Manager's Guide for a Respectful Workplace," "The POWER of Diversity - Workplace Diversity Training for All Employees," as well as targeted trainings for smaller groups on harassment and discrimination awareness.

During the first three years after LADPW initiated its training program, the number of internal EEO complaints rose – perhaps because employees had a greater understanding of their rights and where to go to file complaints. Since that time, however, complaints have decreased by 70%, and the severity of the types of harassment complaints has decreased as well. According to Renette Anderson, Director of LADPW's Equal Employment Opportunity Services, "Much of this is due to our tenacious and steadfast commitment to our training efforts."

[218] Michael P. Leiter *et al.*, *The Impact of Civility Interventions on Employee Social Behavior, Distress, and Attitudes*, 96 J. OF APPLIED PSYCHOL. 1258 (2011).
[219] Cortina testimony, *supra* n. 62.
[220] *See Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164 (2012); *First Transit, Inc.*, 360 N.L.R.B. No. 72 (2014).

Bystander Intervention Training

Bystander intervention training has long been used as a violence prevention strategy, and it has become increasingly utilized by colleges and high schools to prevent sexual assault.[221] The training has been shown to change social norms and empower students to intervene with peers to prevent assaults from occurring.[222] Most bystander intervention trainings employ at least four strategies:

- *Create awareness* – enable bystanders to recognize potentially problematic behaviors.
- *Create a sense of collective responsibility* – motivate bystanders to step in and take action when they observe problematic behaviors.
- *Create a sense of empowerment* – conduct skills-building exercises to provide bystanders with the skills and confidence to intervene as appropriate.
- *Provide resources* – provide bystanders with resources they can call upon and that support their intervention.[223]

One organization that provides training on campuses, Green Dot, creates a sense of empowerment by focusing its training on "three D's:" (1) confront the potential perpetrator of sexual assault in a *direct* manner, and ask the person to cease the behavior; (2) *distract* the potential perpetrator of sexual assault, and remove the potential victim; or (3) *delegate* the problem to someone who has the authority to intervene.[224]

We believe that bystander intervention training might be effective in the workplace. Such training could help employees identify unwelcome and offensive behavior that is based on a co-workers' protected characteristic under employment non-discrimination laws; could create a sense of responsibility on the part of employees to "do something" and not simply stand by; could give employees the skills and confidence to intervene in some manner to stop harassment; and finally, could demonstrate the employer's commitment to empowering employees to act in this manner. Bystander training also affords employers an opportunity to underscore their commitment to non-retaliation by making clear that any employee who "steps up" to combat harassment will be protected from negative repercussions.

The founder of Green Dot told us that, although the training was originally applied to the reduction of sexual assault, domestic violence, and stalking, she believed the training framework

[221] *Sexual Violence: Prevention Strategies*, Injury Prevention and Control: Division of Violence Prevention, Centers for Disease Control and Prevention, available at http://www.cdc.gov/violenceprevention/sexualviolence/prevention.html.
[222] *Id.* (summarizing research).
[223] White House Task Force to Protect Students from Sexual Assault, *Bystander-Focused Prevention of Sexual Violence*, The Nat'l Ctr. for Campus Pub. Safety (2014), https://www.humanrights.gov.au/sites/default/files/content/sexualharassment/bystander/bystander_june2012.pdf.
[224] *Written Testimony of Dorothy Edwards*, WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/edwards.cfm.

could be successfully applied to harassment in the workplace.[225] Similarly, a few researchers have explored the potential of using bystander intervention training in the workplace, and they are encouraged by the possibilities.[226] The studies caution, however, that suggested bystander responses must be crafted for use in the typical situations in which workplace harassment takes place. In addition, the organizational culture must encourage and support bystander intervention and reporting, and provide a safe system in which bystanders may do so.[227]

As with workplace civility training, more research is needed to determine the effectiveness of bystander intervention training as a workplace harassment prevention measure. But we believe such training has real potential to positively impact organizational culture. We know that most co-workers are not comfortable when harassment occurs around them, even when they are not the direct victims of the harassment. Bystander training could teach co-workers how to recognize potentially problematic behaviors; motivate and empower employees to step in and take action; teach employees skills to intervene appropriately; and give them resources to support their intervention.

Organizational culture starts from the top. But reinforcing that culture can and must come from the bottom, middle, and everywhere else in between. Bystander intervention training provides that reinforcement in a particularly concrete manner.

[225] *See, e.g.*, Paula McDonald *et al.*, *Action or Inaction: Bystander Intervention in Workplace Sexual Harassment*, 27 INT'L J. HUM. RES. MGMT. 548 (2016). *See also* Paula McDonald & Michael Flood, *Encourage. Support. Act!: Bystander Approaches to Sexual Harassment in the Workplace*, AUSTRALIAN HUM. RTS. COMM'N (2012), available at https://www.humanrights.gov.au/sites/default/files/content/sexualharassment/bystander/bystander_june2012.pdf.

[226] *See, e.g.*, McDonald, *supra* n. 226 (documenting the types of interventions co-workers use when they observe sexual harassment); Maura Kelly & Sasha Basset, *Evaluation of the Potential for Adapting the Green Dot Bystander Intervention Program for the Construction Trades in Oregon*, SOCIOLOGY FACULTY PUBLICATIONS AND PRESENTATIONS 1 (2015) (evaluating the potential of bystander intervention training to reduce harassment in the construction trades); McDonald and Flood, *supra* n. 226; Lynn Bowes-Sperry & Anne M. O'Leary-Kelly, *To Act or Not to Act: The Dilemma Faced by Sexual Harassment Observers*, 30 ACAD. MGMT. REV. 288 (2005); Cortina & Berdhal, *supra* n. 14.

[227] McDonald & Flood, *supra* n. 226 (outlining some of the elements that should be included in the design of a bystander program to prevent workplace harassment, including information on how to recognize harassment; content on different forms of bystander intervention, including both individual and collective responses; the links between harassment and other forms of inequality; training to demonstrate how bystanders can assist; and training to all employees). The paper suggests principles and strategies for developing and implementing bystander approaches to sexual harassment, but we believe the suggestions are generalizable to harassment based on other protected characteristics, as well.

Case Study: Green Dot in Anchorage, Alaska

"Green Dot" is a violence prevention program focused on providing bystanders with the strategies and techniques they need to: (1) identify situations that can lead to acts of violence (represented on incident maps by a red dot); and (2) intervene safely and effectively. A "green dot" represents "any behavior, choice, word, or attitude that promotes safety . . . and communicates utter intolerance for violence." The goal is to have sufficient positive interventions such that the green dots totally overwhelm the red dots.

The city of Anchorage, Alaska received a grant to implement the Green Dot program at the community level, including at bars and restaurants. When discussing early warning signs of violence, bar and restaurant groups often shared examples where violent or potentially violent behaviors were happening to staff. Examples ranged from intoxicated patrons violating physical boundaries of servers to discussions of bar cultures that accepted or even encouraged some levels of harassment of staff by customers - all in the spirit of keeping the party atmosphere going and the drinks and tips flowing.

As a result of the Green Dot training, bar and restaurant owners in Anchorage began to develop new cultural norms. They hosted trainings, developed policies, included relevant messaging in their signs and bulletins, and engaged in a host of creative ideas such as Green Dot trivia, contests, and competitions. Both staff and patrons acquired new skills to respond to potential harassment or violence.

Based on what we have learned in this area, we offer the following recommendations:

- Employers should consider including workplace civility training and bystander intervention training as part of a holistic harassment prevention program.

- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible content of workplace "civility codes."

- Researchers should assess the impact of workplace civility training on reducing the level of harassment in the workplace.

- EEOC should convene a panel of experts on sexual assault bystander intervention training to develop and evaluate a bystander intervention training module for reducing harassment in the workplace.

- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the efficacy of workplace civility training and/or bystander intervention training on reducing the level of harassment in the workplace. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest

that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.[228]

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of workplace civility and bystander intervention trainings in a manner that would allow research data to be aggregated and not identify individual employers.

E. GETTING THE WORD OUT

We spent a significant amount of time discussing outreach and education with the Select Task Force members and witnesses. Outreach is needed for workers, employers, and the general public. On-the-job, employer-sponsored training is one form of outreach and education for employees. In this section, we highlight a number of other approaches worthy of consideration.

> *EEOC resources can provide invaluable guidance for employers. Employers should view the Commission as a source for education and assistance in addressing these critical issues.*
>
> *Patricia A. Wise, Select Task Force Member*

Getting the Word Out: Providing Simple and Easy-to-Access Information

There is a significant amount of information regarding workplace harassment available on the web. But information on the web can be overwhelming and is not always correct. This is a problem for both employers (especially small business employers with limited resources) and employees.

As Jess Kutch, the co-founder and co-director of Coworker.org told us: "[Internet search results] either give very basic advice (sometimes even wrong advice) or they give you dozens of links to deep legalese that wouldn't be helpful for most people." She also noted that very few search results lead to mobile friendly websites, which is problematic because many workers – low-wage workers, in particular – rely on their mobile phones to access information on the internet.[229] Of course, some workers cannot get their information from the internet at all – either because they do not have access to the internet, cannot find sufficient information in their own language if they do not read English, or are not literate.

[228] In addition, as we noted above, we recognize that employers may be reluctant to have their workplaces turned into a research experiment, that data collection will require the willingness of an employer to participate in this research, and that this in turn may necessitate spelling out the purposes for which this data will and will not be used..

[229] *Written Testimony of Jess Kutch*, FACES OF WORKPLACE HARASSMENT AND INNOVATIVE SOLUTIONS, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Dec.7, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/12-7-15/kutch.cfm.

We also heard a fair amount about the utility of EEOC's resources on the web. Some Select Task Force members felt that EEOC's guidance on harassment was overly legalistic, and with regard to some issues, outdated. In addition, they noted that EEOC's website is neither mobile-friendly nor fully accessible to non-English speakers. One Select Task Force member sought more information on prevention strategies and noted a dearth of user-friendly tools (such as model harassment policies, effective investigation outlines, and promising practices) that could help employers in their efforts to prevent harassment. One witness suggested that EEOC's information on how to file a complaint is difficult to understand, and that the actual process of filing a complaint can be difficult and cumbersome for potential charging parties.

We took all suggestions to heart about what EEOC could do in terms of outreach and education, and a number of our recommendations at the end of this section reflect ideas that we heard. We also recognize the many successful outreach efforts EEOC has done in the past and continues to be engaged in, including the extensive (and highly regarded) outreach training EEOC conducts through its field offices and personnel.[230] EEOC has also made outreach and education for small businesses a priority through its Small Business Task Force, which in 2016 issued a simplified, one-page fact sheet designed to help small business owners better understand their responsibilities under the federal employment anti-discrimination laws.[231]

But we wanted to expand our ideas beyond what EEOC might do. To reach all the people who need to be reached, we need more than just one (or even several) government agencies involved in the effort.

The good news is that many non-profit organizations are using innovative mechanisms to get the word out. For example, as we described above, the Fair Food Program, run by the Coalition of Imokalee Workers in Florida, has developed educational materials created by farmworkers themselves. With these materials, the Coalition of Imokalee Workers provides in-person worker-to-worker education on worker rights at all farms that participate in the Fair Food Program.[232]

Similarly, ROC-LA, a restaurant worker center in Los Angeles, California, provides "know your rights" trainings both individually and to groups. The trainings focus on real-life application of employee rights, including protection from retaliation and the importance of gathering evidence

[230] EEOC provides extensive training via its Technical Assistance Program Seminars and EEOC Training Institute. EEOC representatives are available to make presentations and participate in meetings, conferences and seminars with employee advocate and employer organizations, professional associations, students, non-profit entities, community organizations and other members of the general public. Training programs are also available for tailored to federal sector needs. *See* http://www.eeotraining.eeoc.gov/index.html and https://www.eeoc.gov/field/mobile/training.cfm.

[231] EEOC's Small Business Task Force is led by Commissioner Constance S. Barker. The Task Force was launched in 2011 to address the need to provide small businesses ready access to plainly written, easily understood information, through the use of the internet, social media, and other sources. The Task Force focuses on the needs of startups and companies that are too small to afford human resource professionals or lawyers. The small business fact sheet is the first in a series of products the Task Force is in the process of developing; the Task Force is also working on producing a series of short YouTube videos designed to provide quick, easy answers to questions often asked by small business owners.

[232] Espinoza testimony, *supra* n. 165.

in cases of harassment.[233] ROC-LA also provides a free, weekly legal clinic for its members and has posted a simple "know your rights" brochure on its website that it is available in English, Spanish, and Chinese.[234]

On the employer side, membership organizations like the Society for Human Resource Management maintain libraries of resources on their websites, and provide webinars and conferences for their members that address a number of employment issues, including prevention of harassment.[235] And of course, there are many conferences, webinars, training programs, and written materials on legal issues concerning harassment.

The Commission is in the process of updating its Enforcement Guidance on Harassment, and we believe it will be a useful guide for employers and employees. Similarly, EEOC's Communications and Outreach Plan proposes upgrading the technology and user experience of EEOC's website, including making its website mobile-friendly and accessible in a number of languages.

There is, however, much more to be done to reach various audiences that would benefit from learning about how to prevent harassment, and how to complain about it or report it when necessary.

Based on what we have learned in this area, we offer the following recommendations:

- EEOC should develop additional resources for its website, including user-friendly guides on workplace harassment for employers and employees, that can be used with mobile devices.

- Non-profit organizations should conduct targeted outreach to employers to explain the business case for strong harassment prevention cultures, policies, and procedures.

- Non-profit organizations (including employee advocacy organizations, business membership associations, and labor unions) should develop easy-to-understand written resources and other creative materials (such as videos, posters, etc.) that will help workers and employers understand their rights and responsibilities.

- EEOC should partner with internet search engines to ensure that a range of EEOC resources appear high on the list of results returned by search engines.

[233] *Written Testimony of Sophia Cheng*, WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/cheng.cfm.
[234] *See* http://rocunited.org/la/for-workers/.
[235] *See* https://www.shrm.org/pages/default.aspx.

Getting the Word Out to Youth

We heard from a number of Select Task Force members and witnesses that there needs to be explicit and focused outreach to youth, even before they enter the workforce. As one witness explained:

> Students who are about to be in their first-ever work situations need to be informed about (a) their rights to work in an environment free from harassment, intimidation, and /or discrimination, based on race, color, national origin, sex (including sexual orientation and transgender status), disability, and age… (b) what conduct is not permitted in the workplace (which may differ somewhat from what is acceptable at school); and (c) what they should do when they see or are subjected to any conduct they believe may be prohibited discrimination or harassment.[236]

Another witness explained that some teenagers and young adults "either are unaware of what constitutes harassment or, given their youth, simply don't care."[237] Select Task Force members and other witnesses stressed the importance of reaching youth *before* they enter the workforce, so that they understand workplace norms and how they differ from classroom or social norms. We also heard that traditional outreach mechanisms (materials posted on a website, worker centers, conferences, etc.) may not be the most effective in reaching youth, and that more creative approaches are necessary.

We commend the work EEOC has already done, and is continuing to do, in outreach to youth through its Youth@Work initiative. Youth@Work is EEOC's national outreach and education campaign targeted to young workers, which was launched in 2004. Since that launch, EEOC has maintained and periodically updated the campaign. Most recently, in 2016, the agency redesigned the Youth@Work website, made it mobile-friendly, expanded the campaign's social media strategy, and expanded its substantive treatment of a number of developing areas of employment non-discrimination law. We encourage EEOC to continue to make this program current, meaningful, and accessible to youth.

In light of what we have learned in this area, we offer the following recommendations:

- EEOC should continue to update its Youth@Work initiative (including its website) to include more information about harassment.

- Colleges and high schools should incorporate a component on workplace harassment in their school-based anti-bullying and anti-sexual assault efforts.

[236] *Written Testimony of Rita Byrnes Kittle*, INDUSTRY SPECIFIC HARASSMENT ISSUES, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Sept. 18, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/kittle.cfm.
[237] Robbins testimony, *supra* n. 134.

- EEOC should partner with web-based educational websites, such as Khan Academyor YouTube channels that have a large youth following, to develop content around workplace harassment.

- EEOC should establish a contest in which youth are invited to design their own videos or apps to educate their peers about workplace harassment.

F. IT'S ON US

Harassment in the workplace will not stop on its own. The ideas noted above are helpful, but ultimately, may not be sufficient. It is on *all of us* to be part of the fight to stop workplace harassment. We cannot be complacent bystanders and expect our workplace cultures to change on their own.

For this reason, we suggest exploring an *It's On Us* campaign for the workplace. The *It's On Us* campaign for colleges and high school campuses is an outgrowth of the White House Task Force to Protect Students from Sexual Assault that recognized the need to change the *cultures* of educational institutions. The campaign is housed at Civic Nation, a non-profit organization focused on engaging millennials. The *It's On Us* campaign is premised on the idea that sexual assault is not just about a victim and a perpetrator. It calls upon everyone to do his or her part to be a part of the solution.

As the former leader of the *It's On Us* campaign explained to us, if students, faculty, and campus staff are passive observers when they see the possibility of sexual assault, they reinforce a culture that tolerates such behavior. But if students, faculty, and campus staff are empowered to be part of the solution to preventing sexual assault, and are given the tools and resources to do so, their role as engaged bystanders will make a significant difference in changing the educational culture.[238]

It would be an audacious goal to launch a similar *It's On Us* campaign in workplaces across our country – in large and small workplaces, in urban and rural areas. But doing so would transform the problem of workplace harassment from being about targets, harassers, and legal compliance, and make it one in which co-workers, supervisors, clients, and customers all have roles to play in stopping harassment.

The campaign focuses on three core pillars: increasing bystander intervention, defining consent, and creating an environment to support survivors. These pillars can be adjusted to better fit the scope of anti-harassment efforts in the workplace – particularly when it comes to bystander

[238] *Testimony of Anne Johnson*, FACES OF WORKPLACE HARASSMENT AND INNOVATIVE SOLUTIONS, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Dec. 7, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/12-7-15/johnson.cfm. The *It's on Us* campaign uses a variety of mechanisms to communicate its message, including public service announcements featuring celebrities, large scale digital engagement campaigns, posters at bus stops and in train stations, collaboration with national partners, peer to peer education, engagement with local leaders and not-for-profit organizations, and engagement with policymakers. It is an effort that works in an integrated fashion with the various bystander intervention trainings that take place across educational settings. *See http://itsonus.org* .

intervention and creating an environment where targets feel comfortable coming forward to report.

We have no illusions that such a campaign would be easy to launch. But witnesses who testified before the Select Task Force believed it was possible to transfer to the workplace the principles of the *It's On Us* campaign, and the skills that bystanders would need.[239] We agree. If successful, such an effort could pay high dividends in the workplace well beyond the impact of any policy, procedure or compliance training.

An *It's On Us* campaign for the workplace would require the active engagement of business partners, employee advocacy partners, and ordinary people across the country. But we have a blueprint from the existing *It's On Us* campaign in the educational setting. The campaign was successful due in large part to its multi-faceted approach of using a wide-scale awareness campaign with a robust local organizing model to engage people both online and offline.

We are not starting from scratch with this idea. But someone has to bring the campaign to the workplace. Why not all of us?

In light of what we have learned in this area, we offer the following one, very big, recommendation:

- EEOC assists in launching an "*It's on Us*" campaign to end harassment in the workplace.

[239] *See* Johnson testimony, *supra* n. 239; Edwards testimony, *supra* n. 225.

PART FOUR

SUMMARY OF RECOMMENDATIONS

Our goal over the past year has been to learn everything we could about workplace harassment and the means to prevent it. Based on that work, we now call for a reboot of workplace harassment prevention efforts. We hope the information provided in this report, as well as our concrete recommendations for action, will energize individuals and organizations across the country to join us in that effort.

