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Before the House Labor and Industry Committee
Regarding Employer Best Practices to Prevent
Sexual Harassment, Discrimination and Retaliation
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Chairman Kauffman, Chairman Galloway and members of the House Labor and Industry Committee, thank you for the opportunity to testify today regarding best practices to prevent harassment, discrimination and retaliation in the workplace.

I am a partner at the law firm of Brubaker Connaughton Goss & Lucarelli LLC, and practice primarily in employment and labor law. My emphasis is on management-sided representation, although occasionally I represent executives in claims. I advise employer clients of all sizes on all aspects of the employment relationship, work with clients to develop and implement proactive employment policies, provide training to companies, and litigate employment claims including harassment, discrimination, and retaliation, in administrative agencies, state, and federal court.

I currently serve as the President of the Lancaster Society for Human Resource Management ("LSHRM"), an organization focused on the professional development of HR professionals. LSHRM is an affiliate of the Society for Human Resource Management ("SHRM"), a national organization dedicated to serving the needs and advancing the practice of human resource management. In that capacity, I also serve as a member of the PA SHRM State Council. In these roles, I have interfaced with hundreds of HR professionals in businesses of various sizes.

I have been asked today to address employer best practices, both in the context of Pennsylvania's current legal framework governing sexual harassment, and the current climate surrounding cultural awareness on this issue. As members of the Committee know, Pennsylvania employers are subject to multiple state, federal and local laws prohibiting discrimination and harassment. At the state level, the Pennsylvania Human Relations Act ("PHRA") prohibits discrimination on the basis of sex by private employers with at least four employees.[1] Additionally, within the Commonwealth of Pennsylvania, private employers that operate in certain

[1] 43 P.S. §§ 954, 955.

municipalities are also subject to local ordinances that prohibit discrimination.[2] At the federal level, Title VII of the Civil Rights Act of 1964 ("Title VII"), prohibits sex-based discrimination by private employers with 15 or more employees.[3]

Today I will be reviewing best practices I recommend to employers to prevent and address workplace harassment, discrimination, and retaliation. Harassment and discrimination are symptoms of gender inequity in the workplace. The best practices which I will discuss today provide a starting point for employers to combat harassment, discrimination, and retaliation in the workplace. Approaching these issues solely from the perspective of legal compliance is not enough to eliminate discrimination in the workplace. To eradicate the power dynamic that breeds gender discrimination, harassment, and retaliation in today's workplace, several things must change: (1) more women must be elevated to leadership positions in companies; (2) pay equity must be achieved, and (3) leadership must not tolerate or enable gender discrimination, harassment, and retaliation.

I. ENGAGE THE HIGHEST LEVELS OF LEADERSHIP.

Taking the lead to combat harassment, discrimination, and retaliation must begin in the C-Suite. Employers traditionally delegate harassment and discrimination prevention and compliance to the Human Resources Department. The message from senior leadership must be that a workplace free of harassment and discrimination is integral to the culture and success of the organization. This message must come not only from Human Resources, but also reinforced by company leadership, including the President/CEO and other executive team members in what they say and do.

Leadership can reinforce the importance of harassment prevention by being visible in the employer's prevention efforts. They should attend employee training sessions, either in person or through a video introduction. Steps should be taken by senior leadership to test the effectiveness of the programs by not only evaluating the existence of complaints and claims, but also actively communicating with employees.

Many employers implement programs to create new avenues for formal and informal communication between leadership and employees. For example, some companies host regular lunches for a small group of employees to meet and talk with the CEO in an informal and relaxed setting. Other companies support the creation of affinity groups to foster diversity and inclusion initiatives. Both of these strategies provide opportunities for leadership to reinforce the importance of harassment/discrimination prevention in company culture. These programs also provide leadership with a forum to identify future leaders of the company, and to elevate employees who demonstrate a commitment to diversity and inclusiveness.

