

WOMEN'S RIGHTS ORGANIZATIONS URGE ALBANY LEADERSHIP TO ADOPT STRONG SEXUAL HARASSMENT POLICIES WITHIN THE FY2019 BUDGET

Dear Governor Cuomo and New York State Legislative Leadership,

As experts and advocates for women's rights and equal opportunity, we urge you to ensure that the policy components of the FY2019 budget that seek to reduce sexual harassment in the workplace advance protections in this area of law. As the events of the past year illustrate, it is imperative that the law do more to combat sexual harassment in the workplace. We appreciate and applaud your attention to this issue. To that end, we urge you to incorporate the following recommendations into the FY2019 budget.

Eliminating Non-Disclosure Agreements Except Upon Complainant's Preference

Non-disclosure agreements (NDAs) are being used to cover up the behavior of repeat offenders. However, in some cases victims desire confidentiality. The State should ensure NDAs are voluntary for all employees by adding procedural protections found in other areas of discrimination law, such as a revocation period and required notice that the complainant maintains a right to go to government agencies.ⁱ

Training and Prevention Work

To reduce sexual harassment in our workforce, employees and employers must have the tools they need to prevent it. We strongly recommend all employers, both public and private, be required to provide biannual trainings that reflect standards and best practices promulgated by the State Division of Human Rights.

Reporting Requirements

In an effort to improve transparency across industries, all employers, both public and private, should be required to report annually in relation to sexual harassment: 1) the number of violations against that employer; 2) complaints filed in court and with government agencies; and 3) the total number of settlement agreements, including those with non-disclosure agreements. Where the State requires standardized internal complaint and investigatory procedures for employers, the State should also gather information related to the number of internal complaints filed as well as letters by outside counsel alleging sexual harassment.

Defining Sexual Harassment

Several legislative proposals currently define sexual harassment too narrowly to only include conduct of a sexual nature, implicitly excluding discriminatory conduct based on gender that is not sexual in nature. In this respect, we strongly recommend the definition of sexual harassment reflect the current legal standard.ⁱⁱ In addition, concerns exist as to the insurmountable nature of the current "severe or pervasive" legal standard which has resulted in shutting colorable claims out of court and allowing serious offenses to go without redress.

Clarifying Employer and Managerial Liability

Courts have untenably narrowed when employers and managers may be found legally responsible for sexual harassment. Any final proposal should include an employer liability standard that ensures employers and managers are responsible for sexual harassment that they commit, that they knew about, or that they should have known about.ⁱⁱⁱ

Eliminating Mandatory Arbitration Clauses

In order to ensure employees' rights are not already limited when they walk through the door, the State should attempt to reduce mandatory arbitration agreements (MACs) in employment contracts. Given that the Federal Arbitration Act precludes states from prohibiting MACs outright, the State should disincentivize MACs by refusing to contract with employers who include these clauses in contracts. In addition, the State should also preclude contractors from including pre-employment non-disclosure agreements in their employment contracts.^{iv}

State Indemnification of Sexual Harassment by Members of the Legislature

To ensure that victims receive redress, it is important that the State remains responsible and indemnify state employees for wrongdoing. However, the State can and should require the employee to pay the State back. Further, we recommend that this section apply only to employees who have earned, and violated, the public trust, i.e. elected members of the legislature.^v

Investigatory and Complaint Procedural Standards

The State should require uniform complaint and investigatory procedure for all levels of government as well as employers who wish to receive the privilege of contracting with the State.^{vi}

In addition, while the current proposals under consideration may be a good step forward, we recommend that these standards and protections be extended to all workplaces, both public and private,^{vii} applicable to all forms of workplace discrimination, and incorporate a strong public education component.^{viii}

Given the current national attention to this issue, we urge you to seize this opportunity to advance New York law by incorporating these recommendations. New York can and should be a leader in combatting sexual harassment. The women of New York State deserve nothing less.