EEOC has an essential role in rebooting workplace harassment prevention efforts. But we will always only be one piece of the solution. Everyone in society must feel a sense of urgency in preventing harassment: individual employers and employer associations; individual employees and employee associations; labor union leadership and rank-and-file; federal, state, and local government agencies; academics, foundations, and community leaders. That is the only way we will achieve the goal of reducing the level of workplace harassment to the lowest level possible.

To that end, we set forth below a compilation of the recommendations set forth throughout the report.

It's on Us.

* * *

Recommendations Regarding the Prevalence of Harassment in the Workplace

- EEOC should work with the Bureau of Labor Statistics or the Census Bureau, and/or private partners, to develop and conduct a national poll to measure the prevalence of workplace harassment based on sex (including pregnancy, sexual orientation and gender identity), race, ethnicity/national origin, religion, age, disability, and genetic information over time.

- Academic researchers should compile baseline research on the prevalence of workplace harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity.

- EEOC should confer with the Merit Systems Protection Board to determine whether it can repeat its study of harassment of federal employees, and expand its survey to ask questions regarding harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity in the federal government, and to disaggregate sexually-based harassment and gender-based harassment.

- EEOC should work within the structure established by the Office of Personnel Management to offer specific questions on workplace harassment in the Federal Employee Viewpoint Survey.

Recommendations Regarding Workplace Leadership and Accountability

- Employers should foster an organizational culture in which harassment is not tolerated, and in which respect and civility are promoted. Employers should communicate and model a consistent commitment to that goal.

- Employers should assess their workplaces for the risk factors associated with harassment and explore ideas for minimizing those risks.

- Employers should conduct climate surveys to assess the extent to which harassment is a problem in their organization.

- Employers should devote sufficient resources to harassment prevention efforts, both to ensure that such efforts are effective, and to reinforce the credibility of leadership's commitment to creating a workplace free of harassment.

- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the severity of the infraction. In addition, employers should ensure that where harassment is found to have occurred, discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.

- Employers should hold mid-level managers and front-line supervisors accountable for preventing and/or responding to workplace harassment, including through the use of metrics and performance reviews.

- If employers have a diversity and inclusion strategy and budget, harassment prevention should be an integral part of that strategy.

Recommendations Regarding Harassment Prevention Policies and Procedures

- Employers should adopt and maintain a comprehensive anti-harassment policy (which prohibits harassment based on any protected characteristic, and which includes social media considerations) and should establish procedures consistent with the principles discussed in this report.

- Employers should ensure that the anti-harassment policy, and in particular details about how to complain of harassment and how to report observed harassment, are communicated frequently to employees, in a variety of forms and methods.

- Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.

- Employers should be alert for any possibility of retaliation against an employee who reports harassment and should take steps to ensure that such retaliation does not occur.

- Employers should periodically "test" their reporting system to determine how well the system is working.

- Employers should devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Investigations should be kept as confidential as possible, recognizing that complete confidentiality or anonymity will not always be attainable.

- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations, and the permissible scope of policies regulating workplace social media usage.

- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the behavior(s) at issue and the severity of the infraction. Employers should ensure that discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.

- In unionized workplaces, the labor union should ensure that its own policy and reporting system meet the principles outlined in this section.

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined above.

- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the impact and efficacy of the policies, reporting systems, investigative procedures, and corrective actions put into place by that employer. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of their policies, reporting systems, investigative procedures, and corrective actions put into place by those employers, in a manner that would allow research data to be aggregated in a manner that would not identify individual employers.

Recommendations Regarding Anti-Harassment Compliance Training

- Employers should offer, on a regular basis and in a universal manner, compliance trainings that include the content and follow the structural principles described in this report, and which are offered on a dynamic and repeated basis to all employees.

- Employers should dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information – even before such harassment reaches a legally-actionable level.

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that employers adopt and maintain compliance training that comports with the content and follows the structural principles described in this report.

- EEOC should, as a best practice in cases alleging harassment, seek as a condition of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer to assess the climate and level of harassment in respondent workplaces pre- and post-implementation of compliance trainings, and to study the impact and efficacy of specific training components. Where possible, this research should focus not only on the efficacy of training in large organizations, but also smaller employers and newer or "start up" firms. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of trainings, particularly in the context of holistic harassment prevention efforts, in a manner that would allow research data to be aggregated and not identify individual employers.

- EEOC should compile a resource guide for employers that contains checklists and training modules for compliance trainings.

- EEOC should review and update, consistent with the recommendations contained in this report, its anti-harassment compliance training modules used for Technical Assistance Seminars, Customer Specific Trainings, trainings for Federal agencies, and other outreach and education programs.

Recommendations Regarding Workplace Civility and Bystander Intervention Training

- Employers should consider including workplace civility training and bystander intervention training as part of a holistic harassment prevention program.

- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible content of workplace "civility codes."

- Researchers should assess the impact of workplace civility training on reducing the level of harassment in the workplace.

- EEOC should convene a panel of experts on sexual assault bystander intervention training to develop and evaluate a bystander intervention training module for reducing harassment in the workplace.

- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the efficacy of workplace civility training and/or bystander intervention training on reducing the level of harassment in the workplace. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of workplace civility and bystander intervention trainings in a manner that would allow research data to be aggregated and not identify individual employers.

Recommendations Regarding General Outreach

- EEOC should develop additional resources for its website, including user-friendly guides on workplace harassment for employers and employees, that can be used with mobile devices.

- Non-profit organizations should conduct targeted outreach to employers to explain the business case for strong harassment prevention cultures, policies, and procedures.

- Non-profit organizations (including employee advocacy organizations, business membership associations, and labor unions) should develop easy-to-understand written resources and other creative materials (such as videos, posters, etc.) that will help workers and employers understand their rights and responsibilities.

- EEOC should partner with internet search engines to ensure that a range of EEOC resources appear high on the list of results returned by search engines.

Recommendations Regarding Targeted Outreach to Youth

- EEOC should continue to update its Youth@Work initiative (including its website) to include more information about harassment.

- Colleges and high schools should incorporate a component on workplace harassment in their school-based anti-bullying and anti-sexual assault efforts.

- EEOC should partner with web-based educational websites, such as Khan Academy, or YouTube channels that have a large youth following, to develop content around workplace harassment.

- EEOC should establish a contest in which youth are invited to design their own videos or apps to educate their peers about workplace harassment.

Recommendation Regarding an* It's on Us *campaign:

- EEOC assists in launching an "*It's on Us*" campaign to end harassment in the workplace.

ACKNOWLEDGEMENTS

The work of the Select Task Force on the Study of Harassment in the Workplace, and the report from the two of us as co-chairs of the Select Task Force, could not have happened without the invaluable assistance of many individuals over the past year.

We want to acknowledge and thank the following individuals:

Chair Jenny Yang, for her leadership in convening the Select Task Force;

Sarah Crawford, Special Assistant to Chair Yang, for organizing the Commission meeting on harassment in the workplace in January 2015 and for being our liaison to the Office of the Chair;

Christine Park Gonzalez and her colleagues at the EEOC Los Angeles District Office, for hosting us and helping us produce a full-day meeting of the Select Task Force in Los Angeles, California in October 2015;

Brett Brenner, Adam Guasch, Justine Lisser, and Kimberly Smith-Brown, from our Office of Communications and Legislative Affairs, for press, website, and other communications support;

Tom Schlageter, from our Office of Legal Counsel, for his advice and counsel;

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Leslie Annexstein, from our Office of General Counsel, for helping us identify charging parties who have experienced harassment;

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Patricia Foley, for arranging CART reporters for our Select Task Force public meetings;

Our entire facilities staff, for ensuring that the Training Center was always configured correctly for our Select Task Force meetings; and

James Tillman, Andre Gallmon, and Jill Lewis, for streamlining the security process for our Select Task Force meetings.

We also want to acknowledge and thank all the EEOC staff that engaged us in conversation, provided us with data, and took the time to review and comment on drafts of this report. We appreciate their guidance and counsel.

We want to acknowledge and thank all the witnesses, listed in Appendix A, who took the time to share their expertise with us. Every one of them has helped us in our work during this process.

None of the work required to convene the Select Task Force and write this report could have been done without the assistance of many individuals in our respective offices. We would like to acknowledge and thank:

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Penelope Scudder (summer 2015), Neelam Salman (spring 2016), Ira Stup (summer 2016), Neda Saghafi (summer 2016), and Chauna Pervis (summer 2016), legal interns in Commissioner Feldblum's office; and Erin Perugini (fall 2015), legal intern in Commissioner Lipnic's office, for drafting legal memos, compiling research, chasing down citations, endless bluebooking, and everything in-between.

Three of our staff members stand apart in terms of making this effort possible: Sharon Masling, Chief of Staff to Commissioner Feldblum, and Jim Paretti, Senior Counsel, and Donald McIntosh, Counsel, to Commissioner Lipnic.

Sharon, Jim, and Donald spent countless hours identifying members of the Select Task Force, planning meeting agendas, finding and working with witnesses, preparing legal and policy materials, dealing with logistics, sitting through endless hours of meetings with each other and with us, communicating with Select Task Force members, and preparing draft sections of the report. It goes without saying (but we will say it anyway) that nothing would have gotten done without the incredible work of these three staff members.

Finally, we would like to thank the members of the Select Task Force on the Study of Harassment in the Workplace, for their time, their thoughtfulness, their insights, and their commitment to this project. While this report is by the two of us, it would not have been possible without them.

APPENDIX A

ACTIVITIES OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

On April 7, 2015, the Select Task Force on the Study of Harassment in the Workplace held its first meeting, a private working session in Washington, DC. At that meeting, members of the Select Task Force provided their initial thoughts on how the group might proceed in its work. The bulk of the day was devoted to framing the Select Task Force's mission, and building relationships among the members.

The first public meeting of the Select Task Force, entitled "*Workplace Harassment: Examining the Scope of the Problem and Potential Solutions*," was held on June 15, 2015, at EEOC headquarters in Washington, DC. At that hearing, members of the Select Task Force heard testimony from six invited witnesses:

- Dexter Brooks, Director, Federal Sector Programs, Office of Federal Operations, EEOC
- Ron Edwards, Director, Program Research and Surveys Division, Office of Research, Information and Planning, EEOC
- Lilia Cortina, Professor of Psychology and Women's Studies, University of Michigan
- Mindy Bergman, Associate Professor of Psychology, Texas A&M University
- Eden King, Associate Professor of Psychology, George Mason University
- Louise Fitzgerald, Professor *Emerita* of Gender and Women's Studies and Psychology, University of Illinois.

The witnesses focused their remarks on the prevalence of workplace harassment in both the private and public sector. Their testimony included an examination of existing research, as well as gaps in current literature and data.

Information on the June 2015 meeting is available at: Select Task Force Meeting of June 15, 2015 - Workplace Harassment: Examining the Scope of the Problem and Potential Solutions.

At this meeting, we announced the formation of the Select Task Force's public website, which assembled in one place a range of existing EEOC resources relating to harassment, and provided an online "suggestion box" for public comment.

On August 12, 2015, we gave a presentation concerning the work of the Select Task Force at the annual EXCEL conference, "Examining Conflicts in Employment Law," and heard feedback from the more than 70 attendees regarding their experience in preventing and addressing workplace harassment in federal worksites.

On September 18, 2015, the Select Task Force held a closed working session in Washington, DC. The focus of the session was to explore "risk factors" or problematic issues that might relate to specific workplaces. The Select Task Force heard testimony from three experts in workplace harassment investigations and training who had experience with a range of industries:

- Michael A. Robbins of EXTTI, Inc.
- Fran Sepler of Sepler & Associates
- Sindy Warren of Warren & Associates LLC.

The Select Task Force also heard from Wendi Lazar, a partner at Outten & Golden LLP, on the risk factors faced by women in the legal profession. Finally, the Select Task Force heard from two members of EEOC's legal staff, Los Angeles Regional Attorney Anna Park and Denver Senior Trial Attorney Rita Byrnes Kittle, about lessons learned from large-scale EEOC investigations and litigation.

On October 22, 2015, the Select Task Force held a day-long public meeting in Los Angeles, California, focused on "Promising Practices to Prevent Workplace Harassment."

At this meeting, the Select Task Force heard testimony from:

- Judge Laura Safer Espinoza, Director, Fair Food Standards Council
- Jon Esformes, Chief Executive Officer, Pacific Tomato Growers; Sunripe Certified Brands
- Sophia Cheng, Community Organizer, Restaurant Opportunities Center of Los Angeles
- Dorothy Edwards, Executive Director, Green Dot
- Melissa Emmal, Deputy Director, Abused Women's Aid in Crisis
- Patti Perez, Shareholder, Ogletree Deakins, and Member of the California Fair Employment and Housing Council
- Renette Anderson, Executive Assistant to the General Manager and Director of Equal Employment Opportunity Services, Los Angeles Department of Water and Power
- Heidi Jean Olguin, CEO, Progressive Management Resources.

The witnesses presented testimony on innovative approaches to combatting workplace harassment and new or non-traditional models of training and outreach. The witnesses also testified on the importance of corporate culture and strong leadership in promoting harassment-free workplaces.

Information on the October 2015 meeting can be found at: Select Task Force Meeting of October 22, 2015 - Workplace Harassment: Promising Practices to Prevent Workplace Harassment.

On December 7, 2015, the Select Task Force convened in Washington, DC, "Faces of Workplace Harassment and Innovative Solutions." The public portion of the meeting was devoted to two topics: (1) harassment on the bases of disability, religion, ethnicity, sexual orientation, gender identity, and age; and (2) solutions using general awareness campaigns and social media.

The first panel, "Faces of Workplace Harassment," consisted of:

- Lisa Banks, Partner, Katz, Marshall & Banks, LLP
- Zahra Billoo, Executive Director, Council on American-Islamic Relationa – San Francisco Bay Area
- Tara Borelli, Senior Attorney, Lambda Legal
- Dan Kohrman, Senior Attorney, AARP Foundation Litigation

The second panel, "Innovative Solutions," consisted of:

- Anne Johnson, Executive Director, Generation Progress, Center for American Progress ("It's on Us" campaign)
- Jess Kutch, Co-Founder, Coworker.org

Information on the December 2015 meeting can be found at: Select Task Force Meeting of December 7, 2015 - Faces of Workplace Harassment and Innovative Solutions.

In a closed working session in the afternoon, Select Task Force members gathered into five working groups focused on: (1) Outreach; (2) Research; (3) Training; (4) Employer Best Practices; and (5) Harassment "Risk Factors."

On February 11, 2016, we met with representatives from the federal sector, including equal employment opportunity directors and specialists from federal agencies, to discuss how the federal government is working to prevent harassment, and solicit their feedback, experience, and concerns regarding harassment in the federal-sector workplace.

On February 25, 2016, the Select Task Force met in closed session in Washington, DC to discuss the reports of several of the working groups. At that meeting, the Select Task Force also heard from Nathan Galbreath, Senior Executive Advisor, Sexual Assault Prevention and Response Office, Department of Defense, which oversees the military's sexual assault policy and programs.

On March 1, 2016, we met with the senior leadership of EEOC, including district directors and regional attorneys, to discuss the ongoing work of the task force.

On March 11, 2016, the Select Task Force met in closed session to continue its discussion of the working group reports. The Select Task Force also heard testimony about harassment based on race from Coty Montag, Deputy Director Litigation, NAACP Legal Defense and Education Fund, and about harassment based on national origin and language characteristics from Guadalupe Valdés, Bonnie Katz Tenenbaum Professor of Education, Stanford Graduate School of Education. In addition, the Select Task Force received a briefing on organizational behavior from Robert J. Bies, Professor of Management & Founder of Executive Master's in Leadership Program, McDonough School of Business, Georgetown University, and heard a presentation from Jennifer Abruzzo, Deputy General Counsel, U.S. National Labor Relations Board, on issues relating to harassment arising under the National Labor Relations Act.

The Select Task Force held a closed working session on June 6, 2016, in Washington, DC. The session was devoted to a discussion of the Co-Chairs' draft report, and its release later that month.

APPENDIX B

CHECKLISTS FOR EMPLOYERS

Checklist One: Leadership and Accountability

The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated. Check the box if the leadership of your organization has taken the following steps:

- ❑ Leadership has allocated sufficient *resources* for a harassment prevention effort
- ❑ Leadership has allocated sufficient *staff time* for a harassment prevention effort
- ❑ Leadership has *assessed* harassment *risk factors* and has taken steps to *minimize* those risks

Based on the commitment of leadership, check the box if your organization has the following components in place:

- ❑ A harassment prevention *policy* that is *easy-to-understand* and that is *regularly communicated* to all employees
- ❑ A harassment reporting *system* that employees *know about* and is *fully resourced* and which accepts reports of harassment experienced and harassment observed
- ❑ *Imposition of discipline* that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred
- ❑ *Accountability* for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment
- ❑ Regular *compliance trainings for all employees* so they can recognize prohibited forms of conduct and know how to use the reporting system
- ❑ Regular *compliance trainings for mid-level managers and front-line supervisors* so they know how to prevent and/or respond to workplace harassment

Bonus points if you can check these boxes:

- ❑ The organization conducts *climate surveys* on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace
- ❑ The organization has implemented *metrics* for harassment response and prevention in supervisory employees' performance reviews
- ❑ The organization conducts *workplace civility training* and *bystander intervention training*
- ❑ The organization has *partnered with researchers* to evaluate the organization's holistic workplace harassment prevention effort

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is* not *in compliance.

Checklist Two: An Anti-Harassment Policy

An anti-harassment policy is a key component of a holistic harassment prevention effort. Check the box below if your anti-harassment policy contains the following elements:

- ❑ An unequivocal statement that harassment based on *any* protected characteristic will not be tolerated
- ❑ An easy-to-understand description of prohibited conduct, including examples
- ❑ A description of a reporting system – available to employees who experience harassment as well as those who observe harassment – that provides multiple avenues to report, in a manner easily accessible to employees
- ❑ A statement that the reporting system will provide a prompt, thorough, and impartial investigation
- ❑ A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation
- ❑ A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation
- ❑ An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred
- ❑ An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors
- ❑ A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately
- ❑ Is written in clear, simple words, in all languages commonly used by members of the workforce

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is* not *in compliance.

Checklist Three: A Harassment Reporting System and Investigations

A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.

Check the box below if your anti-harassment effort contains the following elements:

- ❑ A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed
- ❑ Employer representatives who take reports seriously
- ❑ A supportive environment where individuals feel safe to report harassing behavior to management
- ❑ Well-trained, objective, and neutral investigators
- ❑ Timely responses and investigations
- ❑ Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility
- ❑ An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible
- ❑ Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation
- ❑ During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred
- ❑ A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is* not *in compliance.

Checklist Four: Compliance Training

A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Check the box if your organization's compliance training is based on the following structural principles and includes the following content:

- Structural Principles
  - ❑ Supported at the highest levels
  - ❑ Repeated and reinforced on a regular basis
  - ❑ Provided to all employees at every level of the organization
  - ❑ Conducted by qualified, live, and interactive trainers
  - ❑ If live training is not feasible, designed to include active engagement by participants
  - ❑ Routinely evaluated and modified as necessary
- Content of Compliance Training for All Employees
  - ❑ Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment
  - ❑ Includes examples that are tailored to the specific workplace and the specific workforce
  - ❑ Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace
  - ❑ Describes, in simple terms, the process for reporting harassment that is experienced or observed
  - ❑ Explains the consequences of engaging in conduct unacceptable in the workplace
- Content of Compliance Training for Managers and First-line Supervisors
  - ❑ Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods
  - ❑ Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report
  - ❑ Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is* not *in compliance.

