



WORKING REPORT:

Draft Policies on the Prevention of Sexual Harassment in the Virtual World of Work and in Political Life

Developed by the Penn Law Policy Lab

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© Copyright [Artemisia Gentileschi](#) 1610. *Susanna and the Elders* is a 1610 painting by the great Italian Baroque artist Artemisia Gentileschi. The work shows an uncomfortable Susanna with the two men lurking above her while she is in the bath.

These draft policies were developed as part of a policy lab on sexual harassment taught at the University of Pennsylvania Law School by Professor Rangita de Silva de Alwis.

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2 percent of the CEOs of [Global 500](#) companies are women. None are women of color.

The global average for women in [national parliaments](#) is approximately 25 percent.

In the [International Bar Association study on sexual harassment](#), 75% of sexual harassment in the workforce claimed to be unreported and 1 in 3 female identifying respondents have been sexually harassed in a work context.

Key recommendations and highlights of the working report include:

- ☐ An expanded definition of sexual harassment.
- ☐ The inclusion of non-traditional workers (interns, contractors, temps, clerks, fellows, etc.) in the scope of federal sexual harassment laws and the creation of specific reporting mechanisms for these individuals that make their reporting options clear and efficient.
- ☐ Model training module for the virtual world of work.
- ☐ Model code of conduct for virtual world of work.
- ☐ New watchdogs, ombudspersons, and other mechanisms for addressing sex-based harassment.
- ☐ Addressing online sexual harassment in the context of women's political participation.

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PART 1: Model Draft Framework for Policy on Prevention of Sexual Harassment in the Virtual World of Work

Introduction

COVID-19 has acted as a lightning rod to alter the shifting landscape of work around the world. Whether workers have moved from working in a physical office to working from home, continued to work from home, remained in their physical place of work to provide essential services throughout the pandemic, lost their job, or experienced some combination—their “world of work” looks different today than it did a year ago—and it will continue to change.

Sexual harassment, however, is a constant.¹

As more workplaces have moved online, so has the harassment. And although anyone can be subjected to harassment online, women, especially women of color, trans, nonbinary and gender non-conforming people, women who are members of the LGBTQ+ community, women who are ethnic minorities, and other women at the intersection of more than one marginalized identities are especially vulnerable.

In addition to the pandemic’s health and financial crises, workers are facing sex-based harassment in their virtual world of work. Yet many organizations do not have the tools to address existing problems, educate and protect workers, and prevent future harassment from occurring.

Now is the time to fill that gap.

Understanding sexual harassment

The popular perception of sexual harassment is that it refers to unwanted sexual advances, usually by men against less powerful women.² Workplace harassment, however, is both sexual, nonsexual, and intersectional in nature, and takes a variety of forms, including, but not limited to subordinating, marginalizing, sidelining, and isolating the subject of harassment. As explained by legal scholars, “harassment is more about upholding gendered status and identity than it is

¹ We use the terms “sexual” harassment and “sex-based” harassment interchangeably. As we explain below, both should be understood to include workplace harassment that is both sexual and nonsexual in nature, and which stem from and serve to maintain unequal gender norms and power relations. Thus, we believe the term “sex-based” harassment is more descriptively accurate than “sexual” harassment.

² See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1692 (1998).

about expressing sexual desire or sexuality.”³ For this reason, we sometimes adopt the term “sex-based” harassment and use it interchangeably with “sexual” harassment.

Unequal power relations pose structural challenges

Although sexual harassment is often experienced by and between individuals, it is also the result of power relations that structure how societies are organized, economies operate, and cultural norms are shaped. For example, in most countries women participate less in the workforce than men, and when they do work, they get paid less for the same jobs. Women are also more likely to have part-time or contract work and be employed in sectors where job security is often fragile. Meanwhile, for many working mothers, a full day of work is followed by hours of childcaring and household labor. These structural and social determinants, and others, create a discriminatory environment for women at home and place a disproportionate burden on women in the workforce, in which the resulting unequal power relations only serve to exacerbate the existing problem of sex-based harassment.

A global pandemic and a global reckoning on racial and gender injustice has fundamentally changed our workplaces and shown the urgent need for structural change.

The changing nature of the “World of Work”

A common—though not universal—change for workers during the pandemic has been to shift to a more virtual “world of work”—whether that world is completely virtual or a hybrid physical-virtual world.

Yet some workers have worked remotely for years or work for organizations that are entirely virtual but are under increased pressure from the health and financial crises. Other workers have remained in their physical place of work to provide essential services throughout the pandemic. Still others have lost their job. What’s more, the nature of the world of work will continue to evolve.

In this context, companies and organizations must also ensure that policies on harassment can apply to the evolving and virtual world of work. As such, this framework aims to contribute to the development of new and revised policies that account for the changing nature of the world of work

Thus, although we focus on virtual work, this framework is meant to serve only as a starting point to expand on existing anti-harassment policies or to create anti-harassment policies that can apply to virtual work. Importantly, the framework is meant both as a means to protect and respond to incidents of sex-based harassment, but also as a tool for prevention and education.

³ Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. 17, 19 (2018).

More and more organizations are declaring their commitment to fair and inclusive work environments. The evidence is clear that disease outbreaks, such as with COVID-19, as well as harassment both perpetuate existing inequities and disproportionately affect minority groups. Moreover, they threaten individuals' livelihoods and to [undo](#) many of the advances toward equality that organizations have made in recent years.

Our framework is informed primarily by our interpretation of International Labor Organization (ILO) Violence and Harassment Convention, 2019 (No. 190) and the work of Vicki Schultz, including the Open Statement on Sexual Harassment from Employment Discrimination Law Scholars, published in the Stanford Law Review in the wake of the #MeToo movement. We also recognize the contributions of Kimberlé Crenshaw, who first coined the term “intersectionality” to explain how multiple factors of identity intersect and overlap to create layers of oppression and discrimination.

Organizations must rise to the challenge to create a safe and equitable workplace— whether that place is virtual, physical, or both. We hope this document can serve as a helpful starting point for them to do so.

Defining Sexual Harassment

Definition

Whereas Article 1 of the ILO Violence and Harassment Convention, 2019 (No. 190) states:

- (a) “violence and harassment” in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment;
- (b) the term “gender-based violence and harassment” means violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment.

Whereas it is the intention of this Policy to move beyond the common understanding of the term “sexual harassment”—i.e., unwanted or inappropriate sexual remarks and physical advances—and towards a more expansive and meaningful conception of “sex-based harassment.” This conception, [proposed](#) by a legal scholar, recognizes that harassment is about upholding gendered status and identity, not just expressing sexual desire or sexuality. Thus, harassment encompasses both sexual and non-sexual behaviors and practices, including sex segregation, gender stereotyping, sexism, and gender discrimination.

In this usage, harassment includes, but is not limited to: gender stereotyping and humiliating behavior; social ostracism, exclusion, and work sabotage on the basis of one’s sexual or gender-identity; undermining and/or taking credit for women’s work, reputation, and ideas; comments and conduct which are degrading and reinforce gendered workplace hierarchies (such conduct may include, but is not limited to, rape, aggressive touching, forced viewing of porn, taking and circulating sexual photos, lewd jokes and behavior, etc.); exhortations to conform with gendered and normative behaviors and dress; as well as various other forms of humiliation, stereotype, and exclusion.

Crucially, what binds this conduct together is not only that it locates harassment’s origins as between and within the categories of sex and gender-identity, but that it draws one’s attention to the purpose of the conduct: not as an expression of sexual interest—which a narrow conception of sexual harassment would be confined to—but rather as an instrument to maintain and enforce the harasser’s location in a gendered hierarchy. It is in this manner that power relations produce and reproduce themselves in the world of work.

Intersectionality

Harassment takes into account multiple factors of discrimination, such as sex, age, race, ethnicity, socio-economic status, religion and sexual identity. Harassment may occur with increased frequency to women of color, trans, nonbinary and gender non-conforming people, women who are members of the LGBTQ+ community, women who are ethnic minorities, and

other women at the intersection of more than one marginalized identities. We recognize the contributions of legal scholar Kimberlé Crenshaw, who first coined the term “intersectionality” to explain how multiple factors of identity intersect and overlap to create layers of oppression and discrimination.

Sexual Harassment is a Human Rights Violation

Whereas, the protection against sexual harassment and the right to work with dignity are universally recognized human rights by international conventions and instruments such as the: The Beijing Declaration and Platform of Action 1995; ILO Violence and Harassment Convention, 2019 (No. 190), The CEDAW General Recommendation 19; the Sustainable Development Goals 5; The InterAmerican American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994; The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, 2003; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 2011; UN Guiding Principles for Business and Human Rights.

Recalling other relevant international instruments as the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, The Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Protection of the Rights of All Migrant Workers and Their Families, and the Convention on the Rights of Persons with Disabilities.

Recognizing the importance of a work culture based on a mutual respect and dignity of the human being to prevent violence and harassment and recognizing that the duty of the employer is to provide a safe working environment in which work can be carried out.

Scope and Applicability

Whereas the concept of protection against sexual harassment in the virtual world of work and the prevention and redressal of complaints of sexual harassment is new and burgeoning, this framework is considered to be still evolving and considered a “living” document.

Whereas the ILO Violence and Harassment Convention, 2019 (No. 190) “applies to violence and harassment in the world of work occurring in the course of, linked with or arising out of work: (a) in the workplace, including public and private spaces where they are a place of work; (b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities; (c) during work-related trips, travel, training, events or social activities; (d) through work-related communications, including those enabled by information and communication technologies; (e) in employer-provided accommodation; and (f) when commuting to and from work.”

Whereas the COVID-19 crisis has increased the amount of remote virtual work, it is important to elaborate on and emphasize two points from the ILO definition:

1. The workplace can mean any place in which work is conducted, including a dwelling place or home, employer-provided accommodation, or third space.
2. Incidents of sexual harassment in virtual work can occur including but not limited to via email and chat platforms, phone and video calls, and social media.

As the lines between home and work and personal and professional are blurred, the policy must establish boundaries between covered and uncovered conduct. For example, an organization could establish the following limiting principles:

The conduct is covered if:

1. The relationship between the parties at issue is related to work, *OR*
2. The communication at issue is related to work, *OR*
3. The conduct occurred within the organization's pre-defined working hours.

Who is Covered

Whereas the ILO Violence and Harassment Convention, 2019 (No. 190) (1) "protects workers and other persons in the world of work, including employees as defined by national law and practice, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer;" and (2) "applies to all sectors, whether private or public, both in the formal and informal economy, and whether in urban or rural areas."

The policy protects all persons including full time, part time, informal, hourly and non-paid interns and contract workers, regular, temporary and ad hoc employees working in the organization and is not limited to a particular sized organization.

Duties of the Employer

The duties of an employer include, but are not limited to:

- ❖ Adopting a comprehensive strategy to prevent and combat sexual harassment that includes addressing the structural and cultural forces that perpetuate sexual harassment;
- ❖ Acknowledging that harassment takes place in the world of virtual work;
- ❖ Promoting gender sensitivity in virtual work, including on virtual platforms, such as Zoom, Google Meet, Webex, and others (e.g., no breach of privacy or comments that might be deemed insensitive and sexist);
- ❖ Raising awareness about the effects of sexual harassment;
- ❖ Developing tools, guidance, education and mandatory training specific to addressing harassment in the virtual world of work;
- ❖ Making these resources available and accessible in languages that are widely spoken in the country, for example, on the company website, through emails, etc.
- ❖ Establishing or strengthening reporting, enforcement, and monitoring mechanisms, such as providing a hotline or an expedited digital complaints mechanism;
- ❖ Ensuring access to support for victims by, for example, encouraging cultural change and allyship;
- ❖ Providing for remedies and sanctions, including, but not limited to, providing paid leave or flexible work arrangements, temporary protection against dismissal, and the right to

resign with compensation, reinstatement, and/or appropriate compensation for damages to victims; and

- ❖ Ensuring effective means of inspection and investigation, including establishing a complaints committee, an inspection and investigation panel or body and providing support and protection for witnesses to report or assist in investigation, among others.

Importance of Addressing Sexual Harassment in the Virtual World of Work

We recognize the rights of all workers to work in an environment that is free from violence and harassment.

We recognize that the workplace is an important entry point to change social norms.

Harassment in the virtual workplace can affect a person's psychological, physical and sexual health, dignity and family and social environment.

We recognize that harassment may prevent persons from remaining in and advancing in the workplace.

Harassment is incompatible with an equitable work environment and exacerbates the negative impacts of COVID-19 on equitable economic participation and gender, racial and other forms of equality.

Addressing Complaints

A Mechanism to Address Complaints of Harassment

Employers must adopt a mechanism for victims to report their claims of sexual harassment. That mechanism should be accessible, confidential, and transparent.

Information in the complaint form should include, but is not limited to: (1) date, time, and place of the incident of sexual harassment, (2) any witnesses to the incident, (3) circumstances preceding and following the incident, and (4) any supporting documents and evidence (i.e. emails, screenshots, phone calls, video recordings, etc.).

Victims should be encouraged to file a timely complaint as close to the incident as possible. However, employers should also promote the use of apps, such as Gender Watch, that can contemporaneously and confidentially record the details of incidents and can be referenced at a later date when the victim chooses to file a complaint.

Complaints Committee

The Constitution and Composition of the Committee:

- ❖ Chairperson: A representative of the company well recognized for their work in advancing gender equity and well versed in the theory and practice of addressing sexual harassment. The chairperson is to be nominated by and elected through a voting system that includes employees at all levels to ensure accountability to the employees rather than the company. Elections should be held at least biennially.

- ❖ A conflict resolution specialist
- ❖ At least one member who identifies as from an underrepresented race or ethnic group
- ❖ At least one member who identifies as LGBTQ+
- ❖ An ombudsperson who is a well respected independent expert from outside the company. The ombudsperson should both serve as an integrated component of the complaints committee and as a parallel reporting mechanism. The ombudsperson responsible for fielding sexual harassment complaints should be distinct from any similarly situated independent expert hired by the company to investigate non-gender based complaints. The ombudsperson who sits on the sexual harassment complaints committee should have expertise in gender theory, gender-based discrimination and sexual harassment. The ombudsperson should be a good listener and maintain confidentiality to the extent permissible under company policy. The ombudsperson can serve as a reporting outlet when complainants want to explore options prior to or separate from formally filing a complaint; in this respect, the ombudsperson fills an informal role within the broader reporting framework. The ombudsperson should take a trauma-informed approach to listen to complainants and provide complainants with a comprehensive catalog of options.