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[2] For example, employers that operate within the City of Philadelphia are subject to the Philadelphia Fair Practices Ordinance. Philadelphia Code, §§ 9-1101, 9-1103.

[3] 42 U.S.C. §§ 2000e, 2000e-2.

II. DEVELOP AND IMPLEMENT ROBUST POLICIES.

Written employment policies are the foundation of an effective harassment prevention program. An employer's stated commitment to a harassment and discrimination-free workplace is meaningless if the employer does not act on its commitment. Formal written policies are vital to communicate an employer's expectations for the workplace. In the absence of written policies, employees lack clear guidance about what is, and is not, acceptable workplace conduct, and employers lack a framework to respond to complaints of harassment/discrimination and take corrective action.

Adopting formal written policies serves the following purposes:

- Demonstrating an employer's commitment to a harassment-free and discrimination-free workplace;
- Defining discrimination, harassment, and retaliation;
- Identifying what characteristics are protected under the law;
- Identifying specific examples of prohibited conduct;
- Establishing a formal complaint procedure with multiple report avenues; and
- Providing an easy to understand written framework

An effective harassment prevention program must include both an equal employment opportunity policy and anti-harassment/anti-discrimination policy. Employers should also consider adopting a policy governing consensual romantic relationships.

Employer policies should be included in the employee handbook. Policies may also be made available to employees in electronic format for easy access. When beginning employment, employees should be provided a copy of the handbook and required to sign an acknowledgement stating that they read and understood the policies contained in the handbook. Employers with diverse workforces should consider having their handbook translated into additional languages for the benefit of their employees.

A. EQUAL EMPLOYMENT OPPORTUNITY (EEO) POLICIES.

An EEO policy is a written statement demonstrating an employer's commitment to diversity, inclusion, and discrimination prevention, and specifically identifies the protections recognized by the employer. Pennsylvania law recognizes the following protected classes in employment: race; color; religious creed; ancestry; age; sex; national origin; or non-job related handicap or disability or the use of a guide or support animal because of the blindness, deafness or physical handicap.[4]

Currently in Pennsylvania, there are inconsistencies concerning the protected classes designated by law. Under both state and federal law, Pennsylvania employers are required to recognize sex/gender as a protected class. In certain Pennsylvania municipalities, private employers must also recognize gender identity and sexual orientation as protected classes. Although the Commonwealth and its agencies recognize these protected classes pursuant to Executive Order 2016-04, they are not explicitly protected by the PHRA. Consequently, private

[4] 43 P.S. §§ 955.

employers operating within Pennsylvania may have different legal obligations based solely on where they conduct business.[5] Employers who operate in a municipality that does not protect gender identity and sexual orientation must decide whether to include these classes in their EEO policy.

B. ANTI-HARASSMENT/ANTI-DISCRIMINATION/ANTI-RETALIATION POLICIES

In addition to an EEO policy, an effective harassment prevention program must include a formal written anti-harassment/anti-discrimination/anti-retaliation policy. Internal complaints should be encouraged, not discouraged or ignored. The law favors employers who have robust complaint and investigation policy and practices, as this enables companies to swiftly respond to claims and end any unacceptable behavior when it occurs.

Harassment and discrimination are not common-sense concepts that employees understand when they enter the workforce. Employers must establish and communicate expectations concerning harassment and discrimination in the same way they communicate expectations for attendance, safety, and discipline. A fully-developed anti-harassment/anti-discrimination policy should include the following components:

1. **Define Discrimination and Harassment and Identify Unacceptable Conduct.** Recent media coverage of the #MeToo awareness movement demonstrates that harassment and discrimination comes in many forms. While most people understand that quid-pro-quo arrangements (sexual favors exchanged for employment advancement) constitute unlawful sexual harassment, there are many more subtle forms of gender discrimination and harassment which can be difficult to detect and identify. Written policies should define discrimination/harassment, and describe unacceptable behavior so that employees understand what type of conduct will not be tolerated. Examples of subtle forms of discrimination and harassment should be included in the policy.