APPENDIX C

CHART OF RISK FACTORS AND RESPONSES

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Homogenous workforce	Historic lack of diversity in the workplace Currently only one minority in a work group (*e.g.*, team, department, location)	Employees in the minority can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others. Employees in the majority might feel threatened by those they perceive as "different" or "other," or might simply be uncomfortable around others who are not like them.	Increase diversity at all levels of the workforce, with particular attention to work groups with low diversity. Pay attention to relations among and within work groups.
Workplaces where some employees do not conform to workplace norms	"Rough and tumble" or single-sex-dominated workplace cultures Remarks, jokes, or banter that are crude, "raunchy," or demeaning	Employees may be viewed as weak or susceptible to abuse. Abusive remarks or humor may promote workplace norms that devalue certain types of individuals.	Proactively and intentionally create a culture of civility and respect with the involvement of the highest levels of leadership. Pay attention to relations among and within work groups.
Cultural and language differences in the workplace	Arrival of new employees with different cultures or nationalities Segregation of employees with different cultures or nationalities	Different cultural backgrounds may make employees less aware of laws and workplace norms. Employees who do not speak English may not know their rights and may be more subject to exploitation. Language and linguistic characteristics can play a role in harassment.	Ensure that culturally diverse employees understand laws, workplace norms, and policies. Increase diversity in culturally segregated workforces. Pay attention to relations among and within work groups.

The strategies outlined in Part Three of this report (e.g., exercising leadership, holding people accountable for their actions, developing and enforcing effective policies and procedures, and conducting training) will help address all the risk factors listed in this chart. The strategies outlined in the last column of this chart are designed to address specific risk factors.

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Coarsened Social Discourse Outside the Workplace	Increasingly heated discussion of current events occurring outside the workplace	Coarsened social discourse that is happening outside a workplace may make harassment inside the workplace more likely or perceived as more acceptable.	Proactively identify current events—national and local—that are likely to be discussed in the workplace. Remind the workforce of the types of conduct that are unacceptable in the workplace.
Young workforces	Significant number of teenage and young adult employees	Employees in their first or second jobs may be less aware of laws and workplace norms. Young employees may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable. Young employees may be more susceptible to being taken advantage of by coworkers or superiors, particularly those who may be older and more established in their positions. Young employees may be more likely to engage in harassment because they lack the maturity to understand or care about consequences.	Provide targeted outreach about harassment in high schools and colleges. Provide orientation to all new employees with emphasis on the employer's desire to hear about all complaints of unwelcome conduct. Provide training on how to be a good supervisor when youth are promoted to supervisory positions.

The strategies outlined in Part Three of this report (e.g., exercising leadership, holding people accountable for their actions, developing and enforcing effective policies and procedures, and conducting training) will help address all the risk factors listed in this chart. The strategies outlined in the last column of this chart are designed to address specific risk factors.

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Workplaces with "high value" employees	Executives or senior managers Employees with high value (actual or perceived) to the employer, *e.g.*, the "rainmaking" partner or the prized, grant-winning researcher	Management is often reluctant to jeopardize high value employee's economic value to the employer. High value employees may perceive themselves as exempt from workplace rules or immune from consequences of their misconduct.	Apply workplace rules uniformly, regardless of rank or value to the employer. If a high-value employee is discharged for misconduct, consider publicizing that fact (unless there is a good reason not to).
Workplaces with significant power disparities	Low-ranking employees in organizational hierarchy Employees holding positions usually subject to the direction of others, *e.g.*, administrative support staff, nurses, janitors, etc. Gendered power disparities (*e.g.*, most of the low-ranking employees are female)	Supervisors feel emboldened to exploit low-ranking employees. Low-ranking employees are less likely to understand complaint channels (language or education/training insufficiencies). Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.	Apply workplace rules uniformly, regardless of rank or value to the employer. Pay attention to relations among and within work groups with significant power disparities.
Workplaces that rely on customer service or client satisfaction	Compensation directly tied to customer satisfaction or client service	Fear of losing a sale or tip may compel employees to tolerate inappropriate or harassing behavior.	Be wary of a "customer is always right" mentality in terms of application to unwelcome conduct.

The strategies outlined in Part Three of this report (e.g., exercising leadership, holding people accountable for their actions, developing and enforcing effective policies and procedures, and conducting training) will help address all the risk factors listed in this chart. The strategies outlined in the last column of this chart are designed to address specific risk factors.

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Workplaces where work is monotonous or tasks are low-intensity	Employees are not actively engaged or "have time on their hands" Repetitive work	Harassing behavior may become a way to vent frustration or avoid boredom.	Consider varying or restructuring job duties or workload to reduce monotony or boredom. Pay attention to relations among and within work groups with monotonous or low-intensity tasks.
Isolated workplaces	Physically isolated workplaces Employees work alone or have few opportunities to interact with others	Harassers have easy access to their targets. There are no witnesses.	Consider restructuring work environments and schedules to eliminate isolated conditions. Ensure that workers in isolated work environments understand complaint procedures. Create opportunities for isolated workers to connect with each other (*e.g.*, in person, on line) to share concerns.

The strategies outlined in Part Three of this report (e.g., exercising leadership, holding people accountable for their actions, developing and enforcing effective policies and procedures, and conducting training) will help address all the risk factors listed in this chart. The strategies outlined in the last column of this chart are designed to address specific risk factors.

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Workplaces that tolerate or encourage alcohol consumption	Alcohol consumption during and around work hours.	Alcohol reduces social inhibitions and impairs judgment.	Train co-workers to intervene appropriately if they observe alcohol-induced misconduct. Remind managers about their responsibility if they see harassment, including at events where alcohol is consumed. Intervene promptly when customers or clients who have consumed too much alcohol act inappropriately.
Decentralized workplaces	Corporate offices far removed physically and/or organizationally from front-line employees or first-line supervisors	Managers may feel (or may actually be) unaccountable for their behavior and may act outside the bounds of workplace rules. Managers may be unaware of how to address harassment issues and may be reluctant to call headquarters for direction.	Ensure that compliance training reaches all levels of the organization, regardless of how geographically dispersed workplaces may be. Ensure that compliance training for area managers includes their responsibility for sites under their jurisdiction Develop systems for employees in geographically diverse locations to connect and communicate.

The strategies outlined in Part Three of this report (e.g., exercising leadership, holding people accountable for their actions, developing and enforcing effective policies and procedures, and conducting training) will help address all the risk factors listed in this chart. The strategies outlined in the last column of this chart are designed to address specific risk factors.

Title VII and GERA

Sexual Harassment and EEOC Complaint Processing

Joint Meeting of

Illinois Senate Sexual Discrimination and Harassment Awareness & Prevention Task Force
and
Illinois House Sexual Discrimination & Harassment Task Force

Presented by:
Muslima Lewis, Senior Attorney Advisor, EEOC Office of Legal Counsel

March 27, 2018

OVERVIEW

TITLE VII AND GERA

Title VII

- Prohibits employers with 15 or more employees from discriminating against employees (including applicants) on the bases of race, color, religion, national origin, or sex.

- Prohibits retaliation against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

GERA

- Personnel actions must be free from discrimination based on:
  - Race, color, religion, sex, or national origin (within meaning of Title VII)
  - Age 40 and above (within meaning of ADEA)
  - Disability (within meaning of ADA and Rehabilitation Act)
  - Genetic Information (within meaning of GINA)
- Prohibits retaliation against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

"EMPLOYEE" COVERAGE

TITLE VII Exclusions

- Elected state or local official
- Person chosen by such elected official:*
  - To be on his/her **personal staff**;
  - As an appointee on the **policymaking** level; or
  - As an **immediate adviser** with respect to the **exercise of constitutional or legal powers** of the office.

*Not excluded from Title VII coverage if the person is covered by civil service laws

GERA Coverage

- Person chosen or appointed by an elected state/local official:
  - To be on his/her **personal staff**;
  - To serve the official on the **policymaking l**evel; or
  - To serve the elected official as an **immediate adviser** with respect to the **exercise of constitutional or legal powers** of the office

FREQUENT EXCLUSION and COVERAGE QUESTIONS

- Is the person an **elected** state/local official (excluded by Title VII and GERA)?
- Has the person been **chosen or appointed** by an elected state/local official?
- Is the person on the **personal staff** of the elected official?
  - Six factor analysis in some circuits
- Does the chosen person serve in a **policy-making** capacity?
  - Ex: magistrate who sets bail or officiates weddings without exercising policy discretion probably *does not* serve in a policy-making
  - But: judge who decides civil or criminal matters under state law probably *does* serve in a policy-making capacity.

Analysis is often fact-intensive

7TH CIRCUIT EXAMPLES

- Examples include ADEA cases: ADEA and Title VII have identical definitions of "employees".

- Cases analyzing the Title VII exemptions are instructive in understanding GERA coverage.
  - Title VII exemptions are almost a mirror of the positions covered by GERA.

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Personal Staff:

District courts in 7th Circuit have applied the 5th Circuit's six-factor test to determine whether an individual falls within the "personal staff" exception:

(1) whether the elected official has plenary powers of appointment and removal,

(2) whether the person in the position at issue is personally accountable to only that elected official,

(3) whether the person in the position at issue represents the elected official in the eyes of the public,

(4) whether the elected official exercises a considerable amount of control over the position,

(5) the level of the position within the organization's chain of command, and

(6) the actual intimacy of the working relationship between the elected official and the person filling the position.

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Examples of Personal Staff:

- **Administrative assistant to mayor**
  - *Lockwood V. McMillan*, 237 F.Supp.3d 840 (S.D. Ind. 2017)

- **City fire chief**
  - *Deneen v. City of Markham*, No. 91-C-5399, 1993 WL 181885 (N.D. Ill. May 26, 1993) (Fire chief is member of Mayor's staff)

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Policy Making:

"An individual is considered an appointee on the policymaking level if 'the position held by the individual authorizes, either directly or indirectly, meaningful input into governmental decision-making on issues where there is room for principled disagreement on goals or their implementation.'"

- *Opp v. Office of the State's Attorney of Cook County,* 630 F.3d 616, 619 (7th Cir. 2010) (*quoting Americanos v. Carter*, 74 F.3d 138, 141 (7th Cir. 1996)). (ADEA case)
  - Under Illinois statute, positions of Assistant State's Attorneys gave plaintiffs inherent policymaking authority, notwithstanding actual duties.

TITLE VII EXEMPTIONS
(7TH CIRCUIT)

Policy Making (con't):

The "policy making" analysis examines the inherent powers in the office, rather than the functions performed by a particular occupant of the position.

- *Tomczak v. City of Chi*., 765 F.2d 633, 640 (7th Cir. 1985)

- *Opp v. Office of the State's Attorney of Cook County,* 630 F.3d 616 (7th Cir. 2010) (ADEA case)

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Policy Making (con't):

The Seventh Circuit's analysis of whether an individual is exempted from coverage under Title VII (and the ADEA) is "essentially indistinguishable from that applied in the political firing context…. [T]he reasons for exempting the office from the patronage ban apply with equal force to the requirements of the ADEA [and Title VII]."

- *Americanos v. Carter*, 74 F.3d 138 (7th Cir. 1996), citing *Heck v. City of Freeport*, 985 F.2d 305, 310 (7th Cir. 1993).
  - Applied Supreme Court's political patronage exemption test. *See Elron v. Burns,* 427 U.S. 347, 360 (1976), and *Branti v. Finkel*, 445 U.S. 507, 517 (1980).
  - Held Deputy Attorney General was exempt from the ban on political firing and therefore likewise exempt from coverage under Title VII (and ADEA).

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Examples of Policy-Making Positions (fact-specific inquiries):

- ***Assistant State Attorney***
  - *Opp v. Office of the State's Attorney of Cook County,* 630 F.3d 616 (7th Cir. 2010). Under Illinois statute, the Assistant State Attorney position has inherent policymaking authority, notwithstanding actual duties. "The position authorizes, either directly or indirectly, meaningful input into governmental decision-making on issues where there is room for principled disagreement on goals or their implementation." (ADEA case)
- **Zoning Board Chair and Member**
  - *Pleva v. Norquist, 195 F.3d 905* (7th Cir. 1999). Plaintiff, who served as an appointed Chairperson and member of the city zoning board, had broad discretion to influence zoning policy and therefore was exempt from the ADEA.

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Examples of Policy-Making Positions - con't (fact-specific inquiries):

- **Appointed Illinois state court judge**
  - *EEOC v. State of Ill*., 721 F. Supp. 156 (N.D. Ill. 1989). State judges are appointees on the policymaking level.
- **General Counsel for the IHRC**
  - *Parker v. IHRC,* No. 12-cv-8275, 2016 WL 946655 (N.D. Ill. Mar. 14, 2006). General Counsel is a *Rutan*-exempt position, and therefore the State could make employment decisions based on political affiliation or because the position is either a confidential or policy-making position. A *Rutan*-exempt position is likewise a policy-making position exempt from Title VII. The General Counsel has a "duty to offer advice and consultation to the IHRC which could affect policy, decisions, and actions of the agency." (quoting *Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir. 1985).

TITLE VII EXEMPTIONS (7TH CIRCUIT)

"Appointed" by Elected Official:

- **Assistant State's Attorneys**
  - *Opp v. Office of the State's Attorney of Cook County 630 F.3d 616* (7th Cir. 2010). Even though plaintiffs were hired before the current State Attorney was elected, the State Attorney has exclusive authority to appoint ASAs under Illinois statute and each ASA is re-appointed upon the swearing in of each new State Attorney. (ADEA case)
- **Assistant Attorneys General**
  - *Levin v. Madigan*, No. 07-C-4765, 2011 WL 2708341 (N.D. Ill. Jul 12, 2011). Illinois law provides that the Attorney General, an elected official, appoints the Assistant Attorneys General. The fact that the AG did not personally interview the Assistant AG is irrelevant.

TITLE VII EXEMPTIONS (7TH CIRCUIT)

Civil Service:

- *Halloway v. Milwaukee County*, 180 F.3d 820 (7th Cir. 1999)
  - The ADEA exemption does not apply to a judicial court commissioner. Although the commissioner is in a policy-making position, he is subject to state civil service laws.

Title VII and GERA Prohibitions regarding Sex Harassment

PROHIBITED DISCRIMINATION

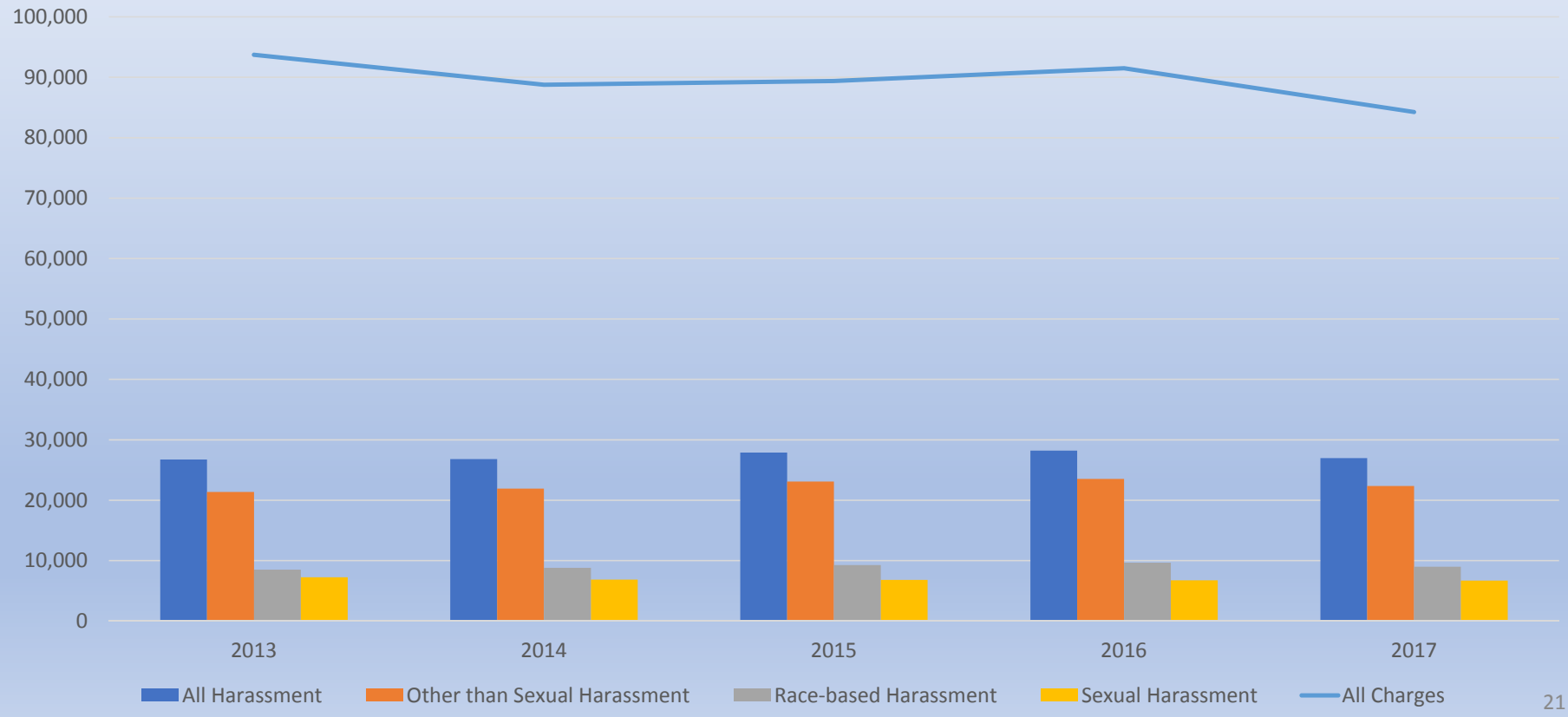
- Title VII and GERA prohibit discrimination on the basis of “sex” in any aspect of employment, including:
  - Hiring
  - Promotion
  - Working conditions
  - Pay
  - Discipline / Termination
  - Work assignments / Work conditions
  - Terms and Conditions
- Title VII and GERA prohibit retaliation.
- Sexual harassment is a form of sex discrimination under Title VII and GERA.
- Sex discrimination includes discrimination because of pregnancy, gender identity (including transgender status), and sexual orientation.

Sexual Harassment Analysis under Title VII and GERA similar to IHRA Analysis

- Sexual harassment claims under GERA are analyzed the same as sexual harassment claims under Title VII.
- Sexual harassment claims under Title VII (and, therefore, GERA) are analyzed virtually the same as sexual harassment claims under the Illinois Human Rights Act.
  - *Polychroniou v. Frank*, No. 1-15-1177, 2015 WL 7429318, at *7 (Ill. App. Ct. Nov. 20, 2015) ("The prohibition of sexual harassment found in the Illinois Human Rights Act 'closely parallels' Title VII of the Civil Rights Act ... and, therefore, examination of federal Title VII law is appropriate.")
  - *Frey v. Coleman*, 141 F.Supp.3d 873, 879 (N.D. Ill. 2015) ("The requirements to make out a sexual harassment claim under the IHRA are substantially the same" as those under Title VII.)