Respectfully,

A Better Balance
New York Civil Liberties Union
ACRIA
American Association of University Women -
New York State, Inc. (AAUW-NYS)

AAUW - St. Lawrence County Chapter
Brooklyn Queens NOW
Callen-Lorde Community Health Center
Citizen Action of New York
Concerned Clergy for Choice

CWA Local 1180
Day Care Council of New York
Day One
Empire State Indivisible
Empire State Progressives
Empire State Virtual NY Branch AAUW
Family Planning of South Central New York,
Inc.
Gay Men's Health Crisis
Gender Equality Law Center
Girls for Gender Equity
Greater New York Labor Religion Coalition
Hollaback!
Hope's Door
Indivisible Nation BK
Interfaith Impact of NYS
Jewish Women's Foundation of New York
LatinoJustice PRLDEF
League of Women Voters of St. Lawrence
County
Legal Momentum, The Women's Legal
Defense Fund
Manhattan Young Democrats
MB Rogers/MaribarStudio
Metro New York Chapter US National
Committee UN Women
MomsRising
NAACP New York State Conference
National Association for Female Executives
National Center for Law and Economic Justice
National Council of Jewish Women New York
National Institute for Reproductive Health
Action Fund
National Organization for Women - New York
National Organization for Women -
Westchester
New Shelves Books
New York Coalition of One Hundred Black
Women
New York Paid Leave Coalition
New York State Coalition Against Domestic
Violence
New York State Coalition Against Sexual
Assault

New York State Nurses Association
NYCD-16 Indivisible
NYCLU
Office and Professional Employees
International Union (OPEIU), AFL-CIO
One Voice to Save Choice of Congregation
Planned Parenthood Empire State Acts
Planned Parenthood Mohawk Hudson
Planned Parenthood of Nassau County
Planned Parenthood of New York City
Planned Parenthood of the North Country New
York
Planned Parenthood of the Southern Finger
Lakes
Public Health Association of New York City
Reproductive Health Access Project
Restaurant Opportunities Center of New York
RHAvote
Rodeph Sholom
The YMCA of Greater Rochester
True Blue NY
U-Act Womens' Issues
Ulster Activists Women's Issues Committee
Ulster County Democratic Women -
Campaign Committee
Upper Hudson Planned Parenthood
Violence Intervention Program
WCLA - Choice Matters
Westchester Women's Agenda
Western New York Council on Occupational
Safety & Health
WHARR (Women's Health and Reproductive
Rights)
Women's Center For Education And Career
Advancement
Women's City Club of New York
Women's March Alliance
YWCA Brooklyn
YWCA of Binghamton and Broome County
Zonta Club of Greater Queens
Zonta Club of New York
Zonta Club of Westchester

ⁱ To ensure procedural protections for signing parties, the State should include the following language: “A) Notwithstanding any other law to the contrary, for any claim or cause of action, whether filed or unfilled, actual or potential, and whether arising under common law, equity, or any provision of law, the factual foundation for which involves sexual harassment, in resolving, by agreed judgment, stipulation, decree, agreement to settle, assurance of discontinuance or otherwise, a state agency or a state official or employee acting in their official capacity shall not have the authority to include or agree to include in such resolution any term or condition that would prevent the disclosure of any or all factual information related to the action unless the condition of confidentiality is the complainant’s preference and the complainant agrees to the condition knowingly and voluntarily. A complainant’s preference to include a condition of confidentiality may not be considered knowing and voluntary unless the agreement: 1) is written in a manner that can be clearly understood; 2) specifically refers to rights or claims arising under relevant federal, state, or local laws; 3) advises that the employee consult an attorney before accepting the agreement; 4) provides twenty-one days within which to consider the condition; 5) provides that for a period of at least seven days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired; and 6) must be supported by consideration in addition to that to which the employee already is entitled. B) An agreement to settle a sexual harassment claim shall expressly state that it does not prohibit, prevent, or otherwise restrict the employee from doing either of the following: (1) lodging a complaint of sexual harassment committed by any person with the appropriate local, state, or federal agency; or (2) testifying, assisting, or participating in any manner with an investigation related to a claim of sexual harassment conducted by the appropriate local, state, or federal agency; (3) Any provision of an agreement to settle a sexual harassment claim that violates subdivision (1) or (2) of this subsection shall be void and unenforceable.”