   Harassment and discrimination are not limited to conduct by company employees. Courts have permitted claims against employers who failed to take corrective action with respect to known harassment by non-employees such as third-party vendors.[6] Employer policies should define harassment and discrimination to include acts by customers, vendors, and any other third parties who interact with employees.

2. **Establish a Report Procedure.** A critical component of an anti-harassment policy is a defined report procedure. Employees must know who they should notify if they experience or witness harassment or discrimination. Best practice is to specifically identify in the policy at least two company representatives that can accept reports of discrimination/harassment. If possible, recipients of reports should be male and female.

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[5] Pennsylvania federal courts have also rendered inconsistent decisions as to whether sexual orientation is protected under Title VII. In *EEOC v. Scott Med. Health Ctr., P.C.,* 217 F. Supp. 3d 834 (W.D. Pa. 2016), the United States District Court for the Western District of Pennsylvania, held that discrimination based on sexual orientation is unlawful under Title VII. By contrast, in *Coleman v. Amerihealth Caritas,* No. 16-3652, 2017 U.S. Dist. (E.D. Pa. 2017), the United States District Court for the Eastern District of Pennsylvania ruled that sexual orientation is not a protected class under Title VII.

[6] *See, e.g., Freeman v. Dal-Tile Corp.,* 750 F.3d 413, 422 (4th Cir. 2014).

This provides employees with an option if they are not comfortable reporting to one of the designated representatives, or one of them is directly or indirectly involved in the conduct. Employers are cautioned against having a policy that mandates reporting to multiple front-line supervisors unless they have been trained in accepting reports and counseling employees through the report process.

3. **Confirm that Confidentiality Will be Maintained, But Only to the Extent Possible.** It is not uncommon for employees to make complaints about work-related issues and ask that the complaint be "off the record" or kept confidential. Employees are sometimes wary about coworkers learning they have complained, or are concerned about being retaliated against for complaining. A well-crafted anti-harassment/anti-discrimination policy should inform employees that complaints will be kept confidential to the extent possible, but that managers and those designated to accept reports are mandated by the company to act upon a complaint. No manager or C-Suite executive should be permitted to keep confidence; they must report using the employer's internal process. Additionally, bystanders who did not experience directly, but observed unacceptable behavior should be encouraged to complaint.

   An employer cannot promise or guarantee complete confidentiality. Limited disclosure will be necessary to conduct an investigation, interview witnesses, and to provide appropriate instructions to supervisors and managers involved in the situation.

4. **Commit to a Neutral Investigation and Prompt Corrective Action.**
   Policies should state that a company will conduct a prompt, thorough, and impartial investigation and that individuals named as witnesses are strongly encouraged to participate in an investigation when requested. Employees should be informed that when merited, prompt corrective action could include discipline up to and including termination.

5. **Apply Policy to All Company Activities.**
   Policies should clearly state that prohibited activity is not only in the physical site of the workplace, but all company-related activities including field work, client or customer visits, travel to the field, and all company-sponsored social events. In these areas, behaviors are more relaxed and companies need the ability to address behavior that occurs outside of the physical location of the workplace.

6. **Confirm that Retaliation is Prohibited.** In addition to prohibiting discrimination on the basis of sex, both the PHRA and Title VII also prohibit retaliation against employees that make a complaint of discrimination, participate as a witness in a discrimination investigation or proceeding, or oppose any unlawful discriminatory practice.[7] Every year, the Pennsylvania Human Relations Commission ("PHRC") and the Equal Employment Opportunity Commission ("EEOC") publish charge statistics for the prior year.[8] These statistics show that, over the past 10 years, the number of retaliation claims filed each year has steadily risen. Retaliation claims are the most frequently filed type of claim with both

[7] 43 P.S. 955(d); 42 U.S.C. § 2000e-3(a).