EEOC ENFORCEMENT

EEOC Harassment Charges



EEOC Prioritizes the Elimination of Workplace Harassment

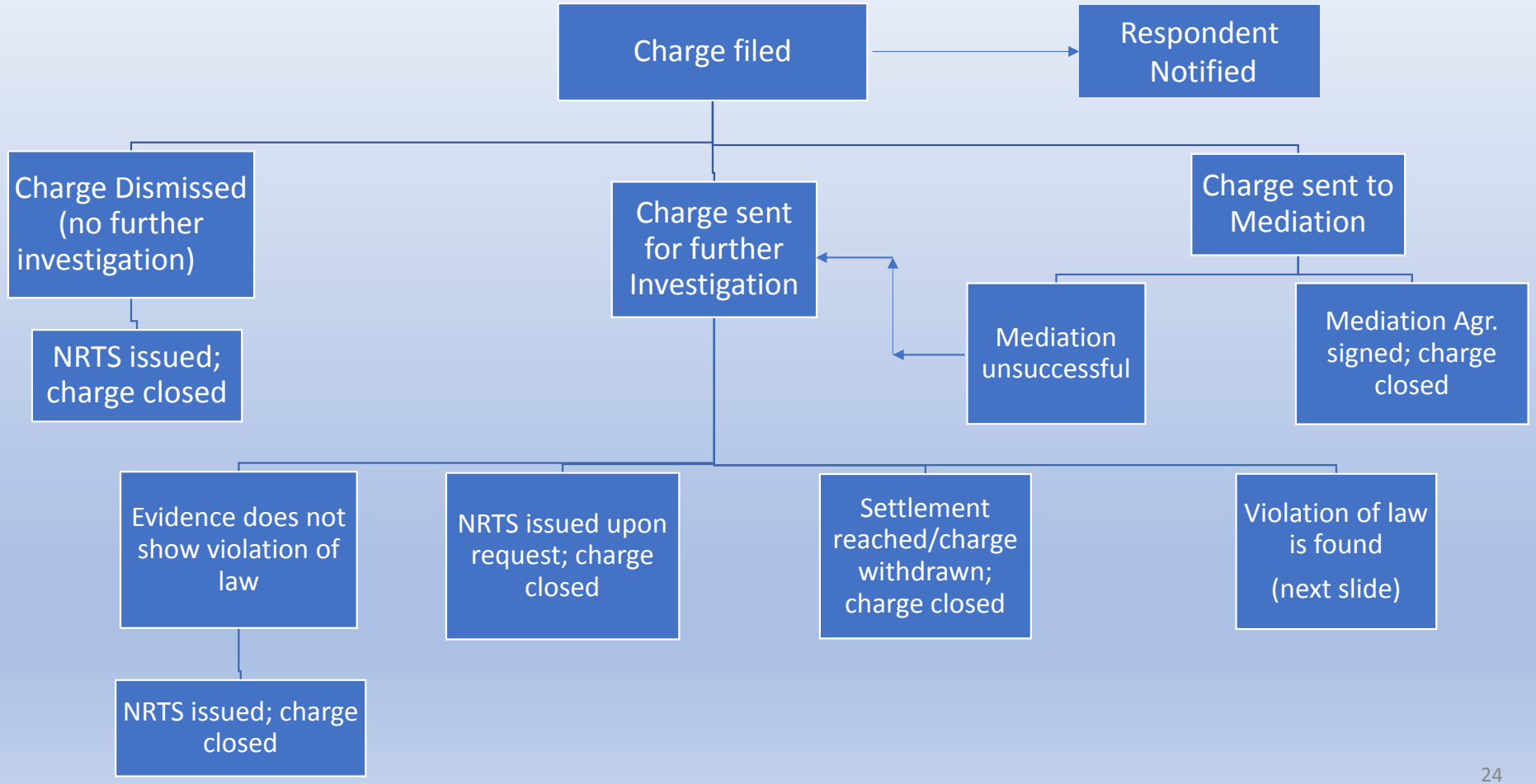
- **Preventing systemic harassment has been one of the EEOC's national enforcement priorities since 2013**. It is included in the 2017-2021 Strategic Enforcement Plan.

- **Select Task Force on the Study of Harassment in the Workplace**
  - Report of the Co-Chairs of the Select Task Force on Harassment in the Workplace with findings and recommendations about harassment prevention (June 2016)
  - Promising Practices

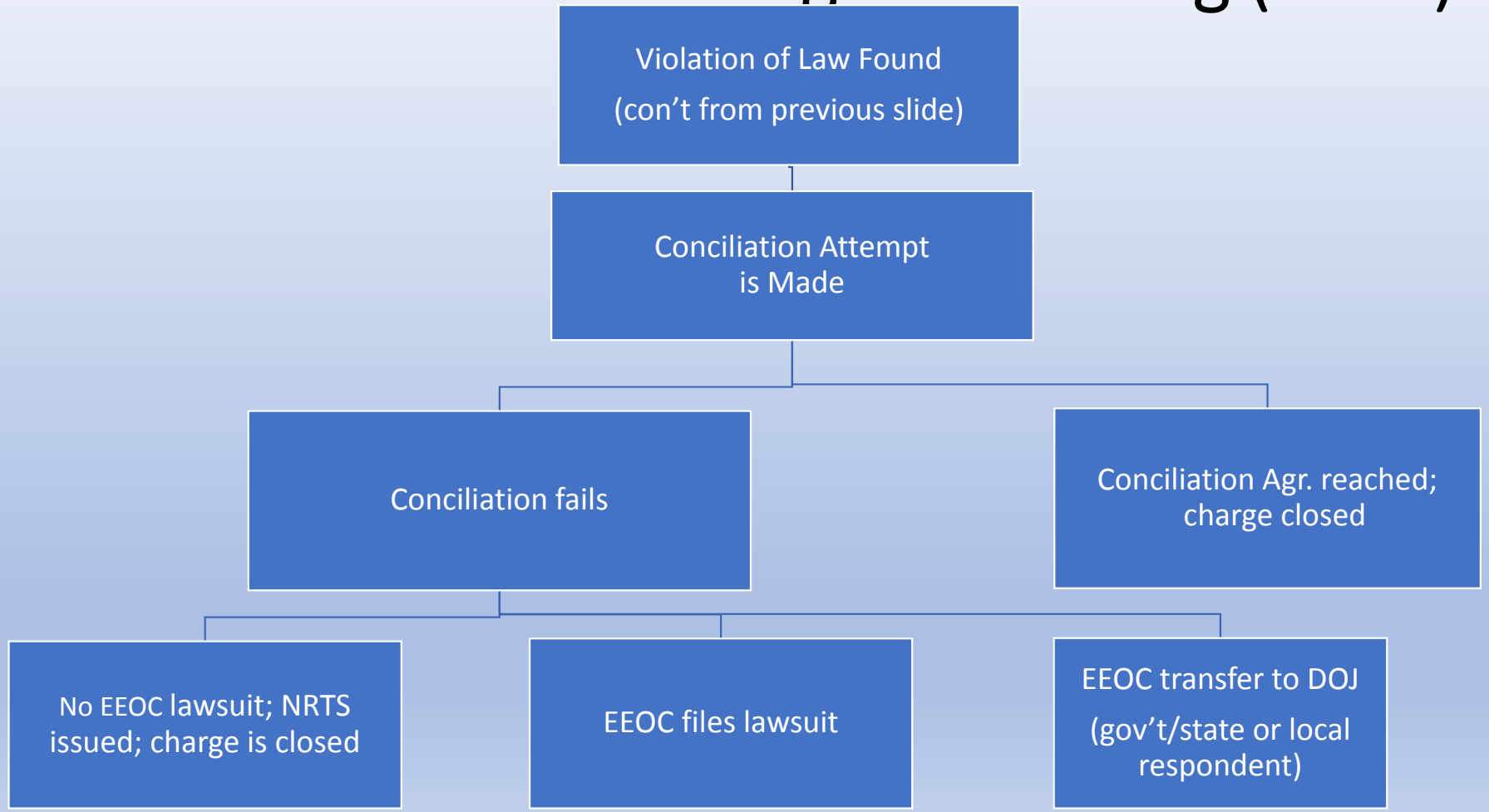
- **Respectful Workplaces Training** launched by EEOC in October 2017, consistent with the Task Force recommendations.

How EEOC Processes Title VII and GERA Complaints

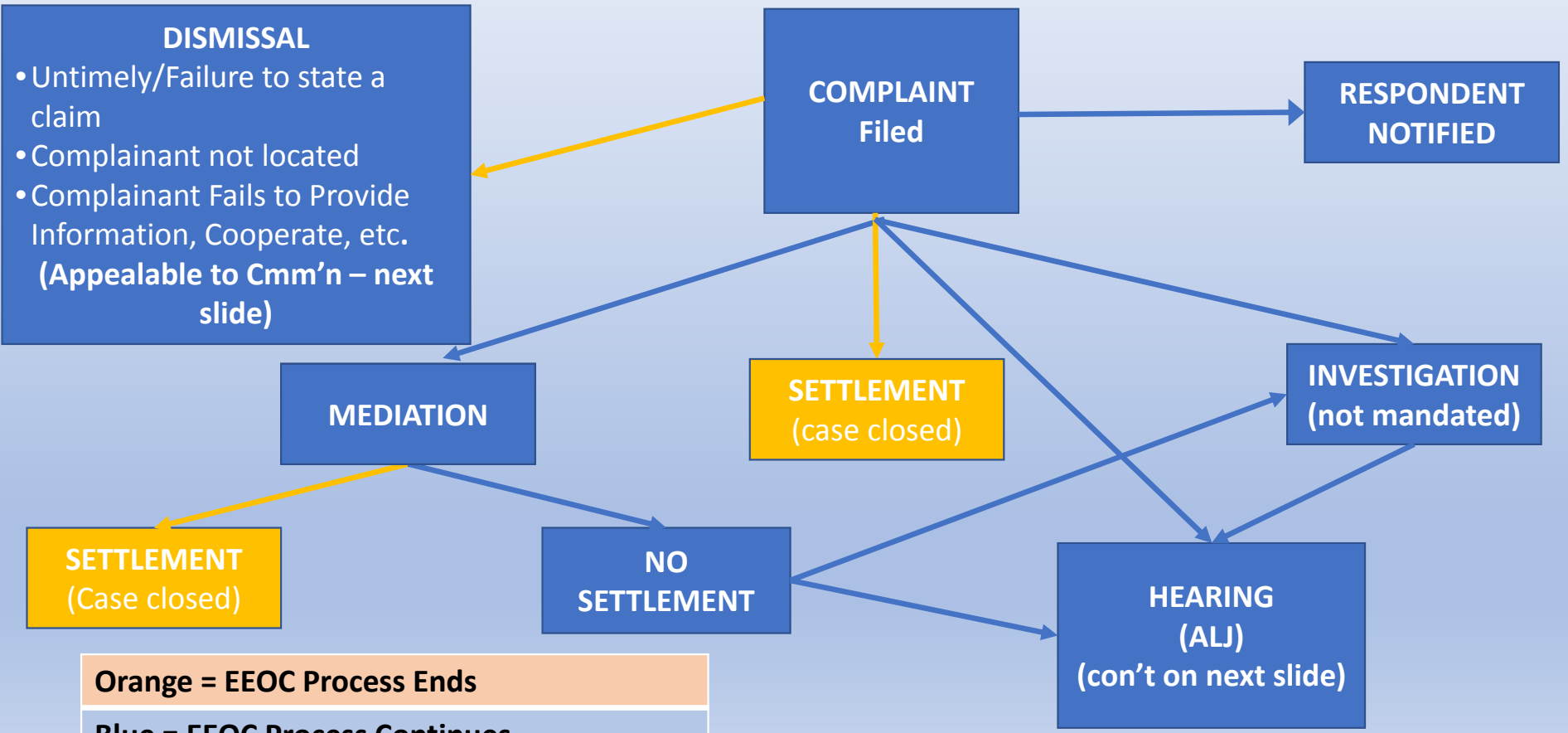
Private Sector Charge Processing



Private Sector Charge Processing (con't)



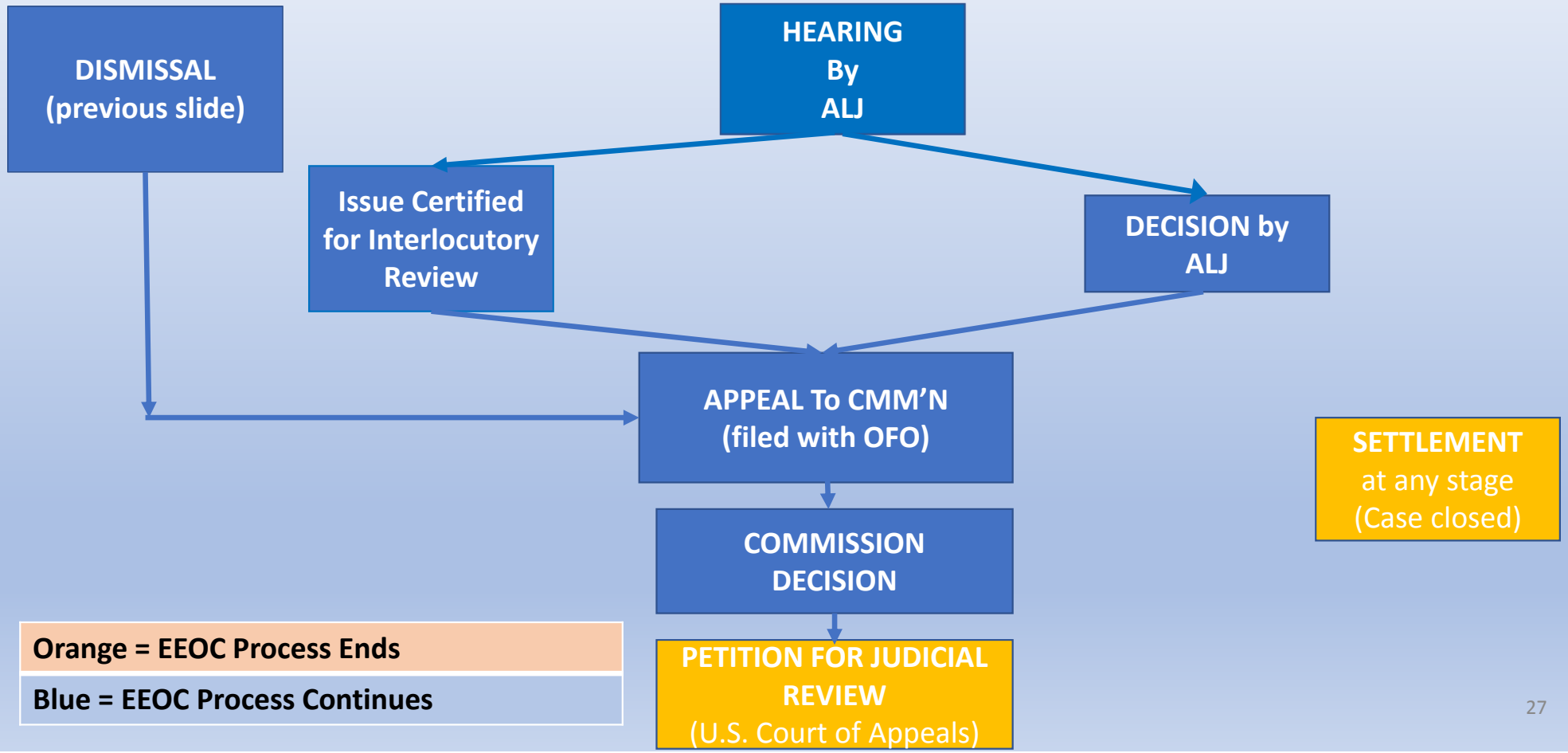
GERA Complaint Processing



Orange = EEOC Process Ends

Blue = EEOC Process Continues

GERA Complaint Processing



Important Differences: Title VII and GERA

Title VII	**GERA**
180 day filing deadline is extended to 300 days in state/locality with FEPA	180 day filing deadline is not extended even where there is a FEPA
Charge filing date is the date of receipt by EEOC (or FEPA)	Complaint filing date is the date: (1) delivered by fax, (2) delivered in person, (3) postmarked, or (4) when postmark is illegible, received by mail within 5 days after expiration of filing period.
"Relation back": when a charge is "misfiled" (ex: filed under Title VII, when it should have been filed under GERA, or vice versa), the date of filing will relate back to the date when the original charge or complaint was filed.	
Charge may be filed against an entity/entities, but not against a person.	Complaint may be filed against a person, a governmental agency, or a political subdivision.

Important Differences: Title VII and GERA

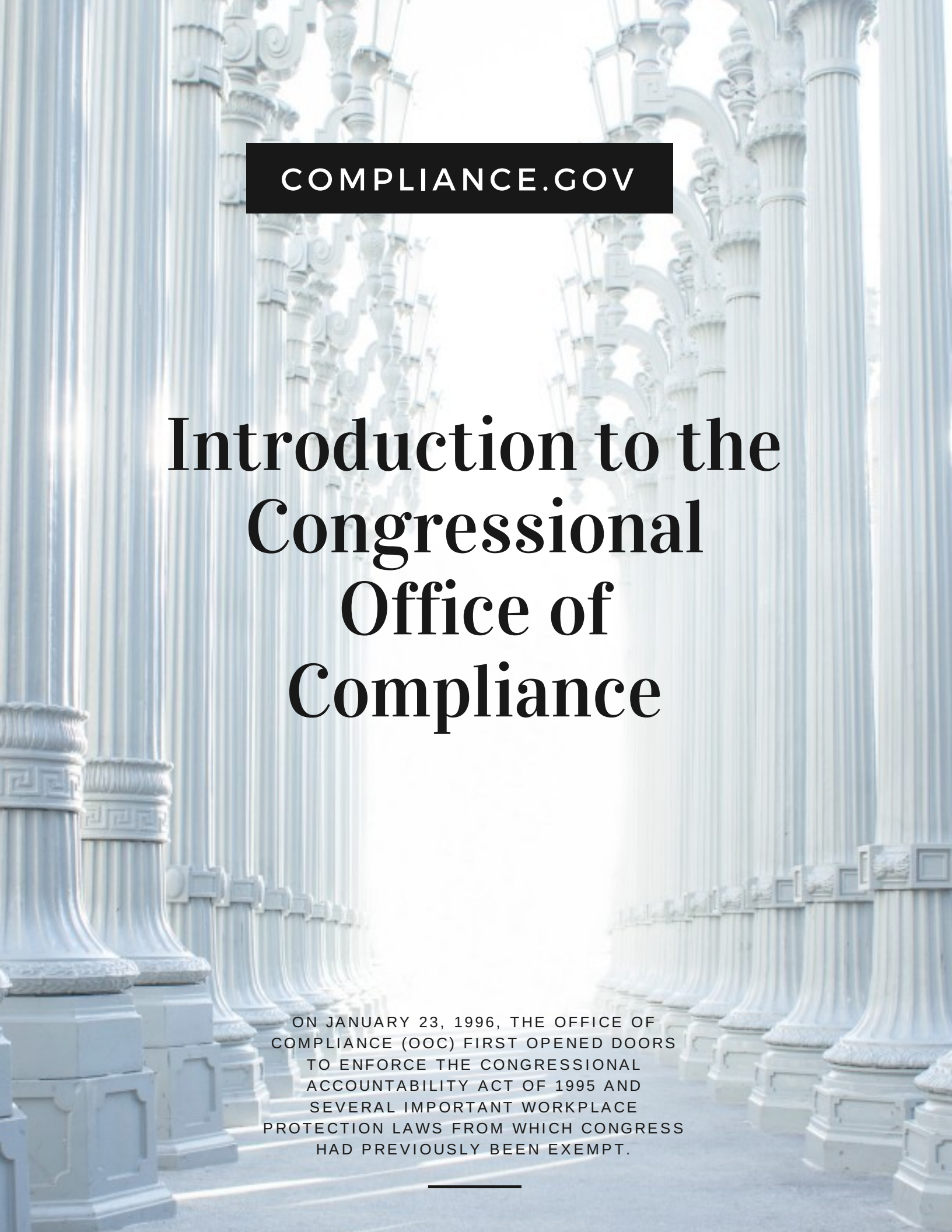
Title VII	**GERA**
Investigation is for enforcement purposes, to reach a "cause" or "no cause" determination.	If EEOC investigates, it is not for enforcement purposes. No authority to find "cause" or "no cause" or to issue a "Right to Sue." A timely complaint that is not otherwise resolved goes to a hearing by ALJ.
Government may sue on the Charging Party's (CP's) behalf: • EEOC may sue any respondent that is not a gov't, gov't agency, state/local subdivision. • DOJ may sue a respondent that is a gov't, gov't agency, state/local subdivision.	EEOC cannot sue on the complainant's behalf.
CP gets Notice of Right To Sue (NRTS) when charge dismissed or upon request (180 days after charge filed). If CP files suit, it must be filed in U.S. District Court within 90 days after NRTS is received.	A party may petition U.S. Court of Appeals to review a final EEOC decision.