Powers of the Committee

To conduct and complete a prompt, thorough, and impartial inquiry into the complaint within ninety days of the receipt of the complaint. The Committee must communicate with the complainant about preliminary steps taken to initiate an investigation within two weeks of the receipt of the complaint. The Committee must, however, conduct the investigation as efficiently as possible and should consistently review its processes to ensure that complaints are resolved in a timely manner. The Committee can summon and enforce attendance of any person. Throughout the entire duration from complaint to resolution, the ombudsperson should serve as an impartial advisor for both parties. The ombudsperson is to not only serve as an information source for the complainant, but also to ensure the efficacy of the company's complaint committee. The committee is to ensure protection for both victims and whistleblowers.

Where appropriate, the committee should employ dispute resolution mechanisms within the workplace. The conflict resolution specialist should mediate the internal dispute to reach a resolution.

The committee should also issue a statement to the complainant if the committee decides not to investigate further. Such a statement is to include a detailed explanation for the committee's decision with an opportunity for the complainant to respond. Opportunity for response is crucial to promote ongoing dialogue to bring awareness to sex-based harassment.

Procedure

Employers must encourage reporting and complaints of sexual harassment in virtual work--including on platforms, phone and video calls and social media--by quick action, quick remedies and redress and making the complaints process efficient, transparent, and private.

Employers must make all parties covered aware of multiple reporting options, including reporting to the ombudsperson.

Employers must collect data and compile statistics on sexual harassment in the virtual world of work that allow for assessment of the problem and the design of concrete actions.

Employers must build anti-retaliation and privacy protections, including but not limited to mechanisms for maintaining complainant's confidentiality to the extent consistent with a thorough investigation.

Employers should establish an automated response to acknowledge the receipt of a complaint of sexual harassment. The complaints committee must send the complainant a preliminary evaluation of the complaint and a summary of the steps taken to begin the investigation within two weeks of receiving the complaint. The investigation and implementation of enforcement remedies must be completed within ninety days of receiving the complaint.

Resolution

Non-disclosure agreements should not be permitted unless they are the express preference of the employee, the employee has time to consider and to revoke the agreement, and the term does not prohibit the disclosure of factual information to certain government agencies. If it is the express preference of the employee to include confidentiality language in an agreement, they must be given at least 21 days to consider whether to accept the confidentiality language, and then have seven days to revoke their acceptance. Any non-disclosure term must not prohibit the individual from participating in an investigation with state or local agencies, nor restrict the disclosure of facts necessary to receive public benefits to which the individual may be entitled.

Mandatory arbitration clauses should not be permitted.

No settlement agreement shall place restrictions on the complainant's current or future employment opportunities.

Consequences and Remedies

Disciplinary action can include but is not limited to: written apology, warning, reprimand, censure, withholding of promotion, withholding of pay raise, transfer to another department or office, undergoing counseling, additional training, carrying out community service, fine.

Remedies could include, but are not limited to, but are not limited to, providing paid leave or flexible work arrangements, temporary protection against dismissal, and the right to resign with compensation, reinstatement, and/or appropriate compensation for damages to victims.

Employers should also consider what the complainant believes is an appropriate remedy in the situation. The complaints committee should ask for and review the remedy sought by the complainant in the formal reporting mechanism. Although the complainant's requested remedy should not solely determine the outcome of an action, it should be taken into consideration.

Compensation to the victim should include compensation for: mental trauma, pain, suffering, emotional distress to the aggrieved employee, the loss in career opportunities, medical expenses for psychiatric treatment.

Confidentiality

Confidentiality is maintained throughout the reporting and enforcement process to provide safeguards for the victim, to encourage victims to come forward with their complaints, and to preserve the dignity and well-being of the victim. Employers must also ensure that the information obtained in this process is not later misused or compromised.

An ombudsperson is to work with the rest of the complaints committee and with the broader human resources personnel to delineate the extent to which the ombudsperson can maintain confidentiality of a complainant's accusation prior to complainant utilizing formal reporting channels. Examples of when an organization can limit the specific sex-based harassment ombudsperson's confidentiality should be limited to when there is credible threat of bodily harm to one or more persons within or outside of the company.

Prevention

Culture of Prevention

Employers must foster a culture of prevention in their workplaces including, but not limited to, the following methods:

- ❖ Organizational leadership focused on building a respectful and inclusive workplace at every level;
- ❖ Hold individuals responsible for engaging in harassment with consequences proportional to the harm they caused, and reward participation in anti-harassment efforts including reporting and conducting investigations;
- ❖ Provide the option of flexible leave (paid) for the complainant during the investigation process and prioritize time and money for committee members to focus on the investigation;
- ❖ Collect sex disaggregated data and conduct workplace climate surveys to assess the extent of harassment across the organization;
- ❖ Encourage bystander reporting and intervention; and
- ❖ Encourage academic institutions including law schools to add an anti-harassment module as part of their professional responsibility/training courses.

Training

- ❖ Gender-sensitive training should be a mandatory part of induction into an organization and should be monitored and periodically developed in accordance with the changes of the work environment and based on data collected. A uniform module that is used with all groups in all workplaces would not engage with the specifics of each. Instead a layered approach that links actions to work roles and responsibilities is preferable.
- ❖ Training should cover all conduct that demeans, intimidates, excludes, undermines, or otherwise treats people differently on the basis of sex. Examples should include a wide range of conduct, emphasizing that both sexual and nonsexual forms of harassment can contribute to a hostile work environment based on sex.

- ❖ Training should cover race-based and other types of harassment and discrimination (race, color, religion, national origin, age, and disability, for example, in addition to sex, sexual orientation, sex/gender stereotyping, and gender identity). It should explicitly cover and explain harassment and discrimination that is intersectional.
- ❖ Training should include concrete examples of circumstances unique to the world of virtual work that could constitute sex-based harassment, such as choice of virtual background, Zoom bombing, distribution of inappropriate images/gifs, etc.
- ❖ Training should detail the internal process that employees could use to file a complaint and should assure employees' rights to protection and confidentiality, as well as of redress regardless of their status of employment, work models, or work location. Training should also list what external resources, organizations, individuals that employees could reach out to for further support.
- ❖ Employers should rethink how training should be implemented, monitored, and progressed in the virtual world of work. Employers should be open to monitoring and evaluation of its training by third-party organizations.
- ❖ Training should be completed by all full-time and part-time employees, including interns. Training should also be made accessible in languages commonly spoken in the workplace.
- ❖ Members of the complaints committee should receive specialized training in conducting confidential investigations, conducting trauma-informed interviews, and the full range of options available to complainants.
- ❖ Training should incorporate a clear code of conduct for the virtual workplace. Employees should demonstrate understanding and agreement with the code through a signature and/or assessment.

Draft Model Training

In light of the explosive #MeToo movement and burgeoning recognition of the pernicious effects of sexual harassment in the workplace, legislation has been widely enacted to protect against workplace harassment. However, the mere existence of a sexual harassment policy within a corporation is insufficient - employers need to have a legally durable policy that is bolstered by effective education and enforcement measures.¹ As such, some legislatures have taken their efforts a step further by necessitating harassment training for employees.² Indeed, surveys and municipal case studies have shown that training is the “critical link between sexual harassment policies and perceived positive outcomes,” noting that “even the best policy, absent a commitment to training, is unlikely to have the desired workplace outcomes.”³

The benefits of robust sexual harassment training programs are manifold. Among the foremost motivators for employers is litigation prevention and minimization of corporate liability - a realistic concern, considering the EEOC’s caseload doubled in the year following #MeToo, with monetary damages paid by employers jumping from \$47.5 million to \$70 million in 2018.⁴ Furthermore, an effective sexual harassment training program can help in building an engaged workforce, supporting employees’ physical and mental health, and contributing to overall wellness and productivity.⁵ Successful sexual harassment training increases knowledge in a standardized way that is invaluable in diverse workplaces, allows victims to speak up more comfortably, cultivates a sense of safety and inclusivity, and increases bystander intervention.⁶

If implemented incorrectly, however, sexual harassment training programs may be ineffective or may even impart negative consequences.⁷ Critics say training programs ignore deeper structural issues relating to power dynamics and discrimination, and note that employers “must tie training to specific organizational policies and systems designed to accomplish the task” of true cultural change.⁸ It has also been suggested that training programs are simply symbolic demonstrations for the sake of litigation defense.⁹ Furthermore, sexual harassment training can lead to fear - both fear of misinterpretation of friendly behavior or weaponization of sexual harassment claims, as

¹ Richard Trotter & Susan Rawson Zacur, *Corporate Sexual Harassment Policies: Effective Strategic Human Resource Management*, 2 J. BUS. ECON. RSCH. 63 (2004).

² Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*, AM. BAR ASS’N (May 8, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims>.

³ Laura Reese & Karen Lindenberg, *The Importance of Training on Sexual Harassment Policy Outcomes*, 23 REV. PUB. PERS. ADMIN. 175 (2003).

⁴ Joell Beagle, *Top 4 Benefits of Sexual Harassment Prevention Training*, SAFE INST. (Oct. 19, 2019), <https://www.safeinstitute.org/blog/top-4-benefits-of-sexual-harassment-prevention-training>.

⁵ *Id.*

⁶ Carmina Ravanera & Joyce He, *Anti-Sexual Harassment Training: Does It Work?*, GENDER AND THE ECON. (Nov. 27, 2019), <https://www.gendereconomy.org/anti-sexual-harassment-training-does-it-work/>.

⁷ *Id.*

⁸ Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. L. REV. 147 (2001).

⁹ Ravanera & He, *supra* note 6.

well as victims' fear of stigma from being labeled an accuser and of ensuing investigations.¹⁰

Despite their potential pitfalls, training programs remain a widespread and critical part of sexual harassment-related corporate governance efforts. Basic elements of sexual harassment training programs include visible commitments from top-level leaders, qualified trainers, thoughtfully selected participant groups, and evaluation mechanisms.¹¹ The following comparative case studies will explore various approaches to sexual harassment training and analyze their respective strengths and weaknesses.

US Case Studies: New York, Illinois, and California

Both New York State and New York City enacted legislation in 2018 that require New York employers to provide their employees with sexual harassment prevention training.¹² Employers must ensure all employees are trained annually, and new hires should be provided with such training as soon as possible after commencing employment. Consequently, the NYC Human Rights Commission ("Commission") has developed an online training that satisfies both the New York State and New York City requirements.¹³ Employers may also choose to provide their own annual anti-sexual harassment training for employees provided that it meets the minimum standards promulgated in both acts.¹⁴

This section will first analyze the online training developed by the Commission and then make a comparative analysis with those developed by the Illinois Department of Human Rights ("IDHR") and the California Department of Fair Employment and Housing ("DFEH").

Content of the Commission's Online Training

The Commission's training module is 45-minute long, contains 164 slides and requires the participant to engage with the slides by answering true or false questions and by clicking to the next slide when finished with each lesson.

At the beginning of the module, the participant is shown a video about gender, including a summary of the following concepts: gender identity, cisgender, transgender, non-binary, an explanation of the differences between gender and sexuality, and examples of gender expression. The training then takes the participant through a series of stories to illustrate and answer the following points: (1) What is sexual harassment?; (2) What are my rights?; (3) What must an employer do?; (4) What do I do if I see harassment?; and (5) How do I file a complaint? The module subsequently covers an employee's right to complain to the city, state and federal

¹⁰ Kim Elssesser, *Sexual Harassment Policies May Be Doing More Harm Than Good*, FORBES (May 4, 2016), <https://www.forbes.com/sites/kimelsesser/2016/05/04/sexual-harassment-policies-may-be-doing-more-harm-than-good/?sh=1d9cf79c76b4>.

¹¹ Bishom-Rapp, *supra* note 8.

¹² N.Y. CITY LOCAL LAWS NO. 96 (2018), https://www1.nyc.gov/assets/cchr/downloads/pdf/amendments/Local_Law_96.pdf; N.Y. LAB. LAW § 201-G, <https://www.nysenate.gov/legislation/laws/LAB/201-G>.

¹³ *Anti-Sexual Harassment Training*, NYC HUMAN RIGHTS COMM'N, <https://www1.nyc.gov/site/cchr/law/sexual-harassment-training.page> (last visited Dec. 5, 2020).

¹⁴ *Id.*

agencies that enforce workplace sexual harassment laws. Additionally, the city legislation requires employers to detail their internal complaint process in their training.

Strengths

The module does a good job in explaining how gender impacts us and the differences between gender identity and gender expression. It also incorporates many examples of sexual harassment described in the voice of a person who experienced the harassment, which helped bring those examples to life. The module also covers harassment and discrimination that is intersectional, such as race, national origin, religion and sexual orientation, retaliation, and bystander intervention. However, the intersectionality and bystander intervention sections are pretty short and deserve to be fleshed out further. The module does a good job in laying out the reporting mechanism and the specific steps one could take to report harassment. But it would be helpful to offer this as a supplemental PDF as well so that employees can have a copy to refer to post-training. The module is accessible in ten other languages, including Spanish, French, Chinese, Korean, Russian and Arabic.

Weaknesses

Most of the video is narrated by one person and the majority of the slides are summary points about the narration. There aren't that many quiz questions and all of them are pretty straightforward. Furthermore, the participant is able to move forward with the module even if he or she gets a question wrong. All of these may lead to a training feeling somewhat "dry" although it's supposed to be "interactive." Although the module briefly addresses the roles of managers and supervisors, it is not comprehensive enough to effectively inform managers and supervisors about their roles and tools accessible by them to address and prevent harassment.

Comparison with Training Module Developed by the IDHR

In August 2019, Public Act 101-0221 mandated the IDHR to develop and release a model sexual harassment prevention training program for Illinois employers.¹⁵ All employees, including short-term and part-time employees and interns, must be trained. Independent contractors who work on-site or interact with the employer's staff are strongly advised to receive training.

Compared to the Commission's training, the IDHR training is more detailed and explicitly acknowledges harassment in online environments, which is particularly imperative in today's climate.¹⁶ Similar to the Commission's training, the IDHR training provides a detailed reporting mechanism and highlights employer responsibility, though this section could use more depth. The IDHR training has several pitfalls. The training provides a narrow construction of sexual harassment, framing it as a conduct that is sexual in nature, as opposed to sex-based harassment. Furthermore, it does not address bystander intervention and intersectionality. It is also not interactive (i.e., training is in the form of a powerpoint as opposed to an online interactive video), and it does not contain example scenarios to illustrate the topics covered.