[8] *See, e.g.,* Pennsylvania Human Relations Commission 2017 Annual Report; Charge Statistics FY 1997 trough FY 2017, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

agencies. It is not uncommon for retaliation claims to succeed, even when an employee's underlying discrimination claim fails.

Retaliation comes in many forms. There are obvious cases of retaliation, such as terminating an employee who makes a complaint. There are also more subtle forms of retaliation, such as exclusion from work activities, silent treatment, assignment to less desirable work, transfers. A well-developed anti-harassment/anti-discrimination policy will confirm that retaliation is prohibited and any incidents of retaliation by supervisors, those accused of violating policies, or other co-workers will result in immediate corrective action up to and including termination. Employees who complain or participate as witnesses need to understand that retaliation against them will not be tolerated.

In addition to establishing an employer's expectations for the workplace, an anti-harassment/anti-discrimination policy is also vital to an employer's ability to defend a harassment claim. In situations where an employee is subject to harassment, but does not suffer a tangible employment action (i.e. failure to promote, demotion, termination), an employer may assert what is known as the *Faragher-Ellerth* defense.[9] Under this defense, an employer can avoid liability for harassment if it can demonstrate two elements: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. To succeed on a *Faragher-Ellerth* defense, and employer must generally show that it maintained a policy against harassment, including a report procedure, and that the employee failed to report the harassment. In the absence of a written policy, an employer will not succeed on a *Faragher-Ellerth* defense.

C. CONSENSUAL ROMANTIC RELATIONSHIP POLICIES

It is not uncommon for romantic relationships to begin in the workplace. Employers should consider a consensual romantic relationship policy prohibiting dating between supervisors and individuals the supervisor oversees. Employers have legitimate concerns that workplace relationships between supervisors and their reports not only increases the likelihood of a sexual harassment claim, but can also negatively impact the team. The relationship often creates an actual or perceived unequal power dynamic in a work arrangement. Other teammates not part of the relationship experience actual or perceived favoritism and bias. Significant issues can also arise after a consensual relationship ends as previously welcomed behavior may become unwelcomed.

While Pennsylvania employers may implement blanket prohibitions against all romantic relationships between any coworker in the workplace, this approach is impracticable and less common. Anti-fraternization policies can force employees to hide their relationship status and requires active detection and monitoring.

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[9] The *Faragher-Ellerth* defense was first articulated in two decisions of the United States Supreme Court, *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Pennsylvania Courts have applied the *Faragher-Ellerth* defense in gender discrimination and harassment cases arising under the Pennsylvania Human Relations Act. *See, e.g., Hoy v. Angelone,* 456 Pa. Super. 596, 608, 691 A.2d 476, 481 (1997); *Florimonte v. Scranton Laminated Label, Inc.,* 11 Pa.D.&C.5th 412, 433 (C.P. Lackawanna 2010).

A more practical approach to workplace romances is a consensual romantic relationship policy that sets clearly defined boundaries. Supervisor/subordinate relationships pose the greatest risk of a harassment claim because they involve an uneven balance of power. Indirect supervision of a romantic partner should also be prohibited. In drafting a consensual relationship policy, employers should consider the following policy elements:

- A prohibition against romantic relationships between a manager/supervisor and employee that reports directly or indirectly to that person.
- A prohibition against romantic relationships between employees who work closely with one another, or in the same department.
- A requirement that employees who engage in a workplace romance must disclose the relationship to the employer.
- Identification of the company representative to whom a relationship must be disclosed.
- A process to separate, transfer or reassign one or both employees involved in the romantic relationship.
- A statement that, if there are no positions available to move one or both employees, the employees will be given the option of resigning.

D. COMPANY TECHNOLOGY POLICIES.

Policies addressing company technology clearly needs to identify that employees have no expectations of privacy and that any company technology will be monitored. Email messages, web visits, text messages, social media posts, computer phones, computers, tablets are forms of communication which fall under the terms of an anti-harassment policy. Employees need to understand that these forms of communication will be viewed and reviewed by employers proactively and in response to complaints during an investigation.