RESOURCES

- Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace
  - Checklists and Chart of Risk Factors for Employers
- Promising Practices for Preventing Harassment
- Harassment Prevention and Respectful Workplaces Training
  - Employers: "Leading for Respect"
  - All Employees: "Respect in the Workplace"

(Electronic versions of these resources have been provided to each Task Force)

QUESTIONS AND ANSWERS



COMPLIANCE.GOV

Introduction to the Congressional Office of Compliance

ON JANUARY 23, 1996, THE OFFICE OF COMPLIANCE (OOC) FIRST OPENED DOORS TO ENFORCE THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995 AND SEVERAL IMPORTANT WORKPLACE PROTECTION LAWS FROM WHICH CONGRESS HAD PREVIOUSLY BEEN EXEMPT.

OVER 30,000 CURRENT EMPLOYEES OF THE LEGISLATIVE BRANCH

FORMER EMPLOYEES

JOB APPLICANTS

VISITORS

Who is covered by the Congressional Accountability Act?

- US HOUSE OF REPRESENTATIVES (DC & STATE DISTRICT OFFICE STAFF)
- US SENATE (DC & STATE OFFICE STAFF)
- US CAPITOL POLICE
- CONGRESSIONAL BUDGET OFFICE
- OFFICE OF THE ARCHITECT OF THE CAPITOL
- OFFICE OF THE ATTENDING PHYSICIAN
- OFFICE OF COMPLIANCE
- OFFICE OF CONGRESSIONAL ACCESSIBILITY SERVICES
- LIBRARY OF CONGRESS

Certain provisions of the CAA also apply to the GAO

CONGRESSIONAL ACCOUNTABILITY ACT OF 1995

OFFICE OF COMPLIANCE—ADVANCING WORKPLACE RIGHTS, SAFETY AND HEALTH, AND ACCESSIBILITY IN THE LEGISLATIVE BRANCH

Laws applied by the CAA

The Age Discrimination in Employment Act of 1967 (ADEA)

The Americans with Disabilities Act of 1990 (ADA)

Title VII of the Civil Rights Act of 1964 (race, sex, color, religion, and national origin)

The Employee Polygraph Protection Act of 1988 (EPPA)

The Fair Labor Standards Act of 1938 (FLSA)

The Family and Medical Leave Act of 1993 (FMLA)

The Federal Service Labor-Management Relations Statute (FSLMR)

The Rehabilitation Act of 1973 (Rehab Act)

Veterans' Employment and Reemployment Rights Act of 1994 (USERRA) (Chapter 43 of Title 38 of the U.S. Code)

The Worker Adjustment and Retraining Notification Act (WARN)

Veterans Employment Opportunities Act (VEOA)

Genetic Information Nondiscrimination Act (GINA)

The CAA also protects against retaliation or reprisal for exercising these rights.

Current Alternative Dispute Resolution Process

1

COUNSELING

Request within 180 days of violation

Length of stage: 1-30 days

2

MEDIATION

Request within 15 days after end of counseling

Length of stage: 30 days, unless extended by mutual agreement

3

ELECTION OF REMEDY

No sooner than 30 days, nor later than 90 days, after end of mediation

OR

JUDICIAL PROCEEDING IN FEDERAL COURT

U.S. COURT OF APPEALS

ADMINISTRATIVE PROCEEDING BEFORE HEARING OFFICER

Hearing commences within 60 days of complaint, unless extended for up to 30 days. Decision issued within 90 days of end of hearing.

APPEAL TO OOC BOARD OF DIRECTORS

No later than 30 days after hearing officer's decision

APPEAL TO U.S. COURT OF APPEALS (FEDERAL CIRCUIT)

No later than 30 days after hearing officer's decision

The process can be as important as the outcome.

PROCEDURAL JUSTICE

refers to the idea of fairness in the processes that resolve disputes and allocate resources. It is a concept that, when embraced, promotes positive organizational change and bolsters good relations.

The first pillar of procedural justice is *fairness.*

Fairness refers to the consistency of rule application. Perceptions of fairness are driven not only by outcomes but also by the processes used to reach those outcomes.

The second pillar of procedural justice concerns providing *voice*.

All people want to be heard especially when a decision will directly affect them. Everyone wants to feel as though they have a measure of control over their fate; having voice in situations that may be somewhat out of their control helps them to know that their opinions matter and that someone is listening to their side of the story, taking them seriously, and giving some consideration to their concerns.

The third pillar of procedural justice is *transparency and openness of process*.

Being transparent means that the processes by which decisions are made do not rely upon secrecy or deception. In other words, decisions unfold out in the open as much as possible. Nobody likes to feel that their future is being decided on another person's whim; we like to be able to see how things are unfolding so that we can come to understand the ultimate result of a decision. When processes are transparent, individuals are more likely to accept decisions—even if they are unfavorable to them.

The forth pillar of procedural justice is *impartiality and unbiased decision making*.

Impartial decisions are made based on relevant evidence or data rather than on personal opinion, speculation, or guesswork. Research shows that people care a great deal about the fairness of decision-making by authorities. When people take the extra few minutes to make apparent to others the objective information used to make decisions, understanding and acceptance follows.

Procedural justice can provide the framework for good working environments where individuals feel they are valued, respected and treated with dignity, thus being more likely to interact with colleagues and the public in the same manner.

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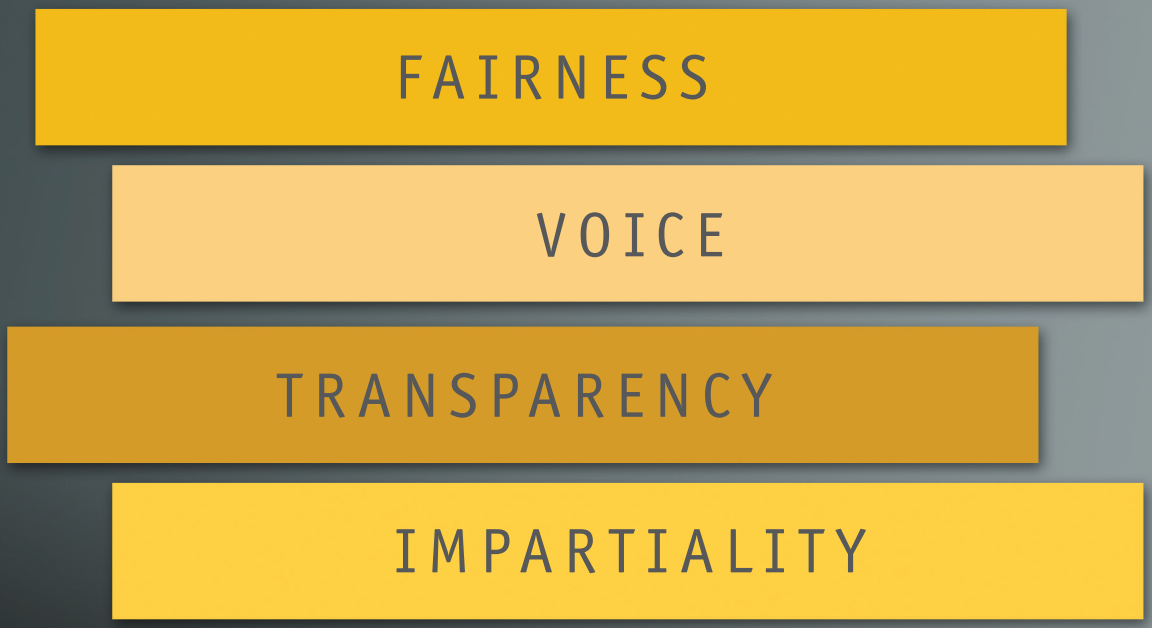
Cedmi1@uis.edu

Center for Public Safety and Justice

Procedural Justice for Law Enforcement: An Overview

By Laura Kunard and Charlene Moe



COPS
Community Oriented Policing Services
U.S. Department of Justice

CPSJ
Center for Public Safety and Justice
College of Urban Planning and Public Affairs
University of Illinois at Chicago

Procedural Justice for Law Enforcement: An Overview

By Laura Kunard, PhD and Charlene Moe
Center for Public Safety and Justice, University of Illinois

This project was supported by cooperative agreement number 2012-CK-WS-K012 awarded by the Office of Community Oriented Policing Services, U.S. Department of Justice. The opinions contained herein are those of the authors and do not necessarily represent the official position of the U.S. Department of Justice. References to specific companies, products, or services should not be considered an endorsement of a product by the authors or the U.S. Department of Justice. Rather, the references are illustrations to supplement discussion of the issues.

The Internet references cited in this publication were valid as of the original date of this publication. Given that URLs and web sites are in constant flux, neither the authors nor the COPS Office can vouch for their current validity.

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ISBN: 978-1-935676-86-7

Published 2015

Contents

Letter from the Director of the COPS Office

Dear colleagues,

I believe I speak for all of us when I say we place a high value on fairness and respect in all personal and professional interactions. Unfair or disrespectful treatment undermines not only respect for the individuals who behave that way but also the willingness of others to cooperate with them.

This is especially true in relations between law enforcement and the communities we serve. As we've seen in recent events, bias and disregard for individual rights—intentional or not—often leads to obstruction, anger, and confrontation. And in our role as guardians of the peace, sworn to serve and protect our communities, we must counteract that by upholding the principles of procedural justice.

The principles of procedural justice—fairness, transparency, impartiality, and providing voice for other sides to be heard—are vital to effective policing and positive community relations. They're also critical to departmental harmony. And because the behavior of officers on the street is often a reflection of their treatment within the agency, these values must characterize the activities of all law enforcement leaders.

This publication serves as an inspiring introduction to the concepts of procedural justice for officers, explaining the importance of practicing these principles in everyday encounters. It is also a useful management tool for supervisors. The Center for Public Safety and Justice (CPSJ) has done an excellent job of describing how procedural justice can be applied to the practices of community policing, detailing the challenges different agencies faced and the solutions they developed.

I encourage you to read this report and consider how you can adopt these principles. Procedural justice is not just a nice idea—it's a critical component of our police work, essential to productive community relations and the public's confidence in the legitimacy of law enforcement authority.

Sincerely,

Ronald L. Davis, Director
Office of Community Oriented Policing Services

Letter from the Center for Public Safety and Justice

Dear law enforcement officers and colleagues,

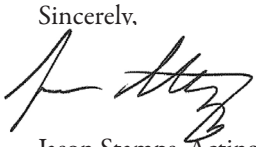
The last several years have seen tremendous change and innovation in American law enforcement. Our nation's law enforcement agencies have leapt forward, not only due to necessity caused by budgetary constraints but also in response to calls by communities that their law enforcement agencies act on their behalf fairly and with greater transparency. There is a sea change occurring in our communities that cannot and should not be dismissed. The tenets of procedural justice are well suited to aid law enforcement agencies and the communities they serve in the pursuit of better relationships and more just outcomes.

The recent and rapid expansion of technology and social media has occurred on a parallel path, and as an aid to, critical analysis of law enforcement practices and policies. The proliferation of captured video and instant transmission of police-community encounters only underscores the point that no encounter with law enforcement is routine. Instead, each community encounter is itself an opportunity for law enforcement to recommit to serving the public through actions that are fair, transparent, and impartial and that offer voice to those involved. This externalization of procedural justice, as a standard for interactions with the community, is a necessary evolution of policing. In this way, procedural justice is tightly tied to community policing, a philosophy that many law enforcement agencies have embraced since the 1980s.

In a similar vein, agencies need to recognize the importance of procedural justice as an internal strategy as well. As a top down and bottom up effort to promote procedural justice, focusing on process throughout the agency will strengthen departments by emphasizing the same tenets that promote strong, resilient ties to the community. Effectively instituting the pillars of procedural justice strengthens departments internally.

With the publication of *Procedural Justice for Law Enforcement: An Overview,* it is our hope that officers in all types of law enforcement agencies will come to better understand procedural justice and how to implement it and will embrace its benefits to their agencies and communities. We are happy to share this resource with you now and hope you find it helpful.

Sincerely,



Jason Stamps, Acting Director
Center for Public Safety and Justice

Acknowledgements

The idea for this publication was conceived and supported by Melissa Bradley at the Office of Community Oriented Policing Services (COPS Office), the project manager for the COPS Office Procedural Justice initiative.

The Center for Public Safety and Justice is grateful to the police department members and others whose anecdotes are featured herein:

- Captain Jim Mallery, Kalamazoo (Michigan) Department of Public Safety
- Captain Richard "Skip" Miller, Sioux Falls (South Dakota) Police Department
- Chief Ed Medrano, Gardena (California) Police Department
- Chief Will Johnson, Arlington (Texas) Police Department
- Lieutenant Leo Daniels, Arlington (Texas) Police Department

Introduction

Procedural justice has become an important focal point in the profession and strategy of policing in recent years, though the basic concept is likely nothing new to police officers. The purpose of this publication is to introduce law enforcement professionals to the concept of procedural justice. This is not a research paper; while it refers to rigorous academic research about policing and procedural justice, it should not be used as a substitution for it. In fact, we encourage officers to read the research in its entirety; complete citations are provided in the references section at the end of this publication.

Photo: Leonard Zhukovsky/Shutterstock

What Is Procedural Justice?

Procedural justice refers to the idea of fairness in the processes that resolve disputes and allocate resources. It is a concept that, when embraced, promotes positive organizational change, bolsters good relations with the community, and enhances officer safety.

One way to think about procedural justice is by considering the equation in figure 1.

Figure 1. A simple equation

Source: "What is Procedural Justice?" fact sheet, Center for Public Safety and Justice, n.d., http://cops.igpa.uillinois.edu/sites/cops.igpa.uillinois.edu/files/pj_fact_sheet.pdf.

The ways in which community members develop opinions about a specific interaction with an officer (their assessment) is based primarily upon two things: the outcome of the encounter (whether they received a ticket, for example) and the process of the encounter (how the officer came to the decision about whether to give a ticket and whether the officer explained their decision making process). In short, procedural justice is concerned not exactly with *what* officers do, but also with *the way* they do it.

Research has shown that often the process is *more* important than the outcome of the encounter in shaping a community member's assessment of the interaction (Sunshine and Tyler 2003; Tyler and Huo 2002). In fact, in a study conducted in 2008, researchers interviewed New Yorkers both prior to and following a personal experience with the police. The people who received a traffic citation from an officer who treated them fairly tended to view the police more favorably and were significantly more willing to cooperate with the police than they had been before that encounter (Tyler and Fagan 2008).

In recent years, procedural justice and how it relates to the profession of policing have been topics of research worldwide. Psychologists, sociologists, and criminologists alike have studied the pillars of procedural justice in police-community interactions. The main finding from this body of research is that "police can achieve positive changes in citizen attitudes to police through adopting procedural justice dialogue as a component part of any type of police intervention" (Masserole et al. 2012). Much of the research in this area has been led by Tom Tyler at New York University. Dr. Tyler's work identifies the main components of procedural justice (also known as the "pillars" of procedural justice), as explained later.

In the field of law enforcement, we generally talk about two types of procedural justice: internal and external.

Figure 2. Internal and external procedural justice

INTERNAL procedural justice refers to procedural justice within your agency—an aspect of this type of procedural justice might be the quality of communication that exists within your agency among different ranks.

EXTERNAL procedural justice refers to procedural justice within your community—an aspect of this type of procedural justice might be the quality of communication that exists between officers and members of the public in different situations.

Source: Center for Public Safety and Justice, University of Illinois at Chicago.

While external procedural justice is concerned with relationships between law enforcement officers and those outside of the department, internal procedural justice is concerned with the relationships officers have with their colleagues in their agencies. In addition to focusing on external procedural justice, Dr. Tyler's research has addressed internal procedural justice and has found that officers who feel respected by their supervisors and peers are more likely to accept departmental policies, understand decisions, and comply with them voluntarily (Tyler, Callahan, and Frost 2007).

Another way to think about procedural justice is to become familiar with the key components of the concept—the four pillars of procedural justice. It helps to think of the pillars as tools that, when used, build mutual respect and trust between and among police officers and the community members they interact with from day to day. The four pillars represent strategic behaviors that, when applied by police officers, increase the likelihood of a positive overall assessment by community member. Every interaction between law enforcement officers and the public is an opportunity for law enforcement to build relationships, shape the reputation of the department, and increase overall community satisfaction.

Figure 3. Four pillars of procedural justice

Source: Laura Kunard and Charlene Moe, *Procedural Justice for Law Enforcement Agencies: Organizational Change through Decision Making and Policy* (Chicago: Center for Public Safety and Justice, 2015), 50.

Fairness and consistency of rule application

The first pillar of procedural justice, as shown in figure 4, is *fairness and consistency of rule application*. Perceptions of fairness are driven not only by outcomes but also by the fairness and consistency of the processes used to reach those outcomes.

Figure 4. First pillar: fairness

Source: Laura Kunard and Charlene Moe, *Procedural Justice for Law Enforcement Agencies: Organizational Change through Decision Making and Policy* (Chicago: Center for Public Safety and Justice, 2015), 53.

Photo: Rachel Donahue/Shutterstock

The perception of fairness is not just about outcomes. As noted earlier, people consider both the outcome of a decision and the process by which the decision was made when forming their opinion about whether a decision was fair. Often, the outcome of an interaction is less important than the interaction itself—whether respectful treatment was experienced by the parties involved. In short, the process of decision making matters, the process of having a respectful conversation with a community member matters, and the process through which an outcome is arrived at matters.

External example

If a member of the public receives a speeding ticket (negative outcome) but was treated fairly during the interaction with the officer issuing the ticket (positive process), the driver is more likely to feel that the encounter was fair and is less likely to contest the ticket or register a complaint against the officer. The driver is also more likely to comply with the officer's requests, such as producing identification when asked, and to come away from the encounter with a positive opinion of the law enforcement agency.

For instance, as reported in a CBS news story (Hartman 2012), Deputy Sheriff Elton Simmons of the Los Angeles County Sheriff's Department is a veteran deputy of 21 years and has written more than 25,000 citations. He knows that, too often, tension can escalate and a simple traffic stop can develop into a more serious matter. But surprisingly he has not received a single complaint in his 21 years.

With every traffic stop he makes, Simmons is determined to diffuse the situation, eliminating any unnecessary anxiety for both himself and the driver. Simmons says his motto is "Do good, be good, treat people good." Simmons' friendly and fair approach appears to endear him with motorists, some of whom end up apologizing.

Internal example

In many police organizations, the environment around the selection of officers for specialized units is extremely competitive and stressful. According to Lieutenant Leo Daniels of the Arlington (Texas) Police Department, the challenge becomes how departments can promote fairness in a selection process that leaves so many disappointed. These situations are similar to the external example: when fairness and consistency are practiced, the negative impact of the outcome is minimized. The way to create processes and outcomes that lead to positive assessment begins at the posting of an available position. The process must be open to everyone with a posting that is distributed widely and clearly identifies closing dates. Next, the selection criteria must not be a secret. If someone is not selected to participate in the process, they should be told immediately and the factors considered to eliminate them should be identified. Finally, after the selections are made, they should be announced publicly, and all candidates that participated in the process should be provided feedback on how they can improve in preparation for the next opportunity.

Voice and representation in the process

The second pillar of procedural justice, as shown in figure 5, concerns *voice*. All people want to be heard, and involving people or groups in the decisions that affect them affects their assessment of a given situation. Everyone wants to feel as though they have a measure of control over their fate; having voice in situations that may be somewhat out of their control (such as whether they get a traffic ticket) helps them to feel that their opinions matter and that someone is listening to their side of the story, taking them seriously, and giving some consideration to their concerns.

