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September 15, 2022

Testimony on New York State's Model Sexual Harassment Prevention Policy

Good morning. My name is Seher Khawaja and I am a senior attorney at Legal Momentum, the Women's Legal Defense and Education Fund. For over five decades, Legal Momentum has been at the forefront of using the law to advance gender equality for women and we are honored to be here today.

I want to start by thanking Commissioner Reardon, Commissioner Imperial, and the Governor's Office for holding this hearing and inviting us to be a part of this important discussion. Through our work, we regularly see employers falling short in addressing sexual and other forms of harassment and one essential way to advance transparency and accountability is to ensure that employers have a legitimate written policy that is enforced. By requiring written policies, New York is leading the way and the DOL has created a valuable model policy for us to build upon and strengthen.

Today, I want to briefly cover 5 areas where we can work towards strengthening the DOL's efforts to meaningfully address workplace harassment, including (1) collecting data and information to assess progress; (2) prioritizing the needs of our most vulnerable workers; (3) fostering an approach that addresses the spectrum of sexual harassment; (4) eliminating procedures known to disempower victims; and (5) addressing inequity more broadly.

The first gap we are facing is a lack of information. New York's legislation thoughtfully included a periodic review to maintain progress, and we are especially heartened that the Department of Labor and the Division on Human Rights have engaged in this broad consultative process so that we keep moving forward. Yet we still lack critical information to adequately assess our progress. We currently know very little about employer compliance rates and impact on workers, including the extent to which workers are aware of internal policies, feel comfortable using them, and whether these policies have facilitated reporting of sexual harassment.

Worker voices and experiences must drive this process. Although reporting or auditing measures might require changes to the underlying legislation, the DOL should also consider any monitoring or reporting that could be carried out and consider conducting surveys, which could be done through the state's new sexual harassment hotline with a few simple questions for workers. Employers should also be encouraged to carry out internal audits and to track data on harassment complaints. This approach would help



us better understand how these policies are functioning and better prepare for the next review.

A second gap we need to address is to center the needs of workers who are especially vulnerable to workplace harassment, including women of color, immigrant women, and women in lower-wage industries, including domestic workers, farm workers, and hospitality workers. All too often, these women face unique and heightened vulnerabilities yet do not see their experiences reflected in guidance and policies. For example, we know that cleaners in office buildings, hotel workers, and farm workers are often at heightened risk of sexual harassment and assault because they typically work in isolated areas, while in the restaurant industry, the reality of working for tips can lead to higher rates of sexual harassment.

As the DOL moves to update its model policy, it's essential that it identify some of the most vulnerable sectors, engage in consultations with workers in these sectors, and use this feedback to shape its guidance. The DOL should also consider opportunities to issue industry-specific guidance. The policy should reflect a diverse set of workplaces and worker experiences, including those of women of color, LGBTQ+ workers, workers with disabilities, and immigrant workers. The policy must be language accessible and account for the heightened risks faced by immigrant workers who typically fear reporting based on the risk or threat of retaliation based on immigration status. The policy should account for these risks and can address them in examples throughout the policy, including the retaliation section.

Our third recommendation is for the policy to go a step further in guiding employers to address sexual harassment earlier. Laudably, the model policy acknowledges that "harassment need not be severe or pervasive to be unlawful." However, we know that sexual harassment continues to thrive in workplaces where less severe forms of conduct are tolerated, harassers are emboldened, and misconduct escalates. We therefore suggest the updated policy go further. Specifically, the policy should explain that employers should make clear that there is a range of prohibited conduct and a corresponding range of proportionate corrective actions, depending on the nature and severity of the conduct. Employers should be advised to intervene early to prevent misconduct from escalating. Employers should also be directed to ensure that all staff responsible for administering the policy are trained on the policy and legal requirements. Time and time again, we have found that leadership and HR personnel are ill-equipped to handle sexual harassment complaints in a competent and sensitive manner and they get the law wrong.

As a fourth recommendation, it's critical that the model policy avoid practices that disempower complainants. For so many of our clients, the process of challenging sexual harassment is traumatic and disempowering and most question whether it was worth it when all is said and done. Going forward, we must do our best to shift this dynamic. For example, the current model policy notes that investigations are confidential to the extent possible. However, this type of confidentiality has long been used by employers as a shield. After a complainant has gone through the traumatic process of filing a complaint, employers often provide minimal information telling them only that a complaint was founded or unfounded and denying them additional information based on confidentiality grounds. This approach leaves complainants in an impossible situation unable to even plan for their own safety and wellbeing at work. The policy should make clear that complainants should be entitled to receive basic information pertaining to their complaint, including the determination made, the basis for the determination, and actions taken, if any.

Lastly, we commend New York State for amending its law to address harassment based on all protected characteristics as we know well that harassment, like other forms of discrimination, often occurs based on intersecting forms of identity. As the policy is updated, it should reflect this broader prohibition. Moreover, to eliminate workplace harassment, we need to address underlying workplace culture as we have found that sexual harassment thrives in workplace cultures that are hierarchical, less diverse, and less inclusive. Therefore, the policy should encourage employers to consider deeper structural changes to advance civility, inclusivity, and equality. These underlying drivers of inequity have to be tackled before we can make meaningful progress.

I want to again thank the Department of Labor, the Division of Human Rights, and the Governor's Office for the opportunity to share our thoughts and for your leadership on this issue and we hope you will continue to rely on us as a resource going forward. Thank you.