III. TRAIN ON AND REINFORCE POLICIES.

Employers must presume that even though they have developed and distributed the most carefully written policies, employees may not read or understand them. Adequate training should occur in various phases of the employment process: when onboarding an employee, during small department meetings, in yearly company meetings, and in periodic formal, customized training programs. Employees should be inundated with expectations and education in numerous communication strategies.

All new employees should not only receive a copy of the antiharassment/antidiscrimination policies, but someone should verbally review the policy directly with the new hire within their first two weeks of employment. The reporting procedure should be specifically explained. This message should be reinforced periodically throughout employment. A specific, customized

training program should also be developed that fits the needs and challenges of a company's unique culture.

Designing an effective training program can be a difficult task. In January 2015, struck by the number of sexual harassment claims filed each year, the EEOC authorized a Select Task Force on the Study of Harassment in the Workplace. In June 2016, after studying the issue of workplace harassment for 18 months, the Task Force published a report of its findings.[10] One of the Task Force's key findings was that much of the training done by employers over the past 30 years was too focused on avoiding legal liability, and ineffective at preventing harassment in the workplace. Despite decades of companies training employees, there is no specific studies confirming that training has been effective as performed. Training strategies need to change.

Employers should consider the following best practices when implementing training programs. Many of these practices have been specifically endorsed by the EEOC Task Force.

A. COMPANY LEADERSHIP SHOULD BE VISIBLE AND ENGAGED IN TRAINING.

As previously discussed, a harassment-free work environment requires support, reinforcement and proactive modeling at the C-Suite level. Visible executive support transforms training from a legal requirement to a core value of the company which the C-suite should model so that employees understand these expectations are taken seriously.

Leadership support can come in a variety of forms. Company executives and leaders should consider attending employee training sessions. The fact that leaders are willing to take time out of their schedules to attend employee training sessions underscores for employees the importance of harassment and discrimination prevention. Even if leaders cannot attend an entire training session, they should be present at the start of the session to introduce the trainer and highlight the company's commitment to anti-discrimination and encourage employees who experience or observe discrimination, harassment, or retaliation to complain. If personal attendance is not possible, leaders should consider a prerecorded a message reinforcing the importance of this issue to the company.

Company leaders can also create other opportunities to reinforce training on an informal basis. Although the HR Department will be involved in the logistics of scheduling training, they should consider asking a member of the leadership team to announce the training to employees. For employers that hold regular staff and department meetings, company executives should make an effort to attend these meetings in the weeks leading up to training to create buzz about the training. After training has been completed, leadership should follow-up in formal and informal settings to reinforce the messages delivered in training. Leaders should also direct strategies to test reporting procedures and ensure that the designed system is effective.

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[10] Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, June 20, 2016.

B. ON-GOING TRAINING SHOULD BE CONDUCTED FOR *ALL* EMPLOYEES.

Too often harassment training focuses only on a company's general labor force. A comprehensive training program will include everyone from the company President to the mail room clerk. Although the message for each group will be tailored based on their position in the company, every employee needs to understand the company's commitment to eliminating harassment and discrimination.

Employers should consider the following best practices for training at all levels of the company:

- **C-Suite Training.** Leaders need to understand not only legal compliance, but their role in providing a discrimination free workplace. C-Suite training should understand and discuss the following:
    - The role of gender inequity and power imbalances as a root cause of discrimination and harassment.
    - Unconscious bias or subtle forms of discrimination.
    - Prior complaints and outcomes.
    - The importance of creating gender equality within the organization as a method to combat discrimination and harassment.
    - The role that leadership plays in upholding, modeling and enforcing the company's anti-discrimination program.
    - Communication strategies when discussing the company's anti-discrimination program and policies with managers and employees.
    - Promotion practices for individuals that effectively and proactively model non-discriminatory communication and action and understand their role in preventing discrimination.
    - The business case for having well-balanced, diverse leadership teams who can vet internal policies and programs from different perspectives.
    - Prompt, proactive strategies for addressing not only internal complaints of discrimination and harassment, but complaints about key customers or stakeholders who exhibit behaviors that violate company policies.
    - The most effective reporting practice and investigation procedure for the company.