Figure 5. Second pillar: voice

Source: Laura Kunard and Charlene Moe, *Procedural Justice for Law Enforcement Agencies: Organizational Change through Decision Making and Policy* (Chicago: Center for Public Safety and Justice, 2015), 57.

External example

If a community member involved in a minor car crash is provided an opportunity to tell their side of the story to a police officer, their overall assessment of the interaction with that police officer will likely be positive. Giving that community member voice in that moment will affect their perception of policing and police officers in the future.

The opposite can also be true. A police officer gave a woman a ticket for making an illegal turn. When the woman protested that there was no sign prohibiting the turn, the officer pointed to one that was bent out of shape, leaning over and hardly visible from the road.

Furious and feeling the officer hadn't listened to her, the woman decided to appeal the ticket by going to court. The day of her hearing arrived, and she could hardly wait to speak her piece. However, when she began to tell her side of the story the judge stopped her and summarily ruled in her favor, dismissing the case.

How did the woman feel? Vindicated? Victorious? Satisfied?

No, she was frustrated and deeply unhappy. "I came for justice," she complained, "but the judge never let me explain what happened." This affected her perception not only of the officer and policing in general but also of the broader judicial system.

Internal example

Similarly, voice is important within law enforcement agencies as well. Officers are no different than residents in the community. They want to know not only that they are heard but also that their opinions are valued. Chief Will Johnson of the Arlington (Texas) Police Department has a long-standing practice of holding nonsupervisory meetings. These meetings are held quarterly between the chief of police and nonsupervisory representatives from throughout the department for the purpose of giving officers an opportunity to connect with the chief. These representatives poll the officers in their respective areas and present the chief a list of questions to be discussed. Although the chief regularly solicits input from his command staff, on nonsupervisory meeting days, no supervisors are allowed in the meeting to ensure that officers feel safe in sharing and discussing their concerns and issues in an open forum. The results of the meetings—the questions, responses, and proposed actions—are communicated to the entire department. As expected, not everyone comes away with exactly what they want, but these meetings are successful because the officers have seen evidence that their ideas and concerns are truly being considered, and they value the opportunity to voice their ideas directly to the chief.

Transparency and openness of process

The third pillar of procedural justice, as shown in figure 6, is *transparency and openness of process*. Transparency means that the processes by which decisions are made do not rely upon secrecy or deception. In other words, decisions unfold out in the open as much as possible as opposed to behind closed doors. Nobody likes to feel that their future is being decided upon another person's whim; we like to be able to see how things are unfolding so that we can come to understand the ultimate result of a decision. When officers are as transparent as possible, community members are more likely to accept officers' decisions—even if they are unfavorable to them.

Figure 6: Third pillar: transparency

Source: Laura Kunard and Charlene Moe, *Procedural Justice for Law Enforcement Agencies: Organizational Change through Decision Making and Policy* (Chicago: Center for Public Safety and Justice, 2015), 60.

External example

Transparency is equally important when police officers interact with members of the public. A story from Captain Richard "Skip" Miller of the Sioux Falls (South Dakota) Police Department (SFPD) nicely illustrates this point. After becoming aware of some problems in a downtown park—including drinking and fighting—the SFPD took a well-thought out and measured approach. They worked with the mayor's office and other city departments to analyze the problem and communicate clearly with those involved. City officials, including representatives of the police department, met with the leaders of the group causing trouble in the park. At these meetings, they outlined the problems and concerns of neighbors in the area, clearly explained the ordinances regulating behavior in the park (for example, drinking beer was allowed but drinking hard liquor was not), and listened to the concerns of those who regularly congregated in the park. As a result of the meeting, the city installed additional picnic tables and portable toilets for use in the park. Their transparent approach—opening lines of communication, explaining the existing ordinances—went a long way to ultimately resolving the problems.

Internal example

Chief Ed Medrano of the Gardena (California) Police Department related a story regarding the selection process for the department's specialized detail positions. Once vacancies are posted, each applicant is encouraged to meet with the sergeant and the team members from the specialized detail. This allows applicants to better understand the necessary skills, education, and experience needed to be successful. These interactions are encouraged months in advance of the testing. In addition, applicants are encouraged to meet with the lieutenants in charge of the specialized units in order to learn what might be expected of that specialized detail in the future. After the applicant selection interview, the specialized detail supervisor and lieutenant meet with each applicant, regardless of placement on the eligibility list. They discuss the applicant's strengths and weaknesses. This internal process filled with dialogue before, during, and after the interview allows applicants to gain full insight on the selection process and skills, experience, and education needed to be selected for a specialized detail.

One officer recently shared he was surprised by the amount of effort put into the selection process by specialty detail supervisors. The officer learned that selections were not just made for filling the team vacancy for today's needs; rather, much effort was placed in determining who could best fill the vacancy for the needs of the team in the future. Even though the officer was not chosen for the position this time, the officer was more willing to accept the decision because the process was transparent and he understood the selection process and found it fair.

If an officer puts in a request for a day off and his supervisor denies the request without explanation, that officer may feel confused, upset, or even angry. If the supervisor openly explains why the decision was made, noting the factors that went into the decision, the officer will likely feel more satisfied with the process, more satisfied with their supervisor, and more satisfied with the police department overall.

Impartiality and unbiased decision making

The forth pillar of procedural justice, as shown in figure 7, is *impartiality and unbiased decision making*. Impartial decisions are made based on relevant evidence or data rather than on personal opinion, speculation, or guesswork. Americans have a strong sense of fairness, and especially in our media-driven society— which allows for instant answers to nearly every question via the Internet—we want the facts. When people take the extra few minutes to make apparent to others the data used to make decisions, understanding and acceptance readily ensue.

Figure 7. Fourth pillar: impartiality

Source: Laura Kunard and Charlene Moe, *Procedural Justice for Law Enforcement Agencies: Organizational Change through Decision Making and Policy* (Chicago: Center for Public Safety and Justice, 2015), 64.

External example

Recently, Sioux Falls, South Dakota, as shared by Captain Richard "Skip" Miller, experienced an uptick in bicycle accidents—two resulting in fatalities. The SFPD's approach to addressing that problem exemplifies impartiality and unbiased decision making. First, SFPD officers met with members of the cycling community, pedestrians in the downtown area, and drivers to find some common ground; all were concerned about the recent accidents and loss of life. Second, the SFPD worked with local media to announce upcoming saturation patrols in the downtown area where the accidents occurred, getting the word out to the community that officers would be on the lookout for violators. Third, the SFPD rolled out the saturation patrols, first with a focus only on giving warnings and educating the public about local ordinances. The officers on patrol stopped everyone in the downtown area in equal measure: cyclists failing to stop at stop signs, pedestrians jaywalking, and drivers who failed to yield to pedestrians. For two weeks, the patrol officers warned residents about their law-breaking behavior, educated them about the recent accidents, and informed them that they would be issuing citations for law-breaking behavior in the near future. This approach not only exhibited impartiality in their approach to problem solving but also built trust between police and the community members frequenting that area.

Photo: Jorg Hackemann/Shutterstock

Internal example

Like anyone else, officers value their time off, especially during the summer. Two officers who serve on the same shift in the Gardena (California) Police Department submitted a request for a vacation day on the same day. One officer requested the day off because of his daughter's third birthday party. The second officer requested off to attend his daughter's baptism. At the time, the department's policy allowed for only one officer off on each shift. Even though both officers had valid and valued reasons to take leave from work, the policy clearly delineated the amount of officers allowed off at the same time: one.

That policy had been set in place as an organizational mechanism to ensure impartiality in determining how many officers could take leave at the same time. The policy was well publicized, clearly explained, and uniformly utilized throughout the patrol bureau. Supervisors were not placed in the sometimes precarious situation of deciding which officer's reason for leave had more merit. Thus, when a decision was made, based on fair and standardized implementation of department policy there was no perception of bias or favoritism.

Ultimately, the second officer found a colleague to trade shifts with him, allowing the officer to attend the baptism. Most significant is the fact that the second officer whose time off request was denied had no animosity toward the department or his fellow officers because the policy was impartial. He understood the reason for the denial and saw that the policy was uniformly applied.

How Does Procedural Justice Relate to Community Policing?

It is also helpful to think about the concept of procedural justice alongside the concept of community policing. Community policing is a philosophy that promotes organizational strategies that support the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime (COPS Office 2014).

Community policing is also often explained through defining its three pillars of partnerships, problem solving, and organizational transformation, as shown in figure 8.

Figure 8. Three pillars of community policing

Source: Laura Kunard and Charlene Moe, *Procedural Justice for Law Enforcement Agencies: Organizational Change through Decision Making and Policy (*Chicago: Center for Public Safety and Justice, 2015), 41.

The first pillar, as shown in figure 9, refers to collaborative *partnerships* between law enforcement agencies and the individuals and organizations they serve to develop solutions to problems and increase trust. Partners with law enforcement may include local government agencies or departments, community groups, nonprofit organizations, social service providers, private businesses, and members of the media.

Figure 9. First pillar: partnerships

Source: Adapted from Laura Kunard and Charlene Moe, *Procedural Justice for Law Enforcement Agencies: Organizational Change through Decision Making and Policy* (Chicago: Center for Public Safety and Justice, 2015), 64.

The second pillar, *problem solving*, as shown in figure 10, refers to the process of engaging in the proactive and systematic examination of identified problems to develop and rigorously evaluate effective responses. Key components of problem solving include the following:

- Scanning: Identifying and prioritizing problems
- Analysis: Researching what is known about the problem
- Response: Developing solutions to bring about lasting reductions in the number and extent of problems
- Assessment: Evaluating the success of the responses
- Using the crime triangle to focus on immediate conditions (victim/offender/location)

Figure 10. Second pillar: problem solving

Source: Adapted from Laura Kunard and Charlene Moe, *Procedural Justice for Law Enforcement Agencies: Organizational Change through Decision Making and Policy* (Chicago: Center for Public Safety and Justice, 2015), 64.

The third pillar of community policing, *organizational transformation,* as shown in figure 11, refers to the alignment of organizational management, structure, personnel, and information systems to support community partnerships and proactive problem solving. Community policing, like procedural justice, should permeate the agency at all levels.

Figure 11. Third pillar: organizational transformation

Source: Adapted from Laura Kunard and Charlene Moe, *Procedural Justice for Law Enforcement Agencies: Organizational Change through Decision Making and Policy* (Chicago: Center for Public Safety and Justice, 2015), 64.

As you can see by the definitions of the pillars, procedural justice and community policing are related, complementary concepts. The common denominator between the two, as shown in figure 12, is that they are both primarily concerned about *relationships*—creating them and maintaining them well.

Figure 12. Cultivating relationships

Source: Laura Kunard and Charlene Moe, *Procedural Justice for Law Enforcement Agencies: Organizational Change through Decision Making and Policy* (Chicago: Center for Public Safety and Justice, 2015).

One more way to think about the concept of procedural justice is by thinking about **banking**. In banking, the two main types of transactions are *deposits* and *withdrawals*. Think about interpersonal interactions (both within your department between colleagues and in the community between officers and residents) as transactions—positive transactions will result in deposits, while negative transactions will result in withdrawals. It is important to note that it may take multiple deposits or positive interactions to make up for one withdrawal or negative interaction. Deposits strengthen relationships while withdrawals damage them.

The **community bank account** represents your community's overall feelings about your agency over time—your officers' opinions about the department and the community's opinions about the department. It is important to understand that each interaction, while it occurs between only two people, ultimately reflects upon the agency as a whole. Every interaction a police officer has with a community member should be seen as an opportunity to make a deposit.

An example of cultivating trust through relationships is demonstrated by Public Safety Officer Araujo from the Kalamazoo (Michigan) Department of Public Safety. Araujo responded to a night shift incident in a neighborhood that typically receives many calls for service. On this night, the call involved a person being stabbed. When Araujo arrived on scene, he recognized the subject who was stabbed. The stabbing victim was refusing to speak with officers at the scene about the incident. When the subject saw Araujo, he recognized him as the officer who had arrested him the previous Monday for another incident. How the stabbing victim was treated by Araujo during the earlier incident and subsequent arrest led him to confide in Araujo the entire

story of the stabbing from his point of view. It may never be known if the stabbing victim would have come forth with this information to any other officer; however, Araujo had shown the victim respect during their previous interaction and built trust with him, resulting in the victim providing the statement.

Procedural justice and officer safety

An example of how procedural justice can relate to officer safety is demonstrated in this deadly encounter illustration courtesy of Captain Jim Mallery of the Kalamazoo Department of Public Safety.

During a foot pursuit of a known gang member with a long history of violence and an outstanding arrest warrant, Officer Rick McCall found himself in a precarious and deadly position. In an effort to elude McCall, the suspect turned in to a backyard and hurdled himself over an old five-foot rickety chain-link fence, landing on his back, face up. McCall, hurdling the same fence and gripping the suspect's arm, found himself hung up by his own gun belt atop the fence. Now McCall was looking straight down at the suspect who was reaching for the butt of his semiautomatic gun, which had fallen out of his pants upon impact. McCall, seeing the gun, shouted "No!"

As the suspect's eyes meet with McCall's eyes, the suspect recognized who had been pursing him and he laid the gun on the ground saying, "McCall, I didn't know it was you! I wouldn't do that to you"—and he, the suspect, pushed his own gun away. While McCall untangled himself from the fence, the suspect cooperated and submitted to handcuffing without resistance.

As McCall walked the suspect to the patrol car, he asked him, "You weren't really going to shoot me, were you?" The suspect replied, "No, McCall, out of all the cops, you've always treated me decent."

McCall had arrested his near-assailant several times. He had also taken the time to engage with him over the years during noncrisis interactions when encountering him on the street. During one of these encounters, they learned they shared a common birthday, 10 years apart. This seemly inconsequential coincidence was the foundation in building a relationship with a sense of general mutual human respect. McCall's choice to treat the suspect with respect and dignity through their numerous interactions, even when arresting him, saved his life that day. A true story of procedural justice impacting officer safety.

As we have learned from this brief overview of officer experiences, officers' use of procedural justice engenders long term respect and compliance from their communities. When officers treat community members with respect, those community members (as well as their friends, families, and neighbors) are more likely to comply with the law and more likely to work with police to keep their communities safe.

By building trust and respect among community members through repeated "deposits" into the community bank account, officers are stacking the deck in their favor to a certain extent—in each encounter with a new community member, officers are more likely to meet someone who respects the department, respects their authority, and complies with officer requests, thus lessening the need for officers to use force. The cumulative effect of procedural justice has a direct bearing on officers' safety on the street.

When officers approach an interaction, the principle of procedural justice suggests that they expand their thoughts about the community encounter from "can I do this?" to "should I do this?" which may ultimately reduce officer fatalities and injuries. By setting a positive tone at the beginning of any interaction, officers can often keep interactions on an even keel, negating the need for raised voices or disrespectful exchanges that could easily escalate into dangerous situations.

Procedural justice and use of force

Similar to the relationship between procedural justice and officer safety, procedural justice also relates to potential use of force situations. As noted by Jason Sunshine and Tom Tyler, "a procedural justice-based policing strategy doesn't mean the police should not resort to the use of force when faced with a hostile individual. It simply means that to the extent that the police can elicit compliance without the use of force, the police officers, the institution of policing, and society in general will benefit greatly" (Sunshine and Tyler 2003).

One of the most important lessons of applying procedural justice to use of force situations is for officers to embrace their wit—their intellect, their use of language, their powers of persuasion, their empathy, and their humanness. As Corporal Charles Fernandez of the Arlington (Texas) Police Department notes, an officer's "greatest weapon or tool is their brain." Officers have high levels of communication skills and are trained in helpful techniques such as verbal judo. Relying upon communication techniques can often defuse a potentially hostile situation quickly and negate the need for the use of force in that situation.

It's often said that an officer's greatest weapon or tool is their brain, which enables them to process all the information from a rapidly evolving situation and be able to adapt accordingly.

—Corporal Charles Fernandez
Arlington (Texas) Police Department

Many interactions have a "tipping point"—a moment in the conversation where things get more or less tense. It is important for an officer who embraces the concept of procedural justice to recognize that moment and rely upon their language skills to turn the conversation to a calm, productive place.

Procedural justice and encounters with people with mental illness

As has been noted, procedural justice is important in every interaction that officers have with their colleagues as well as with the public. It is especially critical for officers to keep the pillars of procedural justice in mind when they are interacting with people with mental illness, particularly people with serious mental illness (SMI). Efforts to improve law enforcement's ability to respond to people with mental illness have taken hold nationally in recent decades with many agencies creating and maintaining crisis intervention team (CIT) training models. Such training, which increases officers' understanding of SMI as well as their savviness in communicating with people with SMI, should also be paired with the principles of procedural justice, which enhances such an approach.

Professor Amy Watson has studied the interactions between officers and people with SMI extensively and focuses some of her work on how officer behaviors may shape cooperation or resistance. (Watson 2007) Watson notes that "Procedural justice theory provides clear direction for efforts to improve police response to persons with mental illness" and goes on to emphasize that "measurable behaviors that may improve officers' abilities to obtain cooperation and more effectively and safely manage encounters with persons with mental illness" include fairness and giving voice—pillars of procedural justice. Watson's recent studies (2010, 2013) have underscored the importance of procedural justice in encounters between people with SMI and officers.

Example. Law enforcement officers who are members of crisis intervention teams have training in reflective listening techniques, which serve to de-escalate situations and build trust between officers and people with mental illness. A medium-sized agency received repeated calls from a woman diagnosed with schizophrenia. She called often to register complaints against her family members for a variety of alleged offenses. Officers who were dispatched to the scene often felt frustrated

When we've talked to people with serious mental illness about their police encounters, the thing that really comes through is that they feel extremely vulnerable when they have these encounters.

—Dr. Amy Watson, Associate Professor
University of Illinois at Chicago

with her seemingly incoherent ramblings about her deceased husband and the absence of any family members in the home. After the first few calls, the dispatcher sent a CIT-trained officer to the scene. By using his reflective listening skills, he realized, her actual needs would be revealed (she was out of medication and needed someone to go pick it up, for example), and he could effectively address her concerns.

Procedural justice and hot spot policing

Hot spot policing is a strategy that focuses on a specialized geographic approach and concentrates police resources in well-defined "hot spots" of violence. Community members who live, work, or go to school in such hot spots tend to see more police officers and are likely to have more interactions with police officers. The increase in interactions between police officers and the public in hot spot policing situations presents many opportunities for police to earn deposits into the community bank account—to show respect through the four pillars of procedural justice and build trust with their community.

The concentration of crime at specific hot spot locations within neighborhoods provides an important opportunity for police to make connections with those citizens who are most vulnerable to victimization and experience fear and diminished quality of life.

—David Weisburd and Anthony Braga

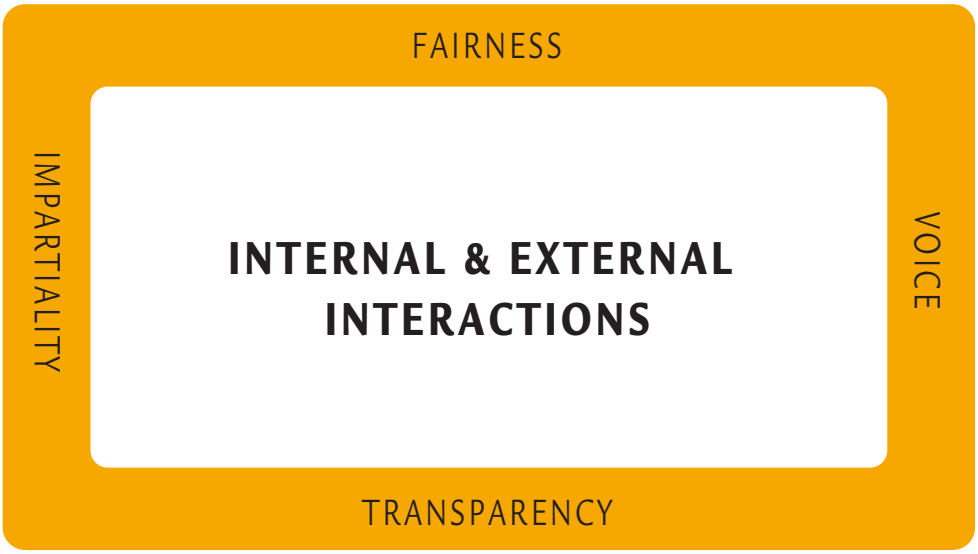
A procedural justice-based approach to policing—even hot spot policing—allows the law enforcement officers to "focus on controlling crime without alienating the public" (Sunshine and Tyler 2003). So while police officers may be in a small geographic area to concentrate on a specific violent crime problem, that focus does not preclude them from using that proximity to get to know the residents, building trust through honest communication and perhaps at times informal conversations.