ⁱⁱ Furthermore, consistent with current law, the definition should reflect that a single incident of sexual harassment may be sufficient to meet the definition of sexual harassment. The following definition can be used: “‘Sexual harassment’ means unwelcome sexual advances, requests for sexual favors, verbal, written, pictorial or physical conduct of a sexual nature, or conduct based on an individual’s sex or gender, if (1) such conduct is made either explicitly or implicitly a term or condition of employment; (2) submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual’s employment; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment. Whether alleged conduct constitutes sexual harassment shall be determined on the basis of the record as a whole and the totality of the circumstances, such as the nature of the conduct and the context in which the alleged incidents occurred. No one factor alone determines whether particular conduct violates this section, and a single incident may be sufficient. The complaining individual need not be the target of the sexual harassment for the conduct to violate this section.”

ⁱⁱⁱ Such a standard, would be reflected in the following language: “An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of discrimination based on sex, with respect to sexual harassment where: (1) the employee or agent exercised managerial or supervisory responsibility; or (2) the employer knew of the employee’s or agent’s discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee’s or agent’s discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or (3) the employer should have known of the employee’s or agent’s discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.”

^{iv} The following language can be used to reduce MACs in a way that has not been precluded by the FAA: “Contracts hereafter awarded by the state, or by any state agency, shall not be let, granted or awarded to any contractor where the contractor requires employees or prospective employees to enter into written contracts if such contract: (i) restricts or limits such employee’s ability to bring or adjudicate claims relating to unlawful discriminatory practices based on sexual harassment in any forum; and (ii) contains any term or condition that would prevent the disclosure of any or all factual information related to future complaints or action related to sexual harassment. A clause shall be

inserted in all contracts hereafter made or awarded by the state, or by any state agency, requiring a contractor to whom any contract shall be let, granted or awarded, as required by law, to certify to the office of general services not later than June thirtieth of each year during the term of the contract that the contractor does not require employees or prospective employees to enter into written contracts if such contract: (i) restricts or limits such employee's ability to bring or adjudicate claims relating to unlawful discriminatory practices based on sexual harassment in any forum; and (ii) contains any term or condition that would prevent the disclosure of any or all factual information related to future complaints or action related to sexual harassment."

^v The following language could accomplish that by amending the Legislative Law: "If all or part of a payment, financial award, or settlement is paid or obtained from any state or legislative accounts or funds, in connection with a claim alleging sexual harassment against an individual elected member of the legislature, the member of the legislature shall fully reimburse the account or source of the funds for the amount of the award or settlement. "Member of the legislature," includes elected members of the New York State Assembly and the New York State Senate. The payroll administrator shall withhold from a member of the legislature's compensation such amounts as may be necessary to reimburse the account for the payment of an award or settlement."

^{vi} We recommend tolling the statute of limitations if a complainant chooses to pursue an internal complaint. Furthermore, the statute of limitations should be extended from one to three years to file a sexual harassment complaint with a state or local agency.

^{vii} In addition, sexual harassment affects different industries in unique ways. To that end, the law must be tailored to address the particular needs of workers in different industries. For instance, hotel workers, who must often interface with guests in private settings, face high rates of sexual harassment in the workplace. The law should account for the challenges faced by these employees by enacting legislation tailored to their needs, e.g. providing workers with panic buttons, and ensuring that they can be re-assigned to a different position if they are harassed and do not face retaliation for reporting incidents of harassment.

^{viii} Employees need a better understanding of their rights and remedies should they experience sexual harassment in the workplace. The State Division of Human Rights should be tasked with developing accessible online materials detailing this information. Furthermore, all state employers should be required to post a notice of rights, created by the State Division of Human Rights, in a conspicuous area of the workplace.