- **Employees Accepting Reports.** Any employee designated to accept or investigate harassment, discrimination, and retaliation must engage in a robust training protocol, including legal training and strategies to counsel employees through the complaint process. Forms should be designed to assist in intaking complaints so relevant information is taken. Strategies and resources should be identified to assist and counsel employees during the process.

- **Manager/Supervisor Training.** Front-line supervisors and managers play a key role in a company's harassment prevention program. They are often in the best position to observe prohibited conduct and set the tone for acceptable behavior. It is critical for supervisors and managers to understand the role they play in the company's harassment prevention

efforts.[11] They should receive ongoing training to assist them in: identifying prohibited conduct; knowing when and how to intervene in a potentially harassing situation; preempting bad behavior; promptly and appropriately responding to employee complaints; forwarding complaints up the chain of command, and overseeing corrective action. I recommend a minimum of 2 hours of one-on-one training every year in small group (under 25) of managers. The small group training enables managers to engage in interactive discussions of how they would handle situation that are both overt and subtle. Managers should also encourage an environment where employees complain about behavior, whether or not the person complaining has experienced or has observed the behavior.

Supervisor training is also extremely important for Pennsylvania employers because supervisors and managers can be found personally liable for discrimination and harassment under Pennsylvania law. Unlike Title VII, which only permits a finding of liability against an employer, the PHRA permits a finding of liability against individuals who "aid, abet, incite, compel or coerce the doing of any" unlawful discriminatory practice.[12] Pennsylvania Courts have interpreted this language broadly to include a supervisor's failure to take action to stop known harassment.[13] Managers and supervisors must be provided training to ensure they understand that they can be held personally liable if they participate in, or fail to address, harassment in the workplace.

C. TRAINING SHOULD BE CUSTOMIZED TO THE WORK ENVIRONMENT.

A bad training program is worse than no training at all. The day of showing a generic video or webinar where legal definitions of harassment and discrimination are read is gone. This strategy is ineffective for several reasons: (1) it does not convey that harassment/discrimination prevention is a priority for the employer; (2) it does not apply to the employer's specific work environment; and (3) it often fails to address unconscious or subtle bias.

Discrimination and harassment concepts can be difficult to understand. Employees come to the workplace with their own lenses of the world, perspectives, and experiences, and have different views on what constitutes acceptable behavior. Training needs to be customized and specifically tailored to deliver the company's anti-harassment/discrimination message in a way that employees will understand and apply in the workplace. When it comes to training, one size does not fit all. A qualified trainer, well-versed in all aspects, both legal and social of harassment and discrimination should be employed retained to conduct training.

In preparing a customized training program, employers must consider the following factors:

- Company culture
- Industry/type of business in which the employer is engaged

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[11] Recognizing the importance of manager training as a key factor in harassment prevention, California, Connecticut and Maine all require mandatory training for supervisory employees upon accepting a supervisory position. AB-182455, § 12590.1; Regulations of the Connecticut State Agencies, § 46a-54-204(C); 26 Me. Rev. Stat. § 807(3).

[12] 43 P.S. § 955(e).

[13] *See, e.g. Dici v. Pennsylvania*, 91 F.3d 542, 553 (3d Cir. 1996).