Example. The Massachusetts State Police's approach to hot spot policing provides an example of how procedural justice can play a role even in high intensity situations like drug raids. Nighttime raids of drug houses in Springfield, Massachusetts, often result in neighbors who come outside, awakened by the noise and commotion. As state trooper Mike Cutone explains, taking the time to explain what is going on in the neighborhood and connect with the residents makes all the difference in building trust between law enforcement and residents in the community. "You want to engage these other folks and let them know what's going on and why we're here," Cutone says. The raid was featured on *60 Minutes* and shows Cutone introducing himself and calling neighbors by their first names after the commotion is over (Stahl 2013).

Procedural justice and the benefits to your community

Procedural justice can be thought of as a framework around every interaction a police officer has—with colleagues in the law enforcement agency and with members of the community alike. It is important for law enforcement officers to recognize and appreciate the power they have in many situations and approach those situations with procedural justice in mind. When embraced by an entire law enforcement agency, as shown in figure 13, all members of the department can expect the building of trust and mutual respect among its members and the public.

Figure 13. The procedural justice framework



Source: Laura Kunard, "Community Policing: New Applications of an Enduring Perspective—Now More Than Ever," presentation given to the Akron (Ohio) Police Department, April 2014, 80.

Conclusion

The tides are shifting in police-community relations in the United States. With the high visibility of several significant events comes a louder call for a new kind of policing rooted firmly in justice, impartiality, and collaboration with the community. Procedural justice is a framework in which law enforcement leadership can build effective policing efforts, first internally and then externally. In conversations with public safety professionals across the nation, the Center for Public Safety and Justice encounters a common response from newcomers to the concepts of procedural justice and police legitimacy: "This isn't new; it's what good cops have always done." And they are right. As the body of research on internal and external procedural justice grows, it has become increasingly clear that this evidence-based way of doing business—rooted in the four pillars of fairness in decision making, impartiality, providing voice, and transparency—is the foundation of a 21st century model of policing.

Indeed, the President's Task Force on 21st Century Policing identifies the philosophical foundation of its work as an effort to "build trust between citizens and their peace officers so that all components of a community are treating one another fairly and justly and are invested in maintaining public safety in an atmosphere of mutual respect" (President's Task Force 2015). A cultural shift in this direction requires more than a reliance on good cops continuing to be good. Procedural justice must be strategically institutionalized through policies and practices in order to shift the internal and external culture of law enforcement agencies to one that promotes mutual respect, where police can effectively serve as guardians working in partnership with members of the community rather than that of an occupying force. Indeed, procedural justice is the fulcrum on which this mutual respect balances.

We are optimistic that you will see the benefits of procedural justice as an organizational principle. Law enforcement executives should find necessity in institutionalizing procedural justice within their agencies. Furthermore, officers within the department will see the significant impact that embracing procedural justice in their everyday encounters with the public can have promoting effective policing and officer safety.

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Selected Procedural Justice Resources

COPS Office Community Policing Learning Portal, Procedural Justice Resource page:
http://cops.igpa.uillinois.edu/procedural-justice-resources
This online resource page features links to COPS Office-developed resources related to procedural justice, including podcasts and articles.

Interview with Professor Tom Tyler:
http://courses2.cit.cornell.edu/sociallaw/videos/tyler/index.html
This website features videos of Professor Tom Tyler speaking about his research on procedural justice and its relationship to law enforcement processes.

Procedural Fairness website:
http://www.proceduralfairness.org/Policing.aspx
This website features many resources related to procedural justice in a variety of criminal justice contexts. Of particular interest to law enforcement officers is the series of six short videos of Professor Tracey Meares speaking about procedural justice and its relationship to law enforcement and the links to recent journal articles.

About the Center for Public Safety and Justice

The Center for Public Safety and Justice's (CPSJ) 18 years of national experience providing training and technical assistance to communities throughout the United States on a variety of policing topics has given its staff unique insight into the culture of law enforcement, including operations, organizational structure and relationships with local government and community partnership teams. The mission of CPSJ is to promote public safety as a philosophy and practice for all members of a community. It is through partnerships and community engagement, organizational change and transformation, innovative approaches to problem solving, strong community-based leadership and quality education, training and technical assistance that the essence of community policing, community preparedness and emergency management is redefined enhancing quality of life across the United States.

CPSJ is one of ten research centers within the College of Urban Planning and Public Affairs (CUPPA) at the University of Illinois at Chicago. CUPPA pursues its mission by weaving together three commitments: to innovative education, to engaged research and to making an influential contribution to policy and practice. CUPPA, through its nationally recognized research centers, strives to interweave the discovery of new knowledge with education and the practical application of research finding to critical issues and problems facing communities across the nation.

CPSJ has a long history of providing curriculum development, training and technical assistance and research capacity to the COPS Office. Additionally, CPSJ has developed long-standing partnerships with the Department of Justice, Bureau of Justice Assistance; the U.S. Department of Homeland Security, Federal Emergency Management Agency and many other state and local agencies. CPSJ has received awards from an extensive list of organizations requesting its expertise on a range of issues. A sampling of these activities include:

- The development and delivery of a three-part procedural justice series including *Procedural Justice for Law Enforcement: Organizational Change through Decision Making and Policy, Procedural Justice as a Dialogue-to-Change* and the update and revision to the *Procedural Justice for Law Enforcement: Front-line Officers* course initially developed by the King County, WA Sheriff's Office
- Design and rollout of a national protocol for community and law enforcement responses to missing persons with Alzheimer's disease and other forms of dementia
- The design and development of the COPS Learning Portal that houses online training and resources developed by CPSJ and other COPS Office grantees
- An extensive revision, update and expansion of the Illinois Basic Law Enforcement Academy Curriculum bringing the curriculum in line with state law and current best practices in law enforcement
- More than a decade-long partnership with the Illinois Emergency Management Agency (IEMA) providing expertise in subrecipient monitoring for the Urban Areas Security Initiative and the State Homeland Security Program

About the COPS Office

The Office of Community Oriented Policing Services (COPS Office) is the component of the U.S. Department of Justice responsible for advancing the practice of community policing by the nation's state, local, territory, and tribal law enforcement agencies through information and grant resources.

Community policing is a philosophy that promotes organizational strategies that support the systematic use of partnerships and problem-solving techniques, to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime.

Rather than simply responding to crimes once they have been committed, community policing concentrates on preventing crime and eliminating the atmosphere of fear it creates. Earning the trust of the community and making those individuals stakeholders in their own safety enables law enforcement to better understand and address both the needs of the community and the factors that contribute to crime.

The COPS Office awards grants to state, local, territory, and tribal law enforcement agencies to hire and train community policing professionals, acquire and deploy cutting-edge crime fighting technologies, and develop and test innovative policing strategies. COPS Office funding also provides training and technical assistance to community members and local government leaders and all levels of law enforcement. The COPS Office has produced and compiled a broad range of information resources that can help law enforcement better address specific crime and operational issues, and help community leaders better understand how to work cooperatively with their law enforcement agency to reduce crime.

- Since 1994, the COPS Office has invested more than $14 billion to add community policing officers to the nation's streets, enhance crime fighting technology, support crime prevention initiatives, and provide training and technical assistance to help advance community policing.
- To date, the COPS Office has funded approximately 125,000 additional officers to more than 13,000 of the nation's 18,000 law enforcement agencies across the country in small and large jurisdictions alike.
- Nearly 700,000 law enforcement personnel, community members, and government leaders have been trained through COPS Office-funded training organizations.
- To date, the COPS Office has distributed more than 8.57 million topic-specific publications, training curricula, white papers, and resource CDs.

COPS Office resources, covering a wide breadth of community policing topics—from school and campus safety to gang violence—are available, at no cost, through its online Resource Center at www.cops.usdoj.gov. This easy-to-navigate website is also the grant application portal, providing access to online application forms.

Procedural justice has become an important focal point in the profession and strategy of policing in recent years. The purpose of this publication is to introduce law enforcement professionals to the concept of procedural justice and to encourage law enforcement to research the concept beyond what is captured in this introduction. The goal of this publication is to have a national understanding of procedural justice in policing and to strive towards institutionalizing the concepts throughout agencies across the country to build trust and confidence and advance public safety.

COPS
Community Oriented Policing Services
U.S. Department of Justice

U.S. Department of Justice
Office of Community Oriented Policing Services
145 N Street NE
Washington, DC 20530

To obtain details on COPS Office programs,
call the COPS Office Response Center at 800-421-6770.

Visit the COPS Office online at **www.cops.usdoj.gov**.

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WRITTEN TESTIMONY OF THOMAS J. HOMER

TO: House Sexual Discrimination and Harassment Task Force

FROM: Thomas J. Homer, Former Legislative Inspector General

DATE: July 30, 2018

Thank you for the opportunity to appear before the task force. By way of background, I served as the Legislative Inspector General from July 24, 2004 – June 30, 2014. My professional career includes 36 years of public service as State's Attorney (8 years), Legislator (12 years), Appellate Court Justice (6 years) and Legislative Inspector General (10 years). Since 2004, I have operated my own law firm in Naperville. Last year, I was appointed by Governor Rauner to serve as a public member on the Illinois Board of Examiners, the agency that determines eligibility and administers testing for CPA candidates.

I applaud the efforts of the General Assembly and your task force to foster and promote legislation designed to address the important subject of sexual discrimination and harassment. Today's hearing is central to that goal and I am pleased to have been invited to testify.

In 1967, the General Assembly enacted the Illinois Governmental Ethics Act (5 ILCS 420/1-101 et seq.), which prohibits certain restricted activities and sets forth a code of conduct for legislators. Although enforcement provisions were lacking – most of the provisions were "intended only as guides to conduct, and not as rules meant to be enforced by penalties", Section 3-107 providing that "no legislator may engage in conduct which is unbecoming to a legislator or which constitutes a breach of public trust" has been relied upon by me and my successor in resolving complaints that otherwise would have been unfounded. The requirement for legislators and certain other officials to file Statements of Economic Interest has its origin in the 1967 Act.

In 2003 the General Assembly took an additional significant step in ethics reform with the passage of the State Officials and Employees Ethics Act. This comprehensive legislation was well thought out and established a process for the orderly investigation and adjudication of certain enumerated ethics violations. Prohibited political activity was defined and prohibited. Campaign contributions were banned on State Property. Fundraising in Sangamon

County was prohibited on days when the General Assembly is in session. Legislators and legislative employees and members of their families were banned for one year from accepting employment with a company if the State employee participated substantially in a state contract awarding $25,000 or more to a prospective employer. This is referred to as the Revolving Door Prohibition. The Gift Ban Act prohibitions were added to the Act making it unlawful for legislators and State employees to accept gifts from lobbyists. Ex parte communications made by interested parties to regulatory agencies must be reported. Whistleblower protections are accorded state employees who bring forth evidence of wrongdoing by state officials or other state employees. Persons having a financial interest in contracts with an entity are prohibited from serving on boards and commissions which oversee the entity. The Act also mandates an ethics training program for all covered employees.

Then in 2009, the General Assembly enacted additional reforms, including the authorization for the inspector general to self-initiate investigations and enabled the inspector general to consider anonymous complaints (both of which were previously prohibited). Another important reform added by the 2009 Act was the mandatory publication of summary reports (and responses) that resulted in a suspension of at least 3 days. 5 ILCS 430/25-52) Of course, it must be noted that legislators are not subject to this provision since there is no authority to suspend legislators.

The recent action taken by the General Assembly was a further step in the right direction, particularly the inclusion of sexual harassment as an ethics violation and extending authorization for investigating such complaints without the necessity of seeking permission from the Legislative Ethics Commission.

Taken together the previous legislation is far reaching and has provided an important framework for the implementation ethics reforms. However, more can and should be done.

One of the main criticisms of the Act has been the lack of transparency due to the strict confidentiality provisions. In an attempt to protect the privacy rights of the subject of the complaint, the legislation limits the parties who are entitled to receive information relative to the complaint and investigation.

Section 25-50 of the Act (5 ILCS 530/25-50) provides that if the Inspector General, upon the conclusion of an investigation, determines that reasonable cause exists to believe that a violation has occurred, then the Inspector General shall deliver a summary report of the investigation "to the appropriate ultimate jurisdictional authority and to the head of each state agency affected by or involved in the investigation, if appropriate." Section 25-50 (c) of the Act provides that the legislative inspector general "shall keep confidential and shall not disclose information exempted from disclosure under the Freedom of Information Act or by this Act."

While it is understandable that the General Assembly desires to protect the innocent from the public revelation of alleged wrongdoing, the same provisions

have served to thwart the public's right-to-know and have served to undermine public confidence in the process.

It has been proposed by others, including former executive inspectors general for the office of the governor that all final founded reports issued by the IG's be subject to publication. So far the General Assembly, other than mandating publication of summary reports that result in suspensions of three or more days, has rejected more liberal publication proposals.

In the spirit of legislative compromise, I propose that the legislature amend the current statute to require that all founded reports (with responses and dispositions) be made available to the public unless specifically rejected by the Commission. The legislature could set forth the criteria by which the Commission is to make the decision to publicize a report. The criteria may include such factors as the seriousness of the infraction and the public's right to know. A redaction requirement could be included to minimize the potential deleterious impact on the accused and innocent individuals. In this way, oversight by the Commission will be provided, the independence of the office of the Inspectors Generals preserved, and the privacy rights of the accused be balanced against the public's right to know. While this compromise falls short of giving the Commission the right to approve or reject disciplinary dispositions, as Mr. Turow has proposed, it would provide oversight and transparency that is not available under the current statutory scheme. I believe that such legislative amendments to the Act will go a long way toward addressing the various concerns that have been expressed without unduly interfering with the independent role of the Inspectors General or violating the privacy rights of the parties.

I would further recommend that the Legislative Ethics Commission be expanded to include one public member, selected by the Commission. Currently there are four Democrats and four Republicans, two each selected by the four Legislative leaders. This bi-partisan, bi-cameral split lends itself to party-line votes which deny a majority. Adding a ninth member to the Commission would avoid such deadlocks.

In further promotion of transparency, I believe that there is at least one additional matter that should be considered. Under the current statutory scheme, all investigatory files and reports of the Inspectors General, other than quarterly reports, are to be kept confidential, and shall not be divulged except as necessary (i) to the appropriate law enforcement authority, (ii) to the ultimate jurisdiction authority, or (iii) to the appropriate ethics commission. See 5 ILCS 430/20-95 and 5 ILCS 430/25-95. The statue does not specifically authorize an IG to inform a complainant of the status or ultimate disposition of the complaint. It is my understanding that at least one of the EIGs has taken the position that complainants are not entitled to any notification. Although I do not read the current statute as precluding general notification of disposition to the complainant, I believe that the IGs should be specifically authorized to notify complainants of the disposition of their complaints. Unless an IG has the authority to inform a complainant, at least in general terms, of the disposition

of the complaint, the matter lacks closure. The failure to communicate with the complainant can lead to unwarranted speculation as to what if any action was taken with respect to the complaint.

I further recommend that the Legislative Ethics Commission repeal Rule 17-25 which requires the Legislative Inspector General to obtain approval from the Commission to initiate investigations. While the recent legislation deleted the requirement for sexual harassment complaints, the independence of the Legislative Inspector General is of paramount importance and should extend to investigations of all complaints.

Separately, I propose that section 25-5(d) of the State Officials and Employees Ethics Act (the Act) ((5 ILCS 430/25-5(d)) be amended. This section limits jurisdiction of the Legislative Ethics Commission to matters arising under the Act. The Commission was not given jurisdiction over matters arising under the Illinois Governmental Ethics Act (5 ILCS 420/1-101 et seq.). The Governmental Ethics Act, which was enacted in 1967, prohibits certain restricted activities and sets forth a code of conduct for legislators. Although my office has jurisdiction to investigate alleged violations of the Governmental Ethics Act ((see 5 ILCS 430/25-10(c)), the Legislative Ethics Commission is without jurisdiction to hear such matters ((see 5 ILCS 430/25-5(d)). The potential harm that could result from this dichotomy is apparent and foreseeable. When my office receives a complaint alleging that a member of the General Assembly has violated the Illinois Governmental Ethics Act, for example by accepting an honorarium prohibited by that Act, I am compelled to investigate the complaint. However, where I conclude that the complaint was founded, the Commission is without jurisdiction to consider the matter. This scenario can lead to a lack of enforcement and serves to undermine public confidence in the integrity of the investigatory process. Consequently, I recommend that section 25-5(d) of the Act be amended to extend the jurisdiction of the Legislative Ethics Commission to violations of Article 2 (Restricted Activities) and Article 3, Part 1 (Rules of Conduct for Legislators) of the Illinois Governmental Ethics Act as well as for violations of other rules and laws. I further recommend that section 25-95(b) of the Act be amended to authorize the Legislative Ethics Commission to impose administrative fines for violations of those provisions.

Thank you for your consideration and for providing a forum for the airing of these important issues.