Comparison with Training Module Developed by the DFEH

¹⁵ ILL. PUBLIC ACT 101-0221, <https://www.ilga.gov/legislation/publicacts/101/PDF/101-0221.pdf>.

¹⁶ ILL. DEP'T OF HUM. RTS., STATE OF ILLINOIS SEXUAL HARASSMENT PREVENTION TRAINING, <https://www2.illinois.gov/dhr/Training/Documents/IDHR-SHPT-2020-OCT-V2.pdf>.

California law requires employers of five or more employees to provide one hour of sexual harassment training to nonsupervisory employees and two hours of such training to supervisors and managers once every two years. The law requires the training to include practical examples of harassment based on gender identity, gender expression, and sexual orientation. The DFEH provides free online training courses that satisfy these legal requirements.¹⁷

Most notably, the DFEH has created two different trainings, one for supervisory employees and one for non-supervisory employees, underscoring the importance of having specialized training for managers and supervisors. The format of the training is similar to that of the Commission, where employees will need to click through a series of screens in one sitting and answer a series of questions.¹⁸ The DFEH training addresses bystander intervention, frames sexual harassment as sex-based harassment, contains more nuanced scenarios, contains more interactive quizzes where a participant won't be able to move forward until he or she gets a question right, discusses the intersectionality of sex-based harassment with discrimination based on race, national origin, age, etc., explains gender identity, gender expression and sexual orientation, outlines what an employee should expect from his or her employer, and addresses retaliation. The module is also accessible in different languages, including Spanish, Korean, Chinese, Vietnamese, and Tagalog. In contrast to the Commission's and IDHR's trainings, the DFEH training ties sexual harassment prevention to organizational climate by stressing multiple times that sexual harassment prevention is part of a collective organization change to create a workplace of respect.

Cultural Differences in Developing Training

Sexual harassment is not just complex, but multidimensional, as cultural differences across various countries can and do lead to different frames of reference and accepted behaviors concerning workplace sexual harassment.¹⁹ In China, the ILO and WomenWatchChina have produced a handbook on prevention of sexual harassment in the workplace.²⁰ Although the handbook explains sexual harassment using real cases as examples, highlights the importance of training and a swift reporting mechanism, and addresses retaliation, it looks at sexual harassment through a narrow lens. The examples the handbook gave are exclusively applicable in a physical workplace, and the definition of sexual harassment the handbook provided only covers behaviors which have direct negative impact on employees.

In Hong Kong, the Equal Opportunities Commission ("EOC") has been working with various sectors in providing sexual harassment training.²¹ But topics such as bystander intervention, intersectionality and a broader view of sexual harassment as sex-based harassment aren't

¹⁷ CAL. DEP'T OF FAIR EMP. AND HOUS., SEXUAL HARASSMENT PREVENTION TRAINING FAQ, https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/06/SB1343EmployerFAQ6_2020.pdf.

¹⁸ *Sexual Harassment Prevention Training*, CAL. DEP'T OF FAIR EMP. AND HOUS., <https://www.dfeh.ca.gov/shpt/> (last visited Dec. 5, 2020).

¹⁹ Jennifer Zimbroff, *Cultural Differences in Perceptions of and Responses to Sexual Harassment*, 14 DUKE J. GENDER L. POL'Y 1311 (2007).

²⁰ ILO & WOMEN WATCH CHINA, HANDBOOK ON PREVENTION OF SEXUAL HARASSMENT IN THE WORKPLACE, https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/publication/wcms_157627.pdf.

²¹ *Preventing Sexual Harassment*, EQUAL OPPORTUNITIES COMM'N, <https://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=preventing%20sexual%20harassment#ForWorkplace> (last visited Dec. 7, 2020).

necessarily prioritized.²² The same could be said for Australia,²³ though a 2020 report by the Australian Human Rights Commission has highlighted the importance of these issues.²⁴ Our point here is to acknowledge that creating a model training program is especially nuanced when considering different countries and should be adjusted according to cultural changes.

Other Considerations and Observations

As many of us have shifted to a virtual workplace due to the COVID-19 pandemic, sexual harassment training needs to be updated to address specific challenges stemming from virtual work.²⁵ Online harassment can take many forms. Some of the most common displays are inappropriate jokes or comments in employee emails or chat messages and the distribution of offensive photos, gifs, or memes. A recent survey discovered that there have been instances of male managers telling women to attend video calls wearing more make-up and sexier clothing.²⁶

Furthermore, retaliation is easier online because there are fewer people to witness it. For example, a woman reported that every time she spoke on a Zoom call, her perpetrator muted her. Retaliation could also take place in the form of women not being sent invites to a meeting.²⁷ This kind of exclusion and ostracization could create a hostile work environment. Managers should pay attention to behavior that may indicate ongoing online sex-based harassment. An employee who becomes quieter on Zoom or withdraws on group chats could be a warning sign. Bystanders who become aware of a coworker who misbehaves online or hears inappropriate comments from coworkers or bosses need to speak up. Employees should be trained on the proper use of email, chat, videoconferencing, and other forms of electronic communication. These are all important points to consider when creating sexual harassment prevention training in a virtual workplace. In addition, employers should also rethink *how* to carry out an effective sexual harassment prevention training virtually.²⁸

²² EQUAL OPPORTUNITIES COMM’N, FORMULATING CORPORATE POLICY ON SEXUAL HARASSMENT, <https://www.eoc.org.hk/eoc/upload/2013116173927302019.pdf>; *Preventing Sexual Harassment on Campus*, EQUAL OPPORTUNITIES COMM’N, <https://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=preventsшонcampus>; EQUAL OPPORTUNITIES COMM’N, PREVENTING SEXUAL HARASSMENT IN THE WORKPLACE, https://www.eoc.org.hk/EOC/Upload/UserFiles/File/publication/booklet/Cover&Content_final_ol_ENG.pdf.

²³ *Sexual Harassment in the Workplace*, AUSTRALIAN HUM. RTS. COMM’N, <https://humanrights.gov.au/our-work/sexual-harassment-workplace-legal-definition-sexual-harassment> (last visited Dec. 8, 2020).

²⁴ AUSTRALIAN HUM. RTS. COMM’N, RESPECT@WORK: NATIONAL INQUIRY INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES (2020), https://humanrights.gov.au/sites/default/files/document/publication/ahrc_wsh_report_2020.pdf.

²⁵ Ellen Pinkos Cobb, *Sexual Harassment in a Changing Workplace: Through the Context of Culture and COVID-19*, SAI GLOBAL (Apr. 28, 2020), <https://www.saiglobal.com/hub/blog/sexual-harassment-in-a-changing-workplace-through-the-context-of-culture-and-covid-19>.

²⁶ *Coronavirus: Women Told to Dress ‘Sexier’ When Working From Home, Survey Finds*, SKYNEWS (July 23, 2020), <https://news.sky.com/story/coronavirus-women-told-to-dress-sexier-when-working-from-home-survey-finds-12034520>.

²⁷ Sian Norris & Claudia Torrisi, *COVID-19 Hasn’t Killed Sexual Harassment at Work – It’s Just Moved Online*, OPENDEMOCRACY (Sept. 23, 2020), <https://www.opendemocracy.net/en/5050/covid19-sexual-harassment-work-online/>.

²⁸ Christina Ro-Connolly and Vida Thomas, *Viewpoint: Tips for Creating Virtual Anti-Harassment Training During the Pandemic*, SHRM (Aug. 25, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/creating-virtual-anti-harassment-training-covid.aspx>.

Separately, a recent Respect@Work report by the Australian Human Rights Commission found that online click-through sexual harassment training is not effective and could have a negative impact on employee attitudes to the issue. Targeted scenario based training that focuses on the complex or more subtle forms of harassment is more powerful and effective.²⁹

Overall, training modules offered by the Commission, the IDHR and DEFH are ideal for small businesses who only have a handful of employees and are looking for low-cost options. However, using the same training every year may lead to diminishing positive effects and the risk of training being viewed as merely a compliance goal. In addition, these training modules are not industry-specific and employees don't have the opportunity to ask questions live. On the other hand, national and global employers may want to create their own training that satisfies evolving requirements in multiple jurisdictions and incorporates industry-specific considerations and their own internal policies.

Employers that have resources to create their own training program should engage with trainers who have expertise on sexual harassment, inequality and discrimination and the skills to engage with complexities. They should also consider including victim-survivors and their advocates in this process. Those with managerial, leadership or internal investigative roles will need additional training, including how to handle reports and be mindful of the needs and wishes of those who file a report. Data collected from the complaint mechanism should inform future training content. Employers should have micro training follow-ups to maintain commitment and trace change at an individual level. Most importantly, training should be an embedded part of an organizational commitment to cultural change, conveyed by leadership and practiced by all. The focus needs to shift from what is unacceptable to what kind of workplace the organization wants to create and encourage.³⁰

Conclusion

Our findings and recommendations as set forth above serve as the basis for the training section subsequently incorporated into our larger proposed policy framework. Overall, while many organizations have come to realize the importance of ending workplace sexual harassment, current training programs must be expansively recalibrated to account for the emergent dominance of virtual work - an environment that presents a whole host of unique challenges and considerations. However, organizations should view this current moment in dramatically shifting workplace norms as a pivotal opportunity to clearly articulate and commit to substantive, forward-looking cultural change.

²⁹ AUSTRALIAN HUM. RTS. COMM'N, *supra* note 24; *COVID-19 Collaboration – Sexual Harassment in the Workplace*, PwC, <https://www.pwc.com.au/about-us/insights/non-executive-directors/sexual-harassment.html>.

³⁰ UN WOMEN, *WHAT WILL IT TAKE? PROMOTING CULTURAL CHANGE TO END SEXUAL HARASSMENT* (2019), <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2019/discussion-paper-what-will-it-take-promoting-cultural-change-to-end-sexual-harassment-en.pdf?la=en&vs=1714>; *Select Task Force on the Study of Harassment in the Workplace*, US EEOC (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686310.

Overexposed? A Modern Case Study on Sexual Misconduct in the Virtual World of Work

Policies must be informed by real-life examples. This annexure provides a case study of an occurrence of sexual misconduct in the virtual world of work, demonstrating why a broad yet nuanced conceptualization of sexual harassment is needed. We will be using law professor Vicki Schultz's *The Sanitized Workplace* and the framework she provides regarding sexuality and sexual harassment within the workplace to analyze the recent occurrence in which *New Yorker* journalist and CNN commentator Jeffrey Toobin exposed himself while on a work Zoom call. We will discuss the implications of this misconduct and how it interacts with the legal and policy proposals of acceptable and equitable workplace conduct proposed in Policy One. We aim to create a helpful and flexible framework to consider sexual harassment policies as the boundaries between home and workplace are increasingly blurred.

In October 2020, the *New Yorker* suspended reporter Jeffrey Toobin for “masturbating on a Zoom video chat” between members of the *New Yorker* and WNYC radio.¹ High-profile journalists and staff from the New York media outlets met on a Zoom video call to conduct an election simulation exercise. Two sources said they saw Toobin masturbating on camera during this call.² It was first reported by Vice online, and in the Vice article Toobin responded with a statement: “I made an embarrassingly stupid mistake, believing I was off-camera. I apologize to my wife, family, friends and co-workers. I believed I was not visible on Zoom. I thought no one on the Zoom call could see me. I thought I had muted the Zoom video.” Toobin’s indecent exposure was reported by numerous press outlets as a Zoom “incident,” not clearly defining or categorizing what happened as sexual harassment or misconduct, or making an effort to argue why this action shouldn’t be considered harassment or misconduct.³ After an internal investigation, Toobin was fired from the *New Yorker*.⁴

In the Framework for Policy on Prevention of Sexual Harassment in the Virtual World of Work, we draw key terms and analysis from Vicki Schultz, a leading voice in the field of sexual harassment and gender discrimination. In Schultz’s seminal essay, *Reconceptualizing Sexual Harassment*, she explains the prevailing “sexual desire-dominance paradigm” of sexual harassment laws is too narrow of an approach to understanding sexual harassment.⁵ Courts’ and workplaces’ focus on sexual conduct has obscured what Schultz considers to be more fundamental problems of gender-based harassment that are not primarily sexual. In her view, the focus of harassment law should be on “conduct that consigns people to gendered work roles that do not

¹ Laura Wagner, *New Yorker Suspends Jeffrey Toobin for Zoom D***k Incident*, VICE, Oct 19., 2020, <https://www.vice.com/en/article/epdgm4/new-yorker-suspends-jeffrey-toobin-for-zoom-dick-incident>.

² *Id.* More specifically, these two sources explained the larger group of journalists had a strategy session via Zoom, and then smaller groups divided up into Zoom breakout rooms to continue working. The sources said it seemed like Toobin was on a second video call while in the breakout room. When the groups returned from their breakout rooms and were back into the main Zoom call, Toobin manually lowered his camera and his colleagues saw him touching his genitals. Toobin then left the call, and rejoined moments later, “seemingly unaware of what his colleagues had been able to see,” and the election simulation exercise continued.

³ See, e.g., *id.*; Johnny Diaz and Azi Paybarah, *New Yorker Suspends Jeffrey Toobin After Zoom Incident*, N.Y. TIMES, Oct. 19, 2020, <https://www.nytimes.com/2020/10/19/business/media/jeffrey-toobin-new-yorker-suspended.html>; Ted Johnson, *Jeffrey Toobin Fired from the New Yorker After Incident During Staff Zoom Call*, DEADLINE, Nov. 11, 2020, <https://deadline.com/2020/11/jeffrey-toobin-new-yorker-fired-zoom-fall-1234613127/>.

⁴ Oliver Darcy, *Jeffrey Toobin fired from the New Yorker after exposing himself on a Zoom call*, CNN, Nov. 11, 2020, <https://www.cnn.com/2020/11/11/media/jeffrey-toobin-fired-new-yorker/index.html>.

⁵ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J., 1686–87 (1998).

further their own aspirations or advantage.”⁶ When sexual harassment laws and policies are so focused on sex, it limits the attention we ought to give to the other ways in which women are repressed and subjugated in the workplace, such as inequity of wage, time, emotional labor, leadership gaps, and stereotyping.

In Schultz’s later essay *The Sanitized Workplace*, she argues that laws designed to prevent and provide redress for sexual harassment have suppressed sexuality and intimacy in the workplace.⁷ She writes: “To put it plainly, sex harassment policies now provide an added incentive and an increased legitimacy for management to control and discipline relatively harmless sexual behavior without even inquiring into whether that behavior undermines gender equality on the job.”⁸ Schultz argues that the time and efforts spent on removing sex from the workplace is disproportionate to the harm it causes, and results in an overzealous management system that policies even the most mundane and harmless sexual and emotional relationships at work. Policies in this vein would include a ban on all office romances, and its effects would stifle blossoming friendships and camaraderie between employees.⁹

Schultz emphasizes that the overzealous policing of sexuality in the workplace is also an economic tool for management. By stripping workers of their humanness—their capacity and desires to form relationships with each other and emotional baggage that comes along with it, management is able to extract as much labor and product as possible.¹⁰ Schultz’s basic framework is one that allows for such human tendencies to exist in the workplace without being stifled and shunted aside. She argues that examples of these workplaces already exist in other countries, and that by introducing a more holistic view of work into our environment would be healthy both on a physical and emotional level, but also on an economic one.

The fact that multiple news outlets used the vague word “incident” to describe Toobin’s harassment shows there is a gap in our societal conversation about remote work and the cultural norms that govern the home as workspace. If Toobin were to masturbate in front of his colleagues during an in-person meeting in a conference room at the *New Yorker* offices, wouldn’t that clearly be considered a form of sexual harassment? The realm of the workplace has shifted from shared office space to private, individual homes, and the dynamics that govern workplace conduct have shifted as well. During a global pandemic that has relegated the bulk of us back into our homes where bedside tables have become our full-time offices, there has been a rapid shift in what we culturally accepted as appropriate for work. As the first few months of the stay-at-home orders wore on, many engaged in discussions on whether one should wear workplace attire (at least as a top), whether your camera should be on, if it’s okay to have your background be your home or if you should choose a neutral wall. These continued to shift and solidify as we realized that a return to what we once viewed as normal would not be coming any time soon. To log in to work now is also to invite one into your home, and often the most intimate places of it.

The Toobin case illuminates the decision-making behind the policymakers’ choice to design the “Scope and Applicability” section of Policy One in a broad and expansive way because it includes all the contradictions and blurred lines of our new reality. In this section, we define that the “workplace” can mean any place in which work is conducted, and we recognize that incidents of sexual harassment in virtual work can occur via video calls. As set out in the beginning of the

⁶ *Id.* at 1689.

⁷ Vicki Schultz, *The Sanitized Workplace*, 112 *YALE L.J.* 2064 (2003).

⁸ *Id.*

⁹ *Id.* at 2069.

¹⁰ *Id.* at 2066, 2136–37.

Policy, it is meant to be a framework and skeleton. We have noted that the norms for what a workplace even constitutes have changed rapidly, and we are aiming to provide a focus that is able to shift and accommodate an ever-changing landscape.

We argue that sexual harassment and misconduct does not necessitate an intent to humiliate, degrade, control or other exertions of power. While these motivations are common in instances of sexual harassment and misconduct, a framework that mandates their existence uses a one-way perspective where workplace environments are only shaped by the people within them, and does not take into account outside factors. In our case study of Jeffery Toobin, he did not admit to any desire to harm the many women he was on the Zoom call with by exposing himself. In witness reports of the incident, Toobin lowered the camera to a point where it was clear that he was masturbating, left the call, then rejoined without seeming to notice that he was on camera the entire time. It has been argued that because Toobin did not intend to be seen, then the incident can be chalked up to an embarrassing Zoom blunder, like a naked child running around in the background. However, we would like to expand this view from just intent of the perpetrator and consider gendered and sexual dynamics of having a white, male, high profile, and senior staff member of a notable organization expose himself in front of his peers, many of whom were women.

The environment is changed because of his actions, but external cultural cues and implicit power dynamics are also called into play. Learned gendered behavior such as silence and complicity in the face of inappropriate and harmful conduct in the workplace have been rewarded in the forms of employment and promotion. When a perpetrator with the resume Toobin has acts in a way that is in strict deviance from the norm, these power dynamics are utilized for his benefit, working to create shame and secrecy among female and lower ranking witnesses. An external cue would be that masturbation, a normal form of human sexual expression, is private. It's a crime to publicly expose oneself. Until very recently, the public discourse around masturbation has been non-existent and surrounded by shame.¹¹ Culturally and legally, it is a form of human sexuality that takes place in private, and if there are participants then they are willing ones. For Toobin to break these norms by publicly masturbating in a work call, the cultural cues to look away and keep quiet are triggered, and if they were not overcome by people who were willing to hold Toobin accountable, they would have worked in his favor.

We raise the question, would we be hearing about this story if Toobin exposed himself in front of a group of interns, or young people without other employment options? While Schultz argues that environments are shaped by the people who form them, the employees and management staff of a workplace, we argue for a two-way perspective, that a workplace environment also affects its inhabitants as well. Working from home invites your employer into a part of your life that previously had the privilege of privacy. While there are many behaviors that coworkers may see now because of this shift, we still have control of much of the environment as well. We can choose not to masturbate on camera. We can choose to alter our environments to be more accepting of our humanness, but we can also choose to respect the implicit structure of the workplace for our peers by remaining fully dressed on video calls. While Toobin says he did not intend to sexually harass his coworkers, his actions and the environmental conditions surrounding

¹¹ See, e.g., Zach Schonfeld, *Remember That Time Bill Clinton Fired his Surgeon General for Encouraging Masturbation Education?* NEWSWEEK, Feb. 5, 2016, <https://www.newsweek.com/remember-time-bill-clinton-fired-his-surgeon-general-encouraging-masturbation-423302> (explaining how Joycelyn Elders, appointed as Surgeon General by President Clinton in 1993, was asked to resign after she encouraged that masturbation be discussed in health educational curricula).

them still manage to create unease. A framework for the scope of sexual harassment needs to consider both internal and external effects of the environment on the employees, and not just how employees shape their environment.

Digital Reporting Mechanism

Model Complaint Form on Sexual Harassment can be found at this link:

https://docs.google.com/forms/d/e/1FAIpQLScmxMVsm3BVMZ7khjy2fJUP6NEbh-ya_-aGf9iBoCpJtwXvpQ/viewform?usp=sf_link (full text also included at the end of this annexure)

Workplaces must adopt a mechanism for reporting allegations of sexual harassment that is readily accessible, confidential, and transparent. Employers have a duty to raise awareness of multiple reporting mechanisms, such as a formal reporting mechanism or speaking to the ombudsperson at the company. At a time when the physical workplace has given way to the virtual world of work, it is more important than ever that organizations make information about reporting sexual harassment and the methods of enforcement readily available, convenient to use, and accessible to encourage victims to come forward. A digital reporting mechanism is an essential way to bridge this gap and provide victims with an efficient mechanism to report sexual harassment in the remote workplace. The reporting mechanism is one of the principal ways that an employee will engage with sexual harassment policy at an organization. The reporting mechanism itself, thus, should reflect a victim-centered approach that provides helpful information and a commitment to maintaining the dignity of the victim throughout the reporting process, investigation, and enforcement.

The model complaint form seeks to embody the values and commitments made in the International Labor Organization's Violence and Harassment Convention No. 190. In Article 10(b) of the Convention, the ILO directs its members to "ensure easy access to appropriate and effective remedies and safe, fair and effective reporting and dispute resolution mechanisms and procedures in cases of violence and harassment in the world of work" which includes "complaint and investigation procedures... at the workplace level."¹ In the virtual world of work, this commitment can most readily be fulfilled by adopting a digital reporting mechanism. A digital reporting mechanism can help expedite the reporting process and make reporting, investigation, and enforcement more efficient as employers adapt to providing resources remotely.

The model complaint form included here is a template for organizations to use when creating their own reporting mechanism. It is inspired by and modelled on the recommendations from India's POSH Act², New York State's Model Complaint Form for Reporting Sexual Harassment³, and India's SHE-Box, an online portal created by India's Ministry of Women & Child Development to facilitate the registration of sexual harassment claims by women throughout the country.⁴

This model complaint form was created using Google Forms as that platform is readily accessible, easy to use, and does not require downloading additional software. A link like the one

¹ International Labor Organization, Violence and Harassment Convention, No. 190, June 25, 2019, art. 10(b).

² See *India's Law on Sexual Harassment at the Workplace*, Nishith Desai Associates 10 (Feb. 2018), https://wccollective.org/wp-content/themes/wcc/Assets/Prevention_of_Sexual_Harassment_at_Workplace.pdf.

³ *Model Complaint Form for Reporting Sexual Harassment*, New York State, <https://www.ny.gov/sites/ny.gov/files/atoms/files/CombatHarassmentComplaint%20Form.pdf>.

⁴ ABOUT SHE-BOX, Ministry of Women & Child Development, Government of India, http://www.shebox.nic.in/user/about_shebox (last visited Dec. 11, 2020).

generated by Google Forms is user friendly, can be featured prominently in an online training module, and can be made directly available on an organization's website. Google Forms also allows the form's creator to gather data and look at the information collected in a holistic manner. As addressed in the model policy, employers must collect data concerning sexual harassment in the workplace and a site like Google Forms can help facilitate that data collection.

However, employers must also ensure and prioritize the confidentiality of the victim who chooses to report. Employers should scrutinize whatever platform they choose to use for its ability to store the data and personal information of the victim in a secure manner. In this sense, a platform like Google Forms may not be the best platform for data privacy and protection. Employers must analyze the risks involved in adopting a platform for online sexual harassment reporting and should prioritize the victim's confidentiality as one of the most important considerations.

As included in the model form, an employer should emphasize its commitment to maintaining the confidentiality of the victim throughout the process right on the reporting form. The ILO Convention No. 190 addresses this issue in Article 10(b)(iv) and Article 10(c) where it stresses that its members must provide protection against retaliation against victims, witnesses, and whistleblowers and to protect the privacy of anyone involved in the reporting process.⁵ The model form should contain the information that a victim would want to know when reporting so that she can manage her expectations of the process from the moment she submits the claim. It should contain the information about the timeline of the process, the communications the complainant should expect, and the confidentiality that will be maintained throughout the process.

The information requested in the model complaint form outlines what would be needed for any complaints committee to begin an investigation into the matter. Employers must respond to complaints with an investigation and any necessary remedies in a timely manner. When adopting a digital enforcement mechanism, the employer should enable an automated response to be sent to the complainant once the form has been submitted. The complaints committee, which receives and reviews the complaint as described in the policy framework, must reach out to the complainant within two weeks of receiving the complaint with information on its preliminary evaluation of the complaint and a summary of the steps it has taken in its investigation. Finally, the investigation and implementation of any appropriate remedies must be completed within ninety days of receiving the complaint. When discussing the timeline, employers should also provide information to the complainant about any relevant statutes of limitations for reporting sexual harassment at the state or local level.

The most important information requested in the model form concerns the details of the complainant, the alleged harasser, and the incident to be investigated. It asks for the identifying information for both the complainant and the alleged harasser concerning their name and position within the organization. It is not necessary for the complainant to know the position of the alleged harasser; however, the information will be important to the complaints committee when investigating the incident to understand the balance of power between the two parties and how that

⁵ International Labor Organization, Violence and Harassment Convention, No. 190, June 25, 2019, art. 10(b)(iv) & art. 10(c).

might have affected the way the harassing behavior was intended or interpreted by the parties involved.

The digital complaint form should also ask about any information or witnesses who could help corroborate the complainant's allegations. This information will be very useful to have at the outset of the investigation to assist the complaints committee in resolving the investigation and any enforcement measures in a timely manner. These questions also may be even more important in the digital workplace as more interactions between employees may be documented through recordings on Zoom, online messaging, and emails. It may also give the complainant notice that he may submit this kind of information to support his complaint and will give him more time to collect that evidence.

Additionally, the model complaint form includes a question about whether the complainant has contemporaneously recorded the information about the sexual harassment in an app. It is a required question in the model complaint form; however, the question does note that it will merely be helpful to the investigation to know whether it has been recorded. Several apps have been and are being developed that allow users to report and record sexual harassment and violence anonymously and confidentially.⁶ If a complainant has previously recorded the incident through one of the apps, the complaints committee may consider it as further evidence of the truthfulness and validity of the complainant's allegations. As more of these apps are developed using blockchain or other technological developments that provide greater anonymity, employers should include these options for confidentially recording information about sexual harassment in their training modules so that employees are aware of them and know of an alternate option for reporting sexual harassment anonymously.

New York State's Model Complaint Form for Reporting Sexual Harassment includes an optional question that asks whether the complainant has complained of or reported sexual harassment related to this one.⁷ The language in the form suggests that the complaint could be formal or informal and written or verbal. This question was included in this model form as well because like documentary evidence, it may aid in the investigation and provide further support for the complainant's allegations. As used in New York State's Model Complaint Form, the question is optional and adopts the broad definition of reporting to account for informal complaints that the complainant has made to others. If the complainant does not wish to reveal this information or it does not apply to her situation, she does not have to provide it.

The model complaint form includes a final question about remedies that is also entirely optional. It asks if the complainant has a preferred remedy for the situation and lists some examples of what a remedy could be. In addressing sexual harassment in the workplace, the employer's goal must be to create an environment free from harassment and remedies should act as both a deterrent and to redress the injury to the victim. Asking this question can help the complaints committee

⁶ Kim Elsesser, *Can Apps Help Eradicate Sexual Harassment?*, FORBES (Mar. 5, 2020, 2:45 PM), <https://www.forbes.com/sites/kimelsesser/2020/03/05/can-apps-help-eradicate-sexual-harassment/?sh=42f07f455522>.

⁷ *Model Complaint Form for Reporting Sexual Harassment*, New York State, <https://www.ny.gov/sites/ny.gov/files/atoms/files/CombatHarassmentComplaint%20Form.pdf>.

assess what kind of remedy would ensure that the victim feels that her injury has been redressed. It also provides a way for the victim to feel that her voice has been heard through each step of the process. The complaints committee is not bound by the preferred remedy but must consider it when deliberating any enforcement actions.

The model complaint form should be adapted to the specific needs of each workplace but any form that a workplace adopts should be accessible, confidential, and transparent and embody a victim-centered approach. As demonstrated by the model complaint form, a reporting mechanism is both a practical vehicle to ensure that victims can access a remedy for the harassment they have suffered and a vehicle for a workplace to convey its commitment to creating an environment that is free from harassment for all persons regardless of their sex. Adopting a digital reporting mechanism is an essential first step towards achieving that environment in the virtual world of work.

Full Text of the Model Form:

Sexual Harassment Complaint Form

Our Values and Dedication:

Sexual harassment will not be permitted in [this workplace] and will be addressed by [this workplace] in a prompt manner focusing on protecting and respecting your dignity and autonomy throughout the reporting process. Sexual harassment is sex-based harassment that encompasses both sexual and non-sexual behaviors and practices, including sex segregation, gender stereotyping, sexism, and gender discrimination.

What to Expect:

The contents of this form will be sent to a complaints committee which will review it and initiate an investigation of the matter within two weeks of receiving the complaint. You can expect an immediate automated response confirming the submission of this form and within two weeks, an email from a member of the complaints committee acknowledging your complaint and summarizing the initial steps that have been taken to assess and address your allegations. The entire investigation will be completed and any appropriate remedies will be imposed within ninety days of submitting this form. If you would like to pursue a complaint at the state or local level, please be aware that it must be submitted within [insert statute of limitations specific to employer's jurisdiction] of the incident.

Role of the Ombudsperson:

There is also an Ombudsperson whom you may contact and talk to as an independent consultant who can speak about potential options for dealing with and remedying the situation outside of the formal reporting mechanism here. The contact information for the Ombudsperson is the following [insert contact information specific to this workplace].

Commitment to Confidentiality:

The information contained in this form will be kept confidential throughout the reporting process. The alleged harasser and any witnesses will need to be interviewed by the complaints committee as part of an investigation. However, your identity will only be revealed in that context and will be kept between the parties and witnesses. We seek to encourage reporting, provide safeguards for those who decide to report, and maintain the dignity of those who report. Any information submitted in this form will not be used against you in retaliation at any point during the reporting process or afterwards.

Required Questions*

Email Address*

What is your name and position or affiliation with the organization?*

What is the name of the alleged harasser and, if known, his or her position within the organization?*

Please describe the harassment (may be one incident or more) in as much detail as possible. Include the time, date, and place to the best of your knowledge.*

Were there any witnesses to the harassment? If so, please provide their names.*

Do you have any corroborating evidence (i.e. screenshots, emails, recordings)? If yes, please describe the evidence and attach a copy.*

Was the information recorded in this form stored in an app that allows users to contemporaneously record incidents of sexual harassment? This information may be useful in the investigation.*

Have you reported any sexual harassment in the past? In this question, reporting refers to any written or verbal communication regarding harassing behavior from the alleged harasser.

What would be your preferred remedy? Sanctions can include termination of harasser's employment, withholding of harasser's pay raise or promotion, fine, apology, additional training, transfer to another department/office, or another reasonable option of your choice. The complaints committee will take this answer into consideration as part of its dedication to victim-centered remedies; however, it cannot guarantee that this remedy will be pursued as an enforcement mechanism after the investigation.

Ombudsperson Procedure

Introduction

The ombudsperson serves a unique role in an organization's sex-based harassment framework. The proposed policy explores innovative ways to address and prevent sex-based harassment, and the ombudsperson is a novel mechanism within the broader policy. The ombudsperson is to operate in parallel to the Complaints Committee as an informal grievance officer, working with the complainant as a first and continuous contact throughout the complaint's life span, from accusation to resolution. To fill a perceived gap between human resources offices and employees, companies need not only implement a general ombudsperson, but also an ombudsperson with tailored expertise to address sex-based harassment in the virtual workplace. This annexure will explain why companies need an organizational ombudsperson in the virtual workplace, how organizations are to fill the position, and what the ombudsperson's role will look like when addressing sex-based harassment allegations.

The Gap Between Traditional Reporting Systems and Employee Trust

The ombudsperson position was created in early nineteenth century Sweden as an appointed position within the government to investigate citizens' complaints against public officials.¹ The position's primary tenets at its inception were neutrality and independence.² The position has since evolved to operate within private organizations as an alternative dispute resolution tool.³ While several institutions across the globe have adopted an organizational ombudsperson since the 1960s,⁴ it is pressing that the position becomes ubiquitous. As of May 2020, only thirteen percent of U.S. companies utilized an ombudsperson.⁵

While the implementation of an ombudsperson is a novel mechanism to address sex-based harassment, it is not unprecedented. In Sweden, the Discrimination Act mandates that employers who become aware of discrimination or harassment "investigate the circumstances surrounding the alleged harassment and where appropriate take the measures that can reasonably be demanded to prevent harassment in the future."⁶ To stave off willful blindness, the law tasks

¹ John M. Capozzola, *An American Ombudsman: Problems and Prospects*, 21 WESTERN POLITICAL QUARTERLY 289, 289 (1968).

² *Id.*

³ Charles L. Howard, *What Happens When an Employee Calls the Ombudsman?*, HARVARD BUSINESS REVIEW (May-June 2020), <https://hbr.org/2020/05/what-happens-when-an-employee-calls-the-ombudsman#:~:text=Typically%2C%20when%20an%20employee%20calls,possible%20responses%20to%20the%20problem.&text=The%20ombuds%20may%20consult%20a,can%20also%20be%20more%20creative.>

⁴ MARY ROWE & HOWARD GADLIN, THE ORGANIZATIONAL OMBUDSMAN (2014) 5, available at https://www.ombudsassociation.org/assets/docs/The_Organizational_Ombudsman.pdf.

⁵ Frank Dobbin & Alexandra Kalev, *Why Sexual Harassment Programs Backfire*, HARVARD BUSINESS REVIEW (May-June 2020), <https://hbr.org/2020/05/why-sexual-harassment-programs-backfire#:~:text=The%20ombuds%20office.,to%20know%20of%20the%20complaint.>

⁶ DISCRIMINATION ACT (2008:567) (Swed.), ch. 2, available at https://www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen_eng.pdf.

an Equality Ombudsman with enforcing the prohibitions against discrimination.⁷ Upon report of an employer's failure to oblige with the Discrimination Act, the Equality Ombudsman then investigates the alleged harassment, and the employer must "give the Ombudsman access to the workplaces other premises."⁸ Absent a government official functioning as an Equality Ombudsman, it is imperative that institutions adopt an internal sex-based harassment ombudsperson to hold the institution accountable to its employees.

Croatia similarly names an ombudsperson as the primary enforcer of prohibitions against discrimination in its Anti-Discrimination Act. Croatia's legislation delegates nine concrete duties to the Ombudsperson in combatting discrimination. To summarize, the following are the ombudsperson's enumerated duties: (1) receive discrimination reports; (2) "provide necessary information" to complainants regarding their rights; (3) "take actions . . . required for elimination of discrimination;" (4) "warn the public about the occurrence of discrimination;" (5) mediate resolutions between parties with the parties' consent; (6) "file criminal charges;" (7) compile data on discrimination; (8) report to the government cases of discrimination; and (9) offer recommendations, administer surveys, and "suggest appropriate legal and strategic solutions to the Government."⁹

Sweden's and Croatia's national ombudspersons provide a framework off of which to base an organizational ombudsperson. While ombudspersons at the government level offer standardized approaches to combat discrimination, an organizational ombudsperson can effectively address and prevent sex-based harassment at the institutional level, offering focused approaches that will prove successful within each unique organization.

It is hard to quantify organizational ombudspersons' global prevalence due to different labels given to positions that function as ombudspersons and, conversely, the different roles those labeled "ombudspersons" execute.¹⁰ The conception put forth in this proposal mirrors the roles customarily attributed to organizational ombudspersons in South Africa, Japan, New Zealand, and the United States.¹¹ In 2017, the International Ombudsman Association had 696 organizational ombudsperson members.¹² Similar to the difficulty in determining the exact number of organizational ombudspersons around the world, there is a difficulty in empirically showing the position's effectiveness.¹³ Management scholars, however, maintain that organizational ombudspersons have "demonstrable effectiveness."¹⁴ Instead of data, scholars look to indicators of trust to evidence effectiveness. For example, an ombudsperson's workload indicates constituents' trust in the office; if an ombudsperson is busy, he or she has garnered the requisite trust to generate work via complaints.¹⁵ Per surveys, ombudspersons are often "swamped" with work.¹⁶ Additionally, from a business decision perspective, studies show that an

⁷ DISCRIMINATION ACT (2008:567) (Swed.), ch. 6, available at https://www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen_eng.pdf

⁸ *Id.*

⁹ ANTI-DISCRIMINATION ACT (2011) (Croatia), Art. 12.

¹⁰ *Supra* note 4, at 7.

¹¹ *Id.*

¹² INTERNATIONAL OMBUDSMAN ASSOCIATION, IOA 2017 SNAPSHOT (2017), available at https://www.ombudsassociation.org/assets/docs/2017_IOA-Annual-Report-Infographic_FINAL_1.pdf.

¹³ *Supra* note 4, at 4.

¹⁴ *Id.* at 10.

¹⁵ *Id.* at 4.

¹⁶ *Id.*

ombudsperson is a cost-effective cog in the reporting office's machine.¹⁷ Although data is hard to obtain, both anecdotal evidence and cost-reduction evidence illustrate that an ombudsperson is effective for workplace conflict resolution.

A shift toward virtual work, not only during the pandemic, but also with continued technological advancements facilitating virtual work well beyond COVID-19's containment, calls for renewed harassment reporting systems. With any workplace complaint, an employee might refrain from reporting, fearing retaliation.¹⁸ A virtual workplace only compounds the hesitation to report; an employee who is separate from the physical space might not want to engage with the human resources protocols. In response to an offensive chat message, an employee might feel uncomfortable, but self-console with the notion that they do not have to physically see the offender in person. With perceived lower stakes, the victim might determine that the time-consuming costs of reporting to human resources outweigh any potential benefits. Contrastingly, an ombudsperson is an informal resource, and the employee can determine how much time to spend discussing options with an ombudsperson. The employee does not have to formally file a complaint even if an employee decides to confidentially consult with an ombudsperson. A certain decorum is expected and maintained in a physical office space. At home, a webcam captures an employee's intimate homelife, blurring the line between work and home. In addition to enumerating examples which amount to sex-based harassment in the virtual workplace, employers shall also engage an ombudsperson to reestablish the line.

An ombudsperson is specifically suited to address sex-based harassment complaints because of the ingrained hesitancy to report sex-based harassment. Not only do victims fear retaliation, but women specifically fear stunting their career prospects due to a "[l]ack of faith in [human resources]."¹⁹ Employees sometimes "see [human resources] . . . as agents of the company whose job it is to protect it"²⁰ An ombudsperson shall have no stake in the company over the employees' rights. Because of this dynamic, an ombudsperson is uniquely situated to field sex-based harassment complaints. In the virtual workplace, an employee who perceives a co-worker's crass comment in the virtual chatroom as offensive can simply seek the objective perspective of an ombudsperson prior to formally filing. An ombudsperson is inherently accessible, as the position notably advances employees' rights, and the position is filled with an esteemed expert on sex-based harassment. When home and work morph in the virtual world of work, accessibility is paramount.

Appointing an Ombudsperson by 2023

The International Ombudsman Association describes the position of a corporate ombudsperson as "a designated neutral or impartial dispute resolution practitioner whose major function is to provide confidential and informal assistance to constituents of the organization's

¹⁷ See generally Mary P. Rowe & James T. Zeigenfuss, *Perspectives on Cost and Cost Effectiveness of Ombudsman Programs in Four Fields*, 15 J. HEALTH & HUM. RESOURCES ADMIN. 281 (1993) (compiling cost-benefit analyses of ombudspersons across five case studies).

¹⁸ See U.S. Equal Employment Opportunity Commission, *Retaliation—Making it Personal*, available at <https://www.eeoc.gov/retaliation-making-it-personal> (showing that nearly half of all discrimination complaints resulted in a subsequent retaliation allegation in 2013).

¹⁹ Katz Melinger PLLC, *4 Reasons Women Don't Report Sexual Harassment*, KATZ MELINGER: BLOG (July 31, 2020), <https://www.katzmelinger.com/blog/2020/07/4-reasons-women-dont-report-sexual-harassment/>.

²⁰ *Supra* note 3.

community.”²¹ Within the next two years, any company with over fifty employees shall appoint an ombudsperson for sex-based harassment.

The hiring process shall consist of an interviewing and hiring board comprised of frontline employees and management at all levels. No less than a simple majority of the hiring board shall be made up of employees below management level. The hiring board shall appoint an ombudsperson after a majority vote, and the winning candidate shall be hired as the company’s ombudsperson. The hiring criteria shall include a demonstrated interest in combatting sex-based harassment and discrimination, stature within the field, and experience delivering trauma-informed services. Sexual and sex-based harassment can lead to trauma for many victims.²² The ability for the ombudsperson to take a trauma-informed approach to addressing complaints will maximize the ombudsperson’s efficacy.

In filling the role, companies shall seek an individual who has no prior relation to the company. It is crucial that employees perceive an ombudsperson as independent. Additionally, the company shall seek an individual with active listening skills to ensure the ombudsperson has the capacity to build trust among employees.²³ The ombudsperson shall also exhibit empathy.²⁴ Empathy, though difficult to measure, can be approximated through self-evaluation or through observational reports.²⁵ In the hiring process, the interviewing board shall pose questions designed to discern a candidate’s level of empathy and shall ask for the candidate’s self-described empathic aptitude.

Once an ombudsperson has been hired, a form based off of the Barrett-Lennard Relationship Inventory²⁶ shall be adapted for a post-hoc evaluation of the ombudsperson’s empathy. The Barrett-Lennard Relationship Inventory form asks questions about how the respondent feels about a focal person’s behaviors and relational interactions;²⁷ here, the focal person is the ombudsperson. The form shall be completed by a complainant employee after the complaint has been resolved.

To ensure the ombudsperson is not dismissed²⁸ for looking into complaints against the company, the same hiring board shall be tasked with firing the ombudsperson for-cause based on majority vote. That way, the ombudsperson will be able to fulfill the role on behalf of employees without fear of retaliation.

It is important to note that the employer’s duties do not cease once an ombudsperson is hired. The employer is to publicize the ombudsperson’s existence to employees at all levels. Employees usually refer co-workers to the ombudsperson in casual “word of mouth”

²¹ *Generic Corporate Ombudsman Position Description*, INTERNATIONAL OMBUDSMAN ASSOCIATION (Feb. 2, 2009), <https://www.ombudsassociation.org/Corporate-PD>.

²² Ronald W. Manderscheid, *Trauma-Informed Leadership*, 38 INT’L J. MENTAL HEALTH 78, 78 (2009).

²³ *Supra* note 3.

²⁴ Heather P. Huhman, *Don’t Wait Until Your Angry Employees Run to the Internet Before Hiring an Ombudsman*, INC (Nov. 30, 2017), <https://www.inc.com/heather-r-huhman/dont-wait-until-your-angry-employees-run-to-internet-before-hiring-an-ombudsman.html>.

²⁵ Karen E. Gerdes et al., *Conceptualising and Measuring Empathy*, 40 BRITISH JOURNAL OF SOCIAL WORK 2326, 2335 (2010).

²⁶ GODFREY T. BARRET-LENNARD, *Appendix 1: The Relationship Inventory Forms and Scoring Keys*, in THE RELATIONSHIP INVENTORY: A COMPLETE RESOURCE AND GUIDE 99-159 (2015), available at <https://onlinelibrary.wiley.com/doi/pdf/10.1002/9781118789070.app1>.

²⁷ *Id.*

²⁸ See generally Tom Simonite, *A Prominent AI Ethics Researcher Says Google Fired Her*, WIRED (Dec. 3, 2020), <https://www.wired.com/story/prominent-ai-ethics-researcher-says-google-fired-her/> (detailing an ethics researcher’s dismissal for looking into ethical questions).

conversation.²⁹ While the casual information spread about the ombudsperson reflects the perception of the ombudsperson as informal and confidential,³⁰ it is difficult to foster “word of mouth” communication in a virtual workplace. In the virtual workplace, employers’ duty to inform employees about the ombudsperson’s role shall take the form of including the ombudsperson’s contact information in a weekly email correspondence from senior-level management. Because the term “ombudsperson” is enigmatic, companies shall also clarify an ombudsperson’s powers and duties. In a virtual workplace, this requirement shall be satisfied with a short summary of the ombudsperson’s position on a visible and easily navigable page on the company website.

Day-to-Day Protocol of the Ombudsperson Office

As an informal resource operating parallel to a company’s formal reporting and investigation mechanisms, the ombudsperson shall respect confidentiality, shall be comfortable providing feedback to C-Suite level executives, and shall comply with the International Ombudsman Association’s Standards of Practice.

Utilizing an ombudsperson is always optional for a complainant. Once an employee decides to meet with the ombudsperson, the discussion shall center on the complainant’s options.³¹ An ombudsperson’s duties involve informing complainants about their options, both internally and through external channels, like potential legal actions. Throughout the process of informing the complainant to initiating formal procedures in the event the complainant chooses that route, the ombudsperson shall maintain confidentiality.³² Confidentiality is central to what makes the ombudsperson a worthwhile addition to a company’s reporting system.³³ For the purposes of sex-based harassment, confidentiality is only to be qualified to the extent that maintaining confidentiality would result in bodily harm to any of the ombudsperson’s constituents.

In the virtual workplace, employees shall have access to an ombudsperson through secure video-conferencing channels to ensure confidentiality is neither breached nor compromised. Throughout the pandemic and the rise in video conferencing, Zoom has failed to prove secure.³⁴ Ombudspersons shall communicate with platforms that have end-to-end encryption, meaning no one, not even the software producers themselves, can hack into the meeting.³⁵

In addition to confidentiality, the ombudsperson shall feel comfortable addressing observed patterns of harassment and discrimination to management. The ombudsperson shall operate as a liaison between employees and management and shall also surveil the company for threats to gender equality. The ombudsperson shall be empowered to “make recommendations to

²⁹ *Supra* note 4, at 4.

³⁰ *Id.*

³¹ *Supra* note 3.

³² Victor Futter, *An Answer to the Public Perception of Corporations: A Corporate Ombudsperson?*, 46 THE BUSINESS LAWYER 29, 35 (1990).

³³ *Id.* at 36 (“What an ombudsperson adds to the existing corporation is a well-publicized figure in the corporation to whom individuals who are troubled can communicate in confidence”).

³⁴ Kate O’Flaherty, *Zoom Alternatives: 4 Super Secure Apps for Private Video Calls*, FORBES (June 1, 2020), <https://www.forbes.com/sites/kateoflahertyuk/2020/06/01/zoom-alternatives-4-end-to-end-encrypted-video-chat-apps/?sh=1ba86f642f2e>.

³⁵ *Id.*

senior management.”³⁶ This is similar to how the Equality Ombudsman in Sweden makes recommendations to improve culture to employers during an investigation. Since an organizational ombudsperson is the most likely position to gauge employee perception of culture, the ombudsperson shall report on that perception to management. The ombudsperson shall administer surveys within the organization, similar to how the Croatian Ombudsperson conducts surveys to determine anti-discrimination efforts’ success. If culture is not operating to prevent sex-based harassment nor to advance women to leadership positions, management can make necessary adjustments. The ombudsperson shall also track company social media pages and report on any content that interferes with advancing women’s leadership or contains text or media that amounts to sex-based harassment or discrimination. The ombudsperson shall use its role to inhibit sex-based harassment in the company.

The ombudsperson’s functions will look different with each complaint depending on which avenues the complainant chooses to pursue. Regardless of the lifecycle of each specific complaint, the ombudsperson shall consistently serve as an objective advisor to the complainant and as a liaison between employees and management. No matter what the ombudsperson’s specific tasks are with respect to each complaint, the ombudsperson shall comply with the International Ombudsman Association’s Standards of Practice³⁷ and Code of Ethics.³⁸

Conclusion

Especially in the virtual world of work, an ombudsperson is essential to address sex-based harassment and to prompt actual change in corporate culture to prevent sex-based harassment in the future. Because an ombudsperson is informal, independent, confidential, and knowledgeable on sex-based harassment, victims skeptical of human resources are more likely to disclose sensitive information to an independent resource viewed as trustworthy. In order for the ombudsperson to operate successfully, a company shall hire an individual who is both a “superb listener”³⁹ and empathetic. The ombudsperson shall maintain confidentiality, consult with management, and comply with the International Ombudsman Association Standards of Practice and Code of Ethics in fulfilling the ombudsperson’s short and long-term duties. When the foregoing policy suggestions are implemented, an ombudsperson will have a profound effect on a company’s strides towards addressing sex-based harassment in the virtual and physical workplace.

³⁶ *Supra* note 26, at 35.

³⁷ INTERNATIONAL OMBUDSMAN ASSOCIATION, IOA STANDARDS OF PRACTICE (Oct. 2009), *available at* https://www.ombudsassociation.org/assets/docs/IOA_Standards_of_Practice_Oct09.pdf.

³⁸ INTERNATIONAL OMBUDSMAN ASSOCIATION, IOA CODE OF ETHICS (Jan. 2007), *available at* <https://www.ombudsassociation.org/assets/IOA%20Code%20of%20Ethics.pdf>.

³⁹ *Supra* note 3.

Model Code of Conduct

Introduction

As more work is conducted from home, the lines between personal and professional spaces become increasingly blurred. In conducting work, colleagues are frequently (virtually) brought into each other's homes, including intimate spaces. Sometimes, there is no option but to zoom into a meeting from one's bedroom. Children, pets, and intimate partners may now occupy an employee's workspace.

As these lines blur and employees adjust to the new norm of virtual work, it is important to reaffirm professional codes of conduct that are expected in workplaces, as well as to adapt these codes to meet the unique needs of virtual work.

When a company communicates or reaffirms its code of conduct, it should also enumerate the company's core values and mission (Part I below). Making these values and mission clear at the beginning of a code of conduct (and in other company communications) signals the significance of the code to employees. Articulating organizational values also help communicate to employees and potential employees who is welcome and for whom the workplace will be safe.¹

Although it is important to maintain the humanity of workers in the workplace,² this does not erase the need for employers to enumerate specific standards for professionalism and decency in the workplace. This model code should not be construed as dehumanizing employees. Rather, it is intended to help create a work environment in which all employees feel respected and safe to be their authentic selves. For example, employees should feel free to form personal relationships in the workplace and should feel welcome to discuss the things that are important to them, such as their families and their interests. The freedom to be authentic, however, does not grant employees the unimpeded right to do anything they want at work, such as using derogatory language or wearing unprofessional clothing. Basic standards of professionalism must still apply in the workplace. These standards should be adjusted to the unique needs and cultures of each company implementing this code.

Below is a model code of conduct that communicates some key expectations to keep the physical and virtual world of work safe for all.

Part I³

Company Vision

[Insert Company Vision Statement]

¹ The ideas in this section come from an unrecorded implicit bias training session conducted by Leslie Culver, expert on issues of inclusivity and diversity, in which she stressed the role that organizational values can play in attracting a diverse workforce. Leslie Culver, *Implicit Bias Training* (2020). For more on how Professor Culver can help your company set inclusive organizational values, see REO INSTITUTE, <https://lesliepatrice.com/reo/>.

² See generally Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

³ This section of the model code of conduct is provided by the Society for Human Resource Management. See *Code of Ethics and Business Conduct*, SHRM (last visited Dec. 5, 2020), <https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/code-of-ethics-conduct-policy.aspx>.

Values

[Insert Company Values Statement]

Mission

[Insert Company Mission Statement]

Part II⁴

Dress Code

[The company's] official dress code is [*Business/ Business Casual/ Casual, etc.*]. This type of dress includes [*suits/slacks/ button up shirts/ blouses/ closed toed shoes/boots, etc.*].

[Company] recognizes that hair (including facial hair) and other grooming styles, clothing, and accessories can be linked to religious belief, ethnicity, or disability. Therefore, absent profanity, obscenities, or violations of the dress code above, [company] will not consider any particular grooming styles, clothing, or accessories unprofessional and all are styles are welcome in the workplace.

While employees are not expected to dress a particular way while working individually from home, they must abide by the company's dress code while in any virtual work meeting where cameras are used, even if the camera is turned off. This includes pants or appropriate bottoms.⁵

Internet use

In the office:

- [Company's] internet is for work activities. While in the office, employees may occasionally use the company's internet for personal purposes, but these uses should not be excessive, immoral, illegal, or interfere with job responsibilities. Employees must immediately stop personal online activities if directed by a superior. The occasional personal online activities should not distract coworkers.
- Employees must not use the company's internet connection for any illegal or inappropriate activities, including but not limited to:
 - Downloading, uploading, streaming, or otherwise viewing obscene, graphic, offensive, or illegal material. This includes material that could make the workplace less safe for coworkers (i.e. downloading material containing racist, sexist, homophobic, or other discriminatory language, images, etc.).
 - Conducting illegal activities, such as hacking, fraud, or buying/selling illegal goods.

⁴ This section of the model code is adapted from a sample workplace code of conduct provided online for free by Workable. See *Employee Code of Conduct*, WORKABLE (last visited Dec. 5, 2020), <https://resources.workable.com/employee-code-of-conduct-policies>.

⁵ Even if employees expect that only their top half will appear on camera, accidents happen, and these accidents can create an uncomfortable or unprofessional work environment. For that reason, employees must be fully clothed while attending virtual meetings. Elyse Wanshel, *Reporter Caught Wearing Suit with no Pants Live on 'Good Morning America'*, HUFFPOST (Apr. 28, 2020, 2:19 PM), https://www.huffpost.com/entry/reporter-no-pants-good-morning-america-gma-abc-coronavrius-quarantine_n_5ea84676c5b6c3fed182cebb (providing an example of a news anchor accidentally appearing only half dressed on camera).

- Sending confidential or private information to unauthorized recipients. If an employee receives confidential information by mistake, they should delete the communication immediately without saving a copy.
- Downloading or uploading pirated/stolen files, including movies, music, and software.
- Visiting dangerous or nonsecure websites that could damage the company's network, software, or hardware.

Virtual work:

- Employees' internet connections are their own, even if used for work activities. The company cannot restrict the use of individual's home internet for personal uses, even if those personal uses are illicit, graphic, obscene, etc. The company, however, retains the right to punish or dismiss employees who demonstrate a failure to abide by the company's core values by violating the law or by using the internet to threaten the safety of other employees.
- In addition, all of the requirements from the section above apply anytime an employee is in a work meeting, even via their own internet connection. This includes meeting by telephone or video conference, even if the camera is off.

Cell phone use

In the office:

- Personal devices are allowed in the workplace but should not impact an employee's productivity.
- Do not conduct personal calls loudly or in public spaces where they might distract coworkers. Try to keep these calls brief and infrequent.
- Do not excessively text, check social media, or play games while at work.
- Do not use phones or other devices to record other people or confidential information in the workplace. Never post an image of another person in the workplace to the internet without their permission.

Virtual work:

- Employees can use personal devices in their own home. Employees should still try not to use personal devices excessively during work hours, even while at home.
- The limitations above apply anytime an employee is in a work-related meeting. This includes meeting by telephone or video conference, even if the camera is off. Do not take screenshots or record virtual meetings without the permission of participants.

Email

- All emails from company accounts should be professional, even if occasionally used for personal purposes. Employees should not use profanity or derogatory language, send illegal, illicit, or offensive material, or spam/harass others from company accounts.
- All employees are encouraged to include their preferred pronouns in their email signature.

Social Media

Employees are reflections of [Company]. As such, they should embody company principals while in public, including and especially on social media pages where posts can be shared and saved. Employees can be disciplined, including terminated, if they violate organizational core values. This includes, but is not limited to:

- Joining hate group or discretionary pages or groups on social media.
- Posting derogatory, discriminatory, threatening, bullying, or harassing statements towards individuals or groups.
- Posting negative or misleading statements about the company or its employees
- Sharing information that directly contradicts organizational core values.

Employee relationships

Generally:

Maintain professionalism with coworkers while at work. This includes while engaged in virtual work. Unprofessional communications include, but are not limited to:

- Making lewd or offensive jokes.
- Refusing to use another employees' preferred name and/or pronouns.⁶
- Commenting on a coworker's physical appearance (body/weight, clothing, hair, facial expressions, etc.).⁷
- Discussing or gossiping about the personal or intimate lives of other employees, especially when they are not involved in the discussion.⁸
- Sending a coworker inappropriate or excessive (non-work related) text messages, emails, or other communications.⁹

Dating:

[Company] recognizes that the workplace should not be stripped of all humanity.¹⁰ To that end, coworker relationships are not discouraged. However, the following caveats apply:

- To avoid bias, abuse of authority, and sexual harassment, superiors should not date employees that work directly for them or over whom they exercise some form of authority (i.e. informing evaluations, pay, promotional decisions etc.).
- Coworkers who enter personal relationships should maintain professionalism while at work. Do not engage in excessive public displays of affection, personal/sexual conversations, or other unprofessional behaviors while at work.

⁶ Respecting a coworker's preferred pronouns is not just a basic, minimal level of decency expected in the workplace, it may be required under local and/or federal antidiscrimination laws. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1782 (2020) (Alito, J., dissenting) (explaining that the majority's decision may allow future plaintiffs to "claim that the failure to use their preferred pronoun violates one of the federal laws prohibiting sex discrimination").

⁷ In a lawsuit against the FBI alleging gender discrimination and sexual harassment at its training academy, one woman alleges that she was formally advised by superiors to smile more. None of her male peers received similar feedback. Complaint at 30, *Bird v. Barr*, (D.C. Cir.) (No. 1:19-CV-1518) http://cdn.cnn.com/cnn/2019/images/05/30/merged_73281_-1-1559169532.pdf.

⁸ *Id.* at 31. In the lawsuit against the FBI, the same young female trainee alleges that her male instructors solicited gossip about her from her peers. These adult male instructors attempted to discuss and speculate about the private, sexual, and married life of the 25-year-old trainee when she was not in the room.

⁹ *Id.* at 30. In the lawsuit against the FBI, one plaintiff alleges that a male classmate sent her up to fifteen texts per day, making her feel uncomfortable.

¹⁰ *See Vicki Schultz, The Sanitized Workplace*, 112 YALE L.J. 2061, 2069 (2003) (explaining the importance of the workplace as a place for individuals to meet friends and intimate partners).

- Employees are expected to demonstrate respect for coworkers who date each other. Do not make sexual jokes or innuendo, gossip, or other offensive or inappropriate comments.
- Relationships must be consensual at all times. If a coworker declines an offer to meet outside of work, any further requests will be considered harassment. Inappropriate or sexual requests/comments will be considered harassment the first time. Superiors must always keep in mind that their authority may create a sense of obligation in their subordinates, even if unintentional. If it exists, this sense of obligations can make legitimate affirmative consent impossible.

Friendships:

Friendships with coworkers are encouraged, including activities outside of work. When at work, however, coworkers should remain professional. Employees should avoid discussing personal activities, disputes, and other people. Although friendships are expected to form, cliques should not be apparent in the workplace. Employees are expected to communicate with and equally demonstrate respect for all coworkers. These guidelines also apply during virtual working meetings, whether by phone, email, chat functions, or video conferencing.

Workplace visitors:

Personal visits should be limited at the office during work hours. Visitors are expected to [*check in at front desk, get visitors pass, be accompanied at all times, etc.*]. Interactions between employees and their workplace visitors should be appropriate for a professional work environment at all times.

In the virtual world of work, non-employees cannot be avoided in employees' work from home spaces. Employees should take reasonable measures while in virtual meetings, especially on camera, to avoid non-employees appearing in the background. Employees should take care to ensure anyone in their household is properly clothed if in the vicinity of a work-related video conference.¹¹ Avoid excessive or inappropriate public displays of affection with intimate partners while in virtual meetings.

Virtual meetings

Meeting organization:

- Those who organize teleconferences or videoconferences should password protect the meeting when possible to protect employees, clients, etc. from uninvited attendees.¹²

¹¹ The internet contains plenty of stories of accidental nudity in zoom backgrounds. Although accidents happen, employees should take precautions to avoid similar incidents that could be embarrassing and uncomfortable for all parties. See, e.g., Eleanor Goldberg, *A Mom Accidentally Flashed her Daughter's Class on Zoom and Shared the Story to Show Parents it's 'Okay not to be Perfect'*, INSIDER (May 27, 2020, 2:37 PM) <https://www.insider.com/mom-accidentally-flashed-her-daughters-zoom-class-2020-5>.

¹² Zoombombing is a new form of workplace harassment in which hackers enter video meetings and post hate speech, pornography, and other offensive images. Shannon Bond, *A Must for Millions, Zoom has a Dark Side—And an FBI Warning*, NPR (Apr. 3, 2020, 5:00 AM) <https://www.npr.org/2020/04/03/826129520/a-must-for-millions-zoom-has-a-dark-side-and-an-fbi-warning>. Meeting organizers are expected to keep employees safe by protecting online meetings to the extent possible.

- Organizers should clearly communicate if participants should have their cameras and microphones on or off throughout the meeting.
- Organizers should be familiar with the functions of the platform before beginning the meeting. They should know how and be prepared to remove participants or uninvited attendees quickly if needed. If a participant engages in lewd, inappropriate, harassing, or offensive behavior, they should be removed immediately from the videoconference.¹³
- If an issue arises that can be resolved without immediately removing a participant from the meeting, it should be addressed. If an organizer or participant believes that another attendee has accidentally left their camera or microphone on, they should be notified. If there is something in a participant's frame that should not be (but does not require immediate removal), they should be notified.
- Ensure that all participants are aware if a meeting is being recorded.
- To create an inclusive environment, ask all employees to signal their preferred pronouns on their meeting identification.

Employee conduct:

- When in virtual meetings, employees should act as if they can always be seen and heard, even if they believe their cameras and microphones are off. Technology and users of technology are not always perfect. Just like the physical workplace, employees should never engage in intimate or lewd behaviors/calls while logged into a virtual work meeting.¹⁴
- When logged into a virtual meeting, employees should not take device on which the meeting is being conducted with them anywhere they would not take coworkers with them in the physical workplace. For example, if an employee needs to use the restroom during a meeting, they should step away from the device rather than taking it with them into the restroom. Employees should also double check that their microphones are muted before stepping away to use the restroom.¹⁵
- If possible, try to avoid appearing on camera from highly intimate places (like from bed). If this is necessary, consider using a background provided by the meeting platform to disguise the intimate space.

¹³ See *id.* If a participant or cohabitant appears nude or indecent onscreen, in most cases organizers should be able to remove the participant or turn off their camera.

¹⁴ A highly publicized story about The New Yorker writer Jeffrey Toobin demonstrates the importance of refraining from behavior that would be inappropriate in the physical workplace during virtual meetings. Believing his camera off during a breakout session, Jeffrey Toobin masturbated on camera. Toobin did not intend for this private moment to be viewed by his coworkers, and employees are free to engage in this behavior in their own homes during their own time. However, to engage in such conduct during a work meeting is inappropriate misconduct and will not be tolerated in the virtual world of work, just as it would not be tolerated at the office. Katie Robertson, *Jeffrey Toobin is Fired by The New Yorker*, NY TIMES (Nov. 11, 2020) <https://www.nytimes.com/2020/11/11/business/media/jeffrey-toobin-fired-new-yorker.html>.

¹⁵ Even U.S. Supreme Court Justices are not immune to embarrassing mishaps as they transition to virtual work. During the first oral arguments to take place virtually, one Justice was heard flushing a toilet. *US Supreme Court Hears Toilet Flush During Oral Arguments—A First*, BBC NEWS (May 7, 2020) <https://www.bbc.com/news/world-us-canada-52572986>. Although this does not amount to misconduct, employees should take simple precautions to avoid embarrassing, distracting, or unprofessional noises during virtual meetings.

PART 2: Model Draft Policy on the Prevention and Protection of Sex-Based and Gender-Based Harassment and Violence in Political Life

Introduction:

Whereas the growing participation of women in political life around the world has resulted in an escalation of acts of violence and harassment against women in political office or women participating in political life.

Whereas virtual world of work and political action has resulted in a high level of sexual harassment via social media platforms and other digital platforms, this framework policy sets out to provide guidelines for the prevention and protection of women in political participation and political life.

Whereas “On the Internet, it seems that almost any woman who dares express a political opinion exposes herself to a barrage of vitriol and threats. These online attacks can have grave offline consequences, from psychological and emotional harm to offline stalking and physical attacks.” —Mr. Andrew Gilmour, Assistant Secretary General for Human Rights, OHCHR

We recognize the importance of this policy framework in the wake of a spate of sexual harassment reports by women in political participation in the US and around the world.

Whereas sexual harassment and the threat of it is one of the major barriers to women’s equal participation in public and political life.

Whereas the unequal participation and representation of women in political life is a direct result of both gender inequalities and discrimination and continuously perpetuated by discriminatory behaviors including gender-based harassment and violence in political life

Whereas the Inter-American Model Law on the Prevention, Punishment and Eradication of Violence Against Women in Political Life or Civic Participation and the Belem Do Para Convention provide standard setting guiding principles to the drafting of this policy.

Moreover, CEDAW Article 7, obliges States Party to take all appropriate measures to eliminate discrimination against women in the political and public life of their countries and, in particular, to guarantee the exercise of political rights on equal terms with men. Similarly, Recommendation No. 23 of the CEDAW Committee is relevant for ensuring women have the right to run for office, hold public office, and participate in non-governmental organizations without any form of discrimination.

Likewise, article 8 of the CEDAW establishes the obligation to take the necessary measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Whereas the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Political Rights of Women, the Vienna Declaration, and paragraph 13 of the Beijing Declaration and Platform for Action, among others addresses the issue of harassment and violence against women in political participation. Whereas the United Nations Sustainable Development Goal 5 targets to “Ensure women’s full and effective participation and equal opportunities for leadership at all levels of decision making in political, economic and public life.”

Whereas we recognize the pioneering Law against Political Harassment and Violence towards Women of Bolivia, adopted in 2012, and the Argentinian Law of 2020 which establishes that undermining, annulling, preventing, hampering, or restricting the political participation of women in violation of their right to engage in a political life free from violence and to participate in public and political affairs on equal terms with men constitutes political violence against women.

The Importance of Law and Policy Reflected in Data

Internationally, Women in politics today constitute on average less than 25% of National parliamentarians but more than 81.8% experienced psychological violence, 44.4% received threats of death, rape, beatings or kidnapping, 25.5% experienced physical violence in the parliament, 21.2% of parliaments surveyed have a sexual harassment policy, 38.7% of women MPs said Violence Against Women in PoliticsAWI undermined both their mandate implementation and freedom of expression, and 46.7% feared for their security and that of their family according to IPU data.⁴ This data outlines the need for policies and laws that protect women in politics.

Purpose and Objective of Law

Given the increased likelihood that women participating in political life are more likely to experience sex-based harassment, the purpose of this law is to put into place reporting mechanisms, sanctioning regimes, training requirements, and statistic-gathering procedures in order to better prevent and remedy sex-based harassment in government offices and party organizations.

⁴ More data is needed about transgender, gender non-conforming, and nonbinary individuals and their political participation as it relates to sex-based or gender-based harassment.

By reducing incidents of sex-based harassment in political life, and swiftly, efficiently, and compassionately remedying and sanctioning incidents when they do occur, this policy aims to increase the number of women participating in political life and to make it safer for them to do so.

Scope and Applicability

Sex-based harassment in political life may include any of the behaviors, activities, and invitations as in the below definitions as directed towards both traditional employees and non-traditional workers.

Non-traditional workers include but are not limited to: interns, fellows, clerks, contractors, sub-contractors, and volunteers.

This policy applies equally to both elected and non-elected officials.

This policy is intended to apply to state-run government offices at the federal, state, and local levels, as well as political party organization at the federal, state, and local levels.

This policy applies to employers with one or more employees.

Intersectionality

Whereas harassment takes into account multiple factors of discrimination, such as sex, gender identity, age, race, ethnicity, socio-economic status, religion, disability status and sexual orientation.

Whereas harassment which occurs over certain online platforms, such as social media or anonymously online, may occur with increased frequency to women of color, women who are members of the LGBTQ+ community, women who are ethnic-minorities, and other women at the intersection of more than one marginalized identities.

Political Party Accountability

Whereas to ensure that members of all political parties comply with the obligations established in the international and national legal framework for preventing, punishing, and eradicating violence and sexual harassment against women. Moreover, to establish a procedure or protocol, specific organizational arrangements, and the measures needed to ensure that, through competent bodies, any instances of violence and sexual harassment against women in political life within a political party can be prevented, addressed, punished, and eradicated, and that the party's governing bodies and disciplinary units are committed to that end.

Definition

Whereas Article 1 of the Violence and Harassment Convention, 2019 states:

- (a) “violence and harassment” in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment;
- (b) the term “gender-based violence and harassment” means violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment.

Whereas political harassment is understood to be the act or set of acts of pressure, persecution, harassment or threats, committed by a person or group of people, directly or through third parties, against women candidates, elected, appointed or in exercise of the political - public function or against their families, with the purpose of shortening, suspending, preventing or restricting the functions inherent to their position, to induce or force them to carry out, against their will, an action or incur in an omission, in the performance of their functions or in the exercise of their rights.

Whereas political violence is understood to be the actions, behaviors and / or physical, psychological, sexual aggressions committed by a person or group of people, directly or through third parties, against women candidates, elected, appointed or in exercise of the political-public function, or against her family, to shorten, suspend, prevent or restrict the exercise of her position or to induce or force her to carry out, against her will, an action or incur in an omission , in the performance of their functions or in the exercise of their rights.

Furthermore, public-political violence against women is understood to be sex-based reasons, mediating intimidation, harassment, dishonor, discrediting, persecution, harassment and / or threats, prevents or limits the development of political life or access to political rights and duties, violating current regulations regarding the political representation of women, and / or discouraging or undermining the political exercise or political activity of women, which may occur in any space of public and political life, such as state institutions, voting precincts, political parties, social organizations, trade union associations, the media, among others.

Whereas violence against women is understood to be any conduct, by action or omission, based on gender reasons, which, directly or indirectly, both in the public and private spheres, based on an unequal relationship of power, affects their lives. , freedom, dignity, physical, psychological, sexual, economic or patrimonial integrity, political participation, as well as their personal safety. Actions perpetrated by the State or by its agents are included.

Whereas it is the intention of this Policy to move beyond the common understanding of the term “sexual harassment”—i.e., unwanted or inappropriate sexual remarks and physical advances—and towards a more expansive and meaningful conception of “sex-based harassment.” This conception, [proposed](#) by a legal scholar, recognizes that harassment is about upholding gendered status and identity, not just the unwanted expression of sexual desire or sexuality. Thus, harassment encompasses both sexual and non-sexual behaviors and practices, including sex segregation, gender stereotyping, sexism, and gender discrimination—including any conduct which prevents or limits access to political rights on gendered grounds.

In this usage, harassment includes, but is not limited to: physical, sexual, psychological, moral, economic or symbolic violence; aggressions—direct or indirect (indirect violence is considered, but not limited to any discriminatory conduct, action, omission, disposition, criterion or practice that places women at a disadvantage compared to men)—which are designed to impair or frustrate the free-exercise of political rights and duties; gender stereotyping and humiliating behavior; social ostracism, exclusion, and sabotage on the basis of one’s sexual or gender-identity; undermining and/or taking credit for women’s work, reputation, and ideas; comments and conduct which are degrading and reinforce gendered hierarchies (such conduct may include, but is not limited to, rape, aggressive touching, forced viewing of porn, taking and circulating sexual photos, lewd jokes and behavior, etc.); exhortations to conform with prescribed gendered and normative behaviors and dress; as well as unwanted sexual proposals, touching, approaching, or invitations that influence the political aspirations of women and the conditions and environment where political and public activity takes place.

Crucially, what binds this conduct together is not only that it locates harassment’s origins as between and within the categories of sex and gender-identity, but that it draws one’s attention to the purpose of the conduct: not as an expression of sexual interest—which a narrow conception of sexual harassment would be confined to—but rather as an instrument to maintain and enforce the harasser’s location in a gendered hierarchy. It is in this manner that gendered power relations produce and reproduce themselves in the world of politics.

Mechanism

Whereas a national- or state-level body or machinery will implement awareness-raising and prevention campaigns on sexual harassment against women in the political life, as well as education and promotion of their political rights in general and the application of this law in particular. These campaigns should mainstream a diverse perspective in order to respond to the needs of specific groups; and bring together an intergovernmental coordination.

Whereas an internal protocol within party headquarters that identify the responsible units, as well as the applicable measures and sanctions, in cases of violence and sexual harassment against women in the political life must be established.

Whereas both public and party units responsible for implementing anti-harassment measures and issuing sanctions in cases of violence and sexual harassment against women in political life should also maintain a dialogue and cooperation with other involved organizations in cases of sexual harassment against non-traditional employees. This includes but is not limited to: contracting businesses, interns' or fellows' affiliated educational institution, and volunteering organizations.

Whereas responsibility to reduce instances of violence and sexual harassment against women in the political sphere will involve bipartisan support, funding, and cooperative sharing of information to achieve the ultimate policy aims. A nonpartisan review agency will oversee implementation of policy initiatives and evaluate cooperation, and provide bi-annual reports on whether the administrability of policy improvements are running effectively. Policy changes to enhance cooperation may follow based on recommendations from the reports.

Note, when relevant, that all applicable criminal laws and sanctions shall still apply to the parties involved and this law shall be read to align with all relevant criminal laws and sanctions.

Whereas the importance of data was established and helps understand and improve women's political participation, it is important to:

- ❖ Compile statistics on violence against women in the political life in the electoral sphere that allow for assessment of the problem and the design of concrete actions;
- ❖ Create and analyze data regarding the number of women who run for political office in each country with democratic elections, and track this over a long time horizon;
- ❖ Track over a long time horizon the % of women in a nation who hold positions of political office around the world, and accordingly, % of women who hold ultimate positions of higher authority beyond being political office holders.

Furthermore, it is important to:

- ❖ Establish an objective investigatory administrative entity such as an ombudsperson or grievance officer within governmental structures to field and resolve complaints. This body should be independently selected by officials;
- ❖ Create a framework for civil remedies available for survivors of sexual harassment in political campaigns;
- ❖ Facilitate an environment through Congressional action that minimizes sexual harassment women political candidates face online;
- ❖ Ensure that any preventative and/or corrective measure is enforced rigorously and diligently work to prevent retaliation;
- ❖ Ensure that organizational structures prevent retribution or retaliation against individuals who report sexual harassment (including but not limited to: termination of employment, demotion in position, provision of unfavorable or below-station work assignments, negative performance reviews, and social ostracization in the workplace);

- ❖ Elevate the importance of diversity at all levels of employment, including leadership, and incorporate hiring and promotional practices in all organizational levels to increase diversity, including:
 - Setting a target for diverse representation to be met by a determined year;
 - Recruiting from a diverse set of locations, schools, employers, and programs;
 - Putting in place programs and structures so that diverse employees have support, sponsorship, and mentorship in order to increase retention of diverse employees;
 - AND
 - Developing a hiring procedure that requires all positions to interview a certain number of diverse candidates before making a hiring decision.
- ❖ Incorporate the prevention and eradication of violence against women in the political life in civic and democratic education policies, as well as in all education and training programs that it implements;
- ❖ Carry out an analysis of the risks and develop a safety plan in order to prevent violence against women in the political life;
- ❖ Educate the media and social networks on sexual harassment in politics and ensure gender sensitive reporting;
- ❖ Promote women's visibility through effective communication strategies, complemented with broader strategies against gender stereotyping, discriminatory social norms, attitudes and behaviors;
- ❖ Elevate the importance of preventing sexual harassment in the political public discourse to raise awareness of the issue through targeted marketing and social media campaigns;
- ❖ Whereas policy initiatives will build off of previously passed legislation, such as S 3749 passed in December 2018, that create frameworks for reducing sexual harassment in the political sphere;
- ❖ Include the issue of violence, both in traditional and social media, against women in political life in their training and education programs on the means of electoral contestation, encouraging strategic litigation in these cases;
- ❖ Establish a registry on the application of this law, including complaints received, judicial resolutions, particular and concurring opinions, as well as jurisprudence on violence against women in political life;
- ❖ Establish and maintain an information system and statistics that progressively reflect votes disaggregated by sex, geographic locations, age, race, ethnicity, sexual identity and disability to illustrate implicit biases and serve as a statistical background for aforementioned marketing and social media campaigns;
- ❖ Perform risk analysis and prepare a safety plan that assigns safeguards to women in situations of violence, and their family members when necessary;
- ❖ Mandate that campaigns for candidates for all political offices offer thorough training on sex-based harassment and reporting procedures to volunteers and staff at all levels of the campaign. Mandate that officeholders at all levels conduct training for staff and volunteers about sex-based harassment and reporting procedures. These procedures

should involve an ombudsperson or outside committee that can respond promptly, thoroughly, and confidentially to complaints both by and against political candidates and officeholders themselves;

- ❖ Establish election observation and violence monitoring initiatives that develop guidelines for observing women's participation in politics and collect sex-disaggregated data, creating early warning and rapid response mechanisms;
- ❖ Provide non-partisan, independent, trauma-informed and survivor-centric support services to assist victims of violence and offer training on harassment to all elected officials and political staff.

Reparation Measures

Whereas funds must be identified for the reparation of the victims from the regular national or local government budgets;

Whereas work to support ballot initiatives and referendum measures that would expand funding for policy initiatives meant to reduce sexual harassment in our political discourse;

Whereas an administrative body should implement civil, criminal, and administrative sanctions;

Whereas work with Congress to pass a bipartisan legislation that creates an independent social media watchdog where reports are filed to the agency, potential harassment is recorded, and investigations commence all in rapid succession;

Whereas the social media watchdog will be administered broadly, applying not only to political candidates, but campaign volunteers, staffers, and other officials that work in the campaign

Structural Change

Whereas it is important to collect and share good practices, e.g. in legal reform, parliamentary response, and research at national and international levels.

Whereas a set number of political tickets at National and State levels are reserved for women, and that these seats are not merely "challenging"

Whereas no tickets are given to any individuals who have history of criminal conduct, especially those against women and marginalized groups

Whereas a diversity policy aimed to increase women's participation in politics will help accelerate women in politics and the prevention of harassment of women in politics.

Whereas it is critical to change the culture around political campaigns such that online harassment of candidates is deterred

Whereas the culture has shifted such that major political parties understand the risk to our political process that harassment of political candidates entails, and cooperate to vigorously defend actions taken to combat harassment.

Whereas instances of harassment are recorded and a book of records for investigations is maintained to learn from past incidents, and reduce a recurrence of such incidents in the future.

Whereas a culture of retaliation for women that report legitimate sexual harassment claims, resulting in diminished career prospects within and beyond the political sphere, is eliminated

Whereas it is critical to have adequate administrability of policy initiatives such that underreporting of legitimate sexual harassment claims does not become widespread, and women are not deterred from reporting said violations;

Whereas structural changes should be made to specifically address the vulnerabilities of non-traditional employees, such as:

- ❖ Creating a specific reporting mechanism for non-traditional employees that:
 - Allows multiple routes of reporting, both within the public office/party organization and within the workers' home organization;
 - Allows home organization reporting mechanisms to also report to the public office/party organization on behalf of the harassed worker; AND
 - Requires the reporting mechanism to compile data on reports filed, how they were filed, how far into the internal investigation process they went, and what the resolution, if any, was.
- ❖ Creating a more structured recruitment and hiring process for non-traditional workers that aids in combating the informality of their roles and prevents whisper networks from controlling who has access to positions;
- ❖ Requiring formal sanctions by organizations that non-traditional workers are coming from following any confirmed sexual harassment incidents if the public office/party organization does not sanction the offender itself;
- ❖ Creating recruitment efforts for non-traditional workers that focus on diverse hiring (including gender, racial, and ethnic diversity) and making efforts to diversify leadership and management in public offices/party organizations in order to combat existing power imbalances;
- ❖ Providing specific training to both non-traditional workers on their options when it comes to reporting and traditional workers on their liability to non-traditional workers when it comes to harassment.

Inclusion of Non-Traditional Workers in Sexual Harassment Policies in Political Life

Introduction:

Despite making progress on obtaining and creating protections against sexual harassment in the workplace, there are still groups of workers who remain vulnerable under the current regime. These workers—often not included under federal and state law definitions of “employee”—do not have the protection of the law when it comes to being sexually harassed in the workplace.¹ Additionally, organizational sexual harassment policies often do not cover these individuals because of the increased liability that it would demand.

In the political sphere, this is particularly relevant given the often informal and temporary nature of employment with political campaigns, political parties, political offices, and government bodies. Interns (paid and unpaid), fellows, clerks, contractors, subcontractors, temporary workers, and volunteers all remain particularly vulnerable to sexual harassment because of various gaps in sexual harassment laws.

As such, this Draft Policy on the Prevention and Protection of Sex-Based and Gender-Based Harassment and Violence in Political Life (“Draft Policy”) adopts various structural changes and legal mechanisms to include these workers under federal sexual harassment law and to better accommodate their specific needs. This addendum will first explore the need for these changes in the law through the specific examples of unpaid interns and judicial clerks. Then, the addendum will outline and explain the relevant changes in the Draft Policy.

Unpaid Interns as a Case Study:

While unpaid internships are on the decline, recent studies suggest that 43% of internships remain unpaid.² This number is likely higher in government offices, as legal efforts to require that internships be paid have not been extended to government internships.³ Additionally, women are more likely than men are to take unpaid internships, which means that the number of women—who are already more likely to experience sexual harassment—is larger in these unpaid internships.⁴

¹ See Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1964) (defining “employee” as “an individual employed by an employer, except that the term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision . . .”)

² Arthur Zuckerman, *52 Internship Statistics: 2019/2020 Data, Trends & Predictions*, COMPARECAMP (May 26, 2020) <https://comparecamp.com/internship-statistics/#4>.

³ Steven Rothberg, *Paid vs unpaid internships are key to landing a well-paying job upon graduation*, COLLEGE RECRUITER (May 27, 2019) <https://www.collegerecruiter.com/blog/2019/05/27/paid-vs-unpaid-internships-are-key-to-landing-a-well-paying-job-upon-graduation/>.

⁴ Jen Fifield, *Why Statehouse interns are especially vulnerable to sexual harassment*, USA TODAY (Feb. 24, 2018), <https://www.usatoday.com/story/news/2018/02/24/why-statehouse-interns-especially-vulnerable-sexual-harassment/363507002/>.

Compensation aside, the power dynamics of any workplace will make interns particularly vulnerable to sexual harassment. Interns tend to be younger than other employees, and “women under age 35 are 12% more likely to say that they have been sexually harassed compared to women aged 35 to 44.”⁵ Further, 82% of former interns have said that they know about colleagues who experienced sexual harassment at their internship, while only 18% of former interns said that they had “complete knowledge of anti-sexual harassment policies and procedures during their internship.”⁶ Not only are interns more vulnerable and potentially more susceptible to experiencing sexual harassment, but they are also less equipped to take advantage of policies and procedures that exist to help them.

All of these factors came to a head during the #MeToo movement, when young, female, unpaid interns in government positions began coming forward about sexual harassment that they had experienced. Despite experiencing sexual harassment, most of these interns were not protected against workplace harassment under the federal Civil Rights Act because they are not considered employees under their state’s definition.⁷ Further, there are often no formal mechanisms for reporting sexual harassment during internships at their schools, meaning that other than talking directly to their advisors, they had no school-side reporting procedure.

Notwithstanding the fact that government offices can be incredibly sexist work environments, women continue to apply for and accept internships in these offices through their schools because of the rapidly growing expectation that you have several internships prior to graduating from college. Many of these young people seek out political work because they are passionate about the important issues that are decided in legislatures and government offices. Activists who are trying to achieve gender parity in politics worry that the experiences these young women have during internships will deter them from participating in politics in the future; especially if the sexual harassment they experience is not remedied by the system.⁸

The rationale for including workers like unpaid interns in federal sexual harassment law is twofold: (1) these individuals deserve protection from sexual harassment regardless of whether or not their work contract is that of a traditional employee and (2) because the experiences that women—especially young women—have in these early, informal positions will determine whether or not they participate in government in the future.

Judicial Clerkships as a Case Study:

⁵ Arthur Zuckerman, *52 Internship Statistics: 2019/2020 Data, Trends & Predictions*, COMPARECAMP (May 26, 2020) <https://comparecamp.com/internship-statistics/#4>.

⁶ Arthur Zuckerman, *52 Internship Statistics: 2019/2020 Data, Trends & Predictions*, COMPARECAMP (May 26, 2020) <https://comparecamp.com/internship-statistics/#4>.

⁷ Jen Fifield, *Why Statehouse interns are especially vulnerable to sexual harassment*, USA TODAY (