- Composition of employees
- Size of company
- Existence of internal HR Department/resources
- Education level of participants
- Generation of participants
- Management structure
- Location of workplace
- Recent complaints (internal and external) or examples of unacceptable behavior
- Methods to engage employees (incentives for completing a quiz, videos, cartoons, appropriate humor, handouts)

An effective training presentation will incorporate real world examples and hypotheticals that could actually arise in the employer's work environment. Employees are more likely to understand and retain the legal concepts behind harassment training if they actively participate in working through hypothetical scenarios, roleplaying and group discussion. They are more likely to be engaged if the training is conducted by live trainers, who foster an interactive approach, and are prepared to address any question that is asked during the training.

Beyond covering the legal elements of discrimination and harassment, employers should address workplace civility, anti-bullying and bystander intervention in training programs. One of the EEOC's more groundbreaking recommendations is its suggestion that employers offer general civility and bystander intervention training as part of a harassment prevention program. According to research cited by the Task Force, incivility, derision and disrespect in the workplace often precede harassment.[14] Consider for example, an employee that refuses to look at or talk to a co-worker. This type of behavior could create a perception that the employee's behavior is due to a protected class. By focusing on general civility, employers can foster a culture of respect which helps to prevent conduct from rising to the level of unlawful harassment.

One type of civility training recommended by the EEOC is bystander intervention training. This type of training has traditionally been used as a violence prevention strategy, and has become increasingly popular on college campuses to combat incidents of sexual assault. Bystander intervention training differs from traditional harassment training because it focuses on a collective approach to harassment prevention by employees at all levels, rather than a top-down approach. Instead of portraying harassment prevention as an employer-mandated rule that must be followed, bystander intervention empowers employees to take responsibility for maintaining a positive environment, and to intervene with co-workers and peers that violate expectations.

D. TRAINING SHOULD BE CONDUCTED AND REINFORCED ON A "REGULAR" BASIS.

Historically, many employers have conducted harassment training largely in response to complaints or the resolution of a legal claim. This type of training strategy is ineffective for two primary reasons: (1) it does not convey that harassment and discrimination are taken seriously by

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[14] Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, June 20, 2016 (citing 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)).

an employer; and (2) it does not address turnover in an employer's workforce. An effective anti-harassment program requires proactive training on a regular basis to demonstrate an employer's commitment to anti-harassment, empower existing employees to take ownership in creating a harassment-free workplace, and ensure that employees understand the employer's policies and expectations. It often takes repeated exposure for employees to understand how such concepts as unconscious bias play a role in how employees interact.

To combat workplace harassment through training, some states have enacted mandatory training statutes. [15] Additionally, several states, require mandatory training for state employees. In Pennsylvania, state employees are required to be educated in sexual harassment issues through written materials, formal training, educational videos, orientation sessions, workplace discussions or individual counseling.[16]

The EEOC takes an aggressive position in defining "regular" training. In the Task Force Report, the EEOC expresses concern that training conducted once a year does not convey to employees that preventing harassment is a high priority, and suggests that harassment prevention be reinforced throughout the year. In order to balance the need for harassment prevention with a company's operational needs, employers should consider the following training schedule:

- The company's anti-harassment/anti-discrimination policies should be reviewed with all new employees as part of the onboarding process.
- Formal, company-wide training should be conducted *at least* every year.
- Manager training should be conducted each year in 2 hour segments of small groups of managers (under 25 per group).
- The company's anti-harassment/anti-discrimination policies should be reviewed and reinforced at department meetings, toolbox talks, lunch and learns, and other company meetings.

IV. TAKE PROMPT CORRECTIVE ACTION.

When an employer is faced with a harassment complaint, it has a legal duty to take "prompt corrective action." In situations where harassment is perpetrated by non-supervisory employees, an employer that immediately addresses and rectifies harassment can avoid liability.

What constitutes prompt corrective action will vary by situation, but typically includes the following:

- **A Prompt and Thorough Investigation of the Claims.** In light of the fact that investigations will be addressed in a separate panel discussion, I will reserve remarks on this topic.