STATE OF ILLINOIS

EXECUTIVE DEPARTMENT

SPRINGFIELD, ILLINOIS

FILED
INDEX DEPARTMENT
JUN 20 2018
IN THE OFFICE OF
SECRETARY OF STATE

EXECUTIVE ORDER **2018-08**

EXECUTIVE ORDER REFORMING THE ADMINISTRATION AND ELIMINATING THE BACKLOG OF ANTI-DISCRIMINATION AND EQUAL OPPORTUNITY HEARINGS AT THE HUMAN RIGHTS COMMISSION

WHEREAS, it has been one of the signature achievements of this administration to track, rationalize, and reform the administrative hearings system within the State of Illinois; and

WHEREAS, more than 150,000 administrative hearings are requested each year across State agencies, and the conduct of these hearings operates as a quasi-judicial court system within State government; and

WHEREAS, our constitutional, democratic principles require the State to afford due process to people and businesses affected by the decisions of agencies that come out of administrative hearings; and

WHEREAS, due process should ensure a speedy disposition of hearings so that people in Illinois receive State services and obtain resolution of their rights and privileges in a timely manner; and

WHEREAS, to ensure this quasi-judicial system operates in a fair, efficient, and transparent way, I signed Executive Order 2016-06 to create a pilot Bureau of Administrative Hearings ("Bureau") within the Department of Central Management Services ("CMS") to provide central, uniform administrative support to State agencies and to recommend consolidation of hearing functions as appropriate; and

WHEREAS, in its pilot year, the Bureau initiated case sharing between the Department of Public Health, the Department of Revenue, and the Department of Labor and doubled the speed of Labor adjudications with no expense to the State; and

WHEREAS, the Bureau has initiated the State's first comprehensive professional development program for administrative law judges, including providing over 1200 hours of professional training, promulgating the State's first bench manual for adjudicators, and developing the State's first orientation program for adjudicators; and

WHEREAS, in recognition of these efforts and the success of the Bureau, I signed Executive Order 2017-04, making the Bureau a permanent part of CMS and directing it to continue and expand its work; and

WHEREAS, recognizing a uniquely problematic backlog in the adjudication of hearings at the Human Rights Commission ("HRC"), I signed Executive Order 2017-02 to consolidate HRC with the Department of Human Rights ("DHR"); and

WHEREAS, DHR receives, investigates, and conciliates charges of unlawful discrimination and undertakes affirmative action and public education activities to prevent discrimination; and

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SECRETARY OF STATE

WHEREAS, HRC is a body that hears and adjudicates discrimination cases; and

WHEREAS, although a single statute governs these two State agencies, HRC and DHR often have different, conflicting, and inconsistent rules of administrative procedure, which confuse parties, impede transparency, and create redundancies, backlog, and delay; and

WHEREAS, the consolidation of these two State agencies was intended to produce faster investigative and adjudicative processes, because they would have been able to share resources effectively and cut bureaucratic red tape; and

WHEREAS, the General Assembly rejected my reorganization of DHR and HRC and the backlog of cases at HRC continues to grow; and

WHEREAS, under our current outdated and unproductive structure, people and businesses wait at least four years, on average, after filing a charge of discrimination for DHR to investigate and HRC to issue its final decision on their cases; and

WHEREAS, HRC currently has over 1,000 backlogged cases pending two years or more without a decision, and some parties wait as long as three years for a resolution to their case by HRC; and

WHEREAS, these delays are unacceptable and unfair to aggrieved parties and businesses and to the general public; and

WHEREAS, individuals and groups most often harmed by delay are impoverished and minority parties and small businesses without the resources to obtain counsel and pay expensive legal fees to appear in Illinois courts; and

WHEREAS, the State and the public recognize, perhaps more than ever before, the critical importance of ensuring due process in discrimination cases, including discrimination complaints regarding sexual harassment; and

WHEREAS, it is the continued obligation of the Governor as the chief executive of the State to oversee executive branch processes and track and resolve process and organizational problems as they are identified, and my administration is still resolved to cure this backlog despite the General Assembly's rejection of my previous Executive Order; and

WHEREAS, collaboration with the Bureau has proven successful for State agencies, and DHR and HRC can benefit from meaningful partnership with each other and the Bureau to realize better hearings processes; and

WHEREAS, addressing this backlog must feature honest and transparent accounting, rooted in thorough data collection, to understand the scope of problems and opportunities in the hearings process;

THEREFORE, I, Bruce Rauner, Governor of Illinois, by virtue of the executive authority vested in me by Section 11 of Article V of the Constitution of the State of Illinois, do hereby order as follows:

I. DEFINITIONS

"Bureau" means the Bureau of Administrative Hearings at CMS.

"CMS" means the Department of Central Management Services.

"DHR" means the Department of Human Rights.

"DoIT" means the Department of Innovation and Technology.

"HRC" means the Human Rights Commission.

"Rapids Results training" means training provided by the Office of Rapid Results, created under this administration based on the State's philosophy of continuous improvement that encourages State employees to find and eliminate process waste and improve the efficiency and quality of State products and services.

II. COORDINATION BETWEEN THE BUREAU, HRC, AND DHR REQUIRED

Coordination between State agencies to identify economies of scale, model best practices, and develop thoughtful approaches to all aspects of administrative hearings work is a proven success. The Bureau is empowered to partner with State agencies to provide administrative hearings support by entering into interagency contracts with participating State agencies, as authorized by the Intergovernmental Cooperation Act and other applicable law. It develops training programs for adjudicators, promotes shared resources among participating agencies, develops uniform rules of procedure, and recommends revisions, where appropriate, to agency administrative rules on administrative hearings. The Bureau is required to cooperate with DoIT to implement modern, uniform filing and case management systems.

With this model in mind, pursuant to this Executive Order, the Bureau, DHR, and HRC shall coordinate to achieve efficiencies and eliminate backlogs. Coordination shall include:

1. Developing a benchmarking system and a plan for the elimination of the backlog, which will require, at a minimum, the complete elimination of backlog in HRC cases within 18 months. This plan shall be submitted to the Governor within 60 days of the effective date of this Executive Order.

2. Reviewing rights and requirements at DHR and HRC and identifying where legislation, administrative rules, and internal policies can be proposed or amended to highlight similarities between DHR and HRC, thereby streamlining the hearings process for parties.

3. Executing intergovernmental agreements to share resources and smooth workloads through the administrative hearings process.

4. Developing, with DoIT, technological solutions and shared case management systems.

5. Tracking, and reporting at least quarterly to the Governor and the Director of CMS, the total number of pending cases, average and median length of time for resolution to cases, and any other information necessary to capture backlog or delays in processing of cases.

6. Soliciting feedback and surveying parties appearing before HRC and DHR and incorporating, as appropriate, their suggestions for better, and not simply faster, service in the hearings process.

7. Developing and participating in training programs, including at least one Rapid Results training program.

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No aspect of coordination should work to limit the constitutional or statutory due process rights of parties before DHR or HRC.

III. REPORT TO THE GOVERNOR'S OFFICE

The Bureau shall, no later than December 31, 2018, and annually thereafter for three years, provide a report to the Governor and the Director of CMS on the coordination efforts and data reporting of the Bureau, DHR, and HRC pursuant to this Executive Order. The report shall include: (1) an analysis of current case backlogs and projected backlog reductions; (2) a description of due process and operational improvements at the HRC and DHR; and (3) the effect of such improvements on State government and the public. The report shall also provide recommendations for further executive or legislative action relating to the implementation of this Executive Order. The Bureau shall work with DHR and HRC to prepare this report. The Bureau shall further work with DoIT to include any proposed or implemented technological changes affecting the operations of DHR and HRC. A copy of such report shall be filed with the General Assembly.

IV. SAVINGS CLAUSE

1. This Executive Order does not, and shall not be construed to, transfer any rights, powers, duties, functions, property, personnel, or funds from, to, or among State agencies; each State agency continues to have whatever authority is provided to it pursuant to the Intergovernmental Cooperation Act and other applicable law to enter into interagency contracts, which may include permissible transfers.

2. This Executive Order shall not affect any act undertaken, ratified, or cancelled or any right occurring or established or any action or proceeding commenced in an administrative, civil, or criminal case before this Executive Order takes effect, but these actions or proceedings may be prosecuted and continued by the Bureau in cooperation with the State agency, if necessary.

3. This Executive Order shall not affect the legality of any rules in the Illinois Administrative Code that are in force on the effective date of this Executive Order, which rules have been duly adopted by the pertinent agencies. If necessary, however, the affected agencies shall propose, adopt, or repeal rules, rule amendments, and rule recodifications as appropriate to effectuate this Executive Order.

4. This Executive Order does not contravene, and shall not be construed to contravene, any federal law, State statute, or collective bargaining agreement.

V. PRIOR EXECUTIVE ORDERS

This Executive Order supersedes any contrary provision of any other prior Executive Order.

VI. SEVERABILITY CLAUSE

If any part of this Executive Order is found invalid by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect. The provisions of this Executive Order are severable.

VII. EFFECTIVE DATE

This Executive Order shall take effect upon filing with the Secretary of State.

Bruce Rauner, Governor

Issued by the Governor: June 20, 2018

Filed with Secretary of State: June 20, 2018

FILED
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JUN 20 2018
IN THE OFFICE OF
SECRETARY OF STATE

Testimony of Alisa Kaplan, Policy Director
Illinois Campaign for Political Reform

Illinois House
Sexual Discrimination and Harassment Task Force

Re: Best Practices Recommendations
General Assembly Ethics Reporting and Investigatory Processes

September 11, 2018

Leader Currie, Spokesperson Jimenez, members of the Task Force, thank you for the opportunity to testify. My name is Alisa Kaplan and I'm the Policy Director of the Illinois Campaign for Political Reform (ICPR). ICPR is dedicated to advocating for reforms that increase integrity, accountability, and transparency in Illinois government.

In January 2018, ICPR compiled a list of recommendations for improving the reporting and investigation of sexual harassment complaints in the Illinois General Assembly.

We are pleased that since January, many of these recommendations have been implemented, and that the General Assembly has made great strides in adding more independence and transparency to its system. We applaud these changes and believe they will enhance public trust in the General Assembly and its commitment to addressing this highly sensitive and important issue.

Today I will briefly review our recommendations from January, beginning with those that have been implemented and proceeding to those that have not yet been put into place but that we believe could further improve the process.

Let me note that our recommendations focus only on the legislature, not on other branches. So unless otherwise specified, when I use the terms “Inspector General” or “Ethics Commission,” I am referring to the Legislative Inspector General and the Legislative Ethics Commission, and not to their counterparts in any other branch.

Implemented recommendations

Implemented: Publication of periodic reports

First, to make the process more transparent, ICPR recommended that periodic reports about the activity of the Legislative Inspector General, including the number, type, and resolution of ethics complaints, should be made available to the public. This recommendation has been implemented, and the Inspector General’s quarterly reports will now be made publicly available on its website.

Implemented (with caveats): Changes in the Inspector General selection process

Second, to increase the independence of the office of the Inspector General, ICPR recommended that changes be made in the way the Inspector General is selected. Previously, the Inspector General was chosen by legislative leaders and appointed by a joint resolution of the House and Senate with the approval of three-fifths of both houses.

While the final appointment of the Inspector General still requires the approval of the General Assembly, a layer has been added to the search process. Now, the Legislative Ethics Committee establishes a search committee comprised of four members, each appointed by one of the four legislative leaders. The search committee recommends up to three candidates to the Legislative Ethics Committee, and the final appointment is, as before, made by joint resolution requiring a three-fifths supermajority in the legislature.

Importantly, none of the search committee members may be a legislator or employee of the General Assembly or a registered lobbyist, and each member must be either a retired judge or an ex-prosecutor.

To be sure, the legislature maintains significant control over the new selection process. Legislative leaders choose the search committee members, and the legislature, as before, approves the appointment.

While the addition of a search committee is a positive development, there appears to be a significant gap in the process as outlined in the statute. It is unclear what happens after the search committee recommends its three candidates to the Ethics Commission. Does the Ethics Commission choose one candidate to present to the legislature? If so, what happens if the legislature rejects the chosen candidate or candidates? Can legislative leaders reject the recommended candidates entirely and choose someone else?

The process needs to be fleshed out to account for different scenarios and to ensure that the purpose of the new search committee - to build more independence into the selection system - is fulfilled.

Still, the introduction of a search committee composed of qualified individuals who do not serve in the legislature appears to add a significant buffer between legislative leaders and the selection of the Inspector General. If properly implemented, this is an important change that has the potential to increase the integrity of the search process and the independence of the office.

Implemented: Initiation of sexual harassment complaint investigations without Ethics Commission approval

The third change that ICPR supported and has been implemented is that the Legislative Inspector General can now initiate investigations of sexual harassment complaints without the approval of the Legislative Ethics Commission. Previously, the Inspector General needed approval from the Ethics Commission to open all investigations, including those involving sexual harassment.

ICPR believes that the Inspector General should be able to initiate investigations of all types of ethics complaints and hopes that the legislature will continue to work towards that goal. For the purposes of this hearing, however, ICPR is gratified that this change has been made for sexual harassment complaints and views it as indispensable to the Inspector General's independence in this area.

ICPR recommendations that have not yet been implemented

I will now discuss recommendations ICPR made in January that have not yet been implemented, and that we hope the legislature will consider adopting.

Not yet implemented: Subpoena power without Ethics Commission approval

The first recommendation involves the Inspector General's subpoena power, which is particularly important to its ability to conduct independent investigations. As mentioned above, the latest legislation empowers the Inspector General to initiate investigations of sexual harassment complaints without approval from the Legislative Ethics Commission, which it was not permitted to do before.

However, the statutory language still does not give the Inspector General the ability to issue subpoenas without prior approval from the Ethics Commission.

Notably, unlike the Legislative Inspector General, the Executive Inspector General has the ability to issue subpoenas without approval from the Executive Ethics Commission. We believe

the Legislative Inspector General should have the same investigatory powers as its executive counterpart. The Legislative Inspector General's ability to compel the production of documents and the appearance of witnesses without the Commission's approval is central to its ability to conduct thorough, independent investigations. The Legislative Inspector General should be explicitly granted the power to issue subpoenas without Commission approval.

Not yet implemented: Increasing the statute of limitations

Our second outstanding recommendation is that the statute of limitations for ethics complaints should be extended so that all investigations can receive adequate time and attention.

Current law requires that the Inspector General must initiate an investigation within 12 months of the last incident of alleged wrongdoing. We are not proposing that this time limit - the maximum time between the last alleged incident and the initiation of the Inspector General's investigation - be changed from the current 12 months.

However, current law also requires that if the Inspector General finds sufficient grounds to advance the complaint to the Ethics Commission, the Inspector General must file its complaint and have it evaluated by the Attorney General for referral within 18 months of the last alleged wrongdoing. In other words, the complainant must submit a complaint to the Inspector General, the Inspector General must complete its investigation, and the Attorney General must complete its evaluation of the Inspector General's investigation to determine if it merits referral to the Ethics Commission, all within 18 months of the last alleged wrongdoing.

The result of this is that in some cases, the Inspector General may only have six months to complete its investigation and have it evaluated by the Attorney General for referral to the Ethics Commission.

ICPR recommends that this time limit be extended from 18 months to 24 months from the last alleged incident. This would ensure that in all cases, the Inspector General and Attorney General have sufficient time - a minimum of 12 months - to complete a thorough investigation in which the public can have confidence.

Not yet implemented: Required publication of the Inspector General's summary reports in cases involving public officials where substantial evidence of wrongdoing has been found

Our third recommendation involves transparency and the public's right to know about investigations involving public officials. Currently, the law requires summary reports on the Inspector General's individual investigations to be made public only in narrow circumstances. Specifically, the law only requires that a summary report be published if the report resulted in a three day suspension or termination by the relevant jurisdictional authority. ICPR believes that this requirement may leave some important investigative reports unavailable to the public,

including reports on members of the General Assembly, who cannot be suspended or terminated and therefore cannot trigger that publication requirement.

To avoid confusion, it is important here to distinguish between two kinds of reports. The first kind, called a summary report, is created by the Inspector General and describes the findings of its investigation. It is an investigative report, somewhat analogous to a police report.

The second kind of report is created by the Ethics Commission, not the Inspector General. If a complaint makes it all the way from the Inspector General's desk to the Commission, and the Commission ultimately finds that a violation has occurred, the Commission must publish a record of the proceedings resulting in that decision. This report focuses on the proceedings before the Commission, not the findings of the Inspector General's investigation, and is more like a court record than like a police report. Again, the Commission is not required to publish the investigative report, which may have valuable additional information, unless it satisfies the narrow requirements above.

In some cases, neither a disciplinary action that would trigger publication of the Inspector General's report, nor an Ethics Commission action that would trigger publication of the Commission proceedings, may occur. For example, the subject of a complaint may be a member of the General Assembly, who cannot be suspended or terminated. Or the subject of a complaint may resign before they can be terminated or suspended. Or, for a variety of reasons, the case may not be referred to the Ethics Commission, or the Ethics Commission may decide not to act on the complaint or decline to find a violation. In those cases, there may be no public record of an investigation despite its potential public importance.

We believe that if the Inspector General finds substantial evidence of wrongdoing by a public official, the public deserves to know about it. Therefore, we recommend that the Inspector General's report be published within 60 days of the investigation's conclusion in cases involving public officials, even if the case does not result in suspension or termination or never advances to the Legislative Ethics Commission.

We are acutely aware of the need to respect the rights and privacy of those involved in these highly charged and sensitive situations. That is why we are recommending additional publication only in cases where the Inspector General has already found substantial evidence of wrongdoing, and only in cases of public officials who have the platform to respond to the Inspector General's report and whose behavior is particularly important for the public to know about. As always, we recommend redaction of sensitive or private material where appropriate.

<u>Not yet implemented: Members of the public on the Legislative Ethics Commission</u>

Our final recommendation involves the composition of the Legislative Ethics Commission. The Legislative Ethics Commission is appointed by the four legislative leaders, with each leader appointing two Commission members. Currently, the legislative leaders have the authority to

appoint members of the public. But it is not required, and the current Commission is comprised only of legislators. Requiring public appointments would increase the independence and transparency of the Commission and with it, public trust in its proceedings.

Conclusion

In summary, ICPR recommends that four reforms be implemented. First, the Legislative Inspector General's independent subpoena power in sexual harassment cases should be made explicit. Second, the statute of limitations should be amended to allow the Inspector General 24 months instead of 18 months from the last incident of alleged wrongdoing to refer a complaint to the Legislative Ethics Committee. Third, Inspector General reports finding substantial evidence of wrongdoing by public officials should be published within 60 days regardless of whether further action is taken. Fourth, the Legislative Ethics Commission should be comprised of both legislators and members of the public.

ICPR also hopes that the process of appointing a Legislative Inspector General is clarified to ensure that the selection system incorporates as much independence as possible.

ICPR supports the legislature's efforts to make the General Assembly's process of addressing sexual harassment complaints more independent, rigorous, and transparent. We believe that adopting these recommendations would further increase public confidence in this process and, by extension, in the General Assembly as a whole. Thank you for your consideration.

Action in the First 60 Days

Within the first 60 days of the Executive Order the different departments have taken the following action:

1) Mobilized staff at HRC, DHR, CMS, and DoIT to examine challenges to the backlog;
2) Executed an Intergovernmental Agreement between HRC, DHR, and CMS to promote resource sharing;
3) Initiated procurement of shared technology platform that will provide DHR and HRC with real-time access to case information;
4) Defined current caseload and progression for a complete picture of the backlog;
5) Conducted comprehensive analysis of the way cases are processed at DHR and HRC;
6) Trained over one dozen employees to deploy Rapid Results techniques for continuous process improvement;
7) Recruited experienced attorneys to assist in reviewing and finalizing over 300 draft Commission orders for aged cases dating to 2010 and 2011;
8) Expedited service of Notices of No Exceptions, allowing for the final deposition of more than 100 additional cases;
9) Established two additional attorney positions and one additional support staff position to optimize staffing levels at the Commission commensurate with the incoming caseload. Seven contract attorney positions have been posted to assist with the backlog;
10) Created training materials for onboarding of new employees;
11) Identified knowledgeable internal staff for appointment to a Deputy General Counsel position;
12) Improved case assignment process to increase oversight in monitoring the backlog;
13) Publicly posted Commission decisions issued dating to 2015, thereby eliminating a repeat audit finding of the Commission.

Case Backlog statistics:
The outlined plan is supposed to ensure that each backlogged Request for Review is presented to the Commission and completed by issuance of written order within the next 15 months.

Below are the current backlog statistics:

- 685 Commission determined requests for review with no written order
- 1,518 requests for review awaiting scheduling to a commission panel
- 495 requests for review aged 7 years or older with no final disposition

LEGISLATIVE ETHICS COMMISSION

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DATE: August 31, 2018

TO: **The Illinois General Assembly**
FROM: **Representative Avery Bourne, Chairman**
Legislative Ethics Commission (LEC)
RE: **LEC Activity Summary for the Period 11/04/17 through 08/31/18**

This report of the Legislative Ethics Commission (LEC) is issued pursuant to the provisions of Section 25-100 of the State Officials and Employees Ethics Act (5 ILCS 430/25-100). The legislature recently amended this provision to require the LEC to publicly disclose a summary of its recent activities as enumerated below:

1. The total number of founded summary reports that the Inspector General requested to be published:

   Answer: 1

2. The total number of founded summary reports that the Inspector General closed without a request to be published:

   Answer: 0

3. The total number of founded reports the Commission agreed to publish:

   Answer: 1

4. The total number of founded summary reports that the Commission did not agree to publish:

   Answer: 0

5. The total number of investigations the Inspector General requested to open:

   Answer: 16

6. The total number of investigations that the Commission did not allow the Inspector General to open:

   Answer: 0