- **Interim Corrective Measures.** During the course of an investigation, it may be necessary to implement interim corrective measures to ensure that further harassment does not occur

[15] In Maine, private employers with 15 or more employees must train all employees about sexual harassment within one year of beginning employment, and supervisors and managers must receive additional training within one year of assuming a supervisory position.
[16] 4 Pa. Code Sec. 7.595.

and that the investigation process is unbiased and not subject to influence. The employer may need to place the alleged perpetrator on paid leave during the investigation, or separate employees. In implementing these measures, it is important that the employer not engage in any action which may be perceived by the complaining employee as retaliatory. For example, if an employee complains that another employee is engaged in harassment, the alleged perpetrator, not the complainant, should be moved. To the greatest extend possible, the individual complaining should be asked if there are any interim measures that would make them feel safe and able to perform their position pending the investigatory process.

- **Formal Corrective Action.** Once the investigation is complete and the employer has made a conclusion about the complaint, formal corrective action should be imposed. This may come in the form of discipline for the offending employee, a requirement that the offending employee seek training and/or counseling through the employer's Employee Assistance Program (EAP), a "last chance agreement," or termination. What form of discipline to impose will depend on the specific facts and circumstances of the offense. Disciplinary measures should be proportional to the seriousness of the offense.[17] Where employees accused of offending action are part of a labor union, corrective action may be specified by the collective bargaining agreement.

- **Reinforcement of Harassment Prevention.** Any time a claim of harassment or discrimination is made, an employer should consider providing company-wide anti-harassment training. In situations where a complaint escalates to an administrative charge of discrimination filed with the PHRC or EEOC, the agencies often require training as part of the resolution of the claim. The PHRC proactively offers free training upon request to any organization in Pennsylvania, and also conducts training when required as part of settling a complaint of unlawful discrimination.[18] Training should be conducted in accordance with the best practices recommended above.

- **Termination clauses for the C Suite.** Taking appropriate corrective action can be extremely difficult in situations where the offending employee is an executive or leader in the company. One proactive strategy that employers can implement for employees who have written employment agreement including a specific clause indicating that engaging in harassment or discriminatory behavior, or failing to take action to address harassment or discrimination, is a basis for immediate termination.

V. ENCOURAGE PRIVATE SETTLEMENT AGREEMENTS.

Many harassment, discrimination, and retaliation claims are settled prior to going to a jury trial. The legal process can be expensive, emotionally draining, and embarrassing for all involved. To the extent that the parties involved can settle a claim prior to heated litigation, all parties tend to have a more positive experience. Despite what is in the news today, confidential settlements between the parties should continue to be an option for the parties to decide based on the facts and circumstances of the situation.

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[17] Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice 915.002 (June 18, 1999) (*citing Mockler v Multnomah County,* 140 F.3d 808, 813 (9th Cir. 1998)).

[18] Pennsylvania Human Relations Commission 2017 Annual Report, p. 6.

Any settlement of a harassment or discrimination claim will involve the execution of a settlement agreement by the employer and employee. In exchange for the payment of settlement proceeds, an employer will almost always require the employee to fully release and waive any and all employment claims the employee has, or may have, against the employer. Confidentiality provisions can either be one-sided or mutual. A mutual confidentiality provision, which applies equally to employer and employee, is often equally important to the employee. An employer's request for a confidentiality provision can provide a basis for an employee to negotiate a greater settlement payment. Additionally, some employees may simply wish to prevent the facts of the case from becoming public knowledge so that the employee can move on to another opportunity without others knowing about the situation. Prohibiting confidentiality in agreements could take away an important incentive for companies to settle claims.

VI. CONCLUSION.

What recent headlines and social media movements have shown us is that we have a lot of work to do. Companies need to take this issue seriously. Eliminating harassment and discrimination will never happen organically without intentional strategies and effective., repeated programs and initiatives that address this multi-layered problem on many levels with different strategies.

With proactive policies, c-suite engagement, effective training, and prompt corrective action, progress can be made on this issue.

Thank you for the opportunity to provide input on this important issue.

Respectfully submitted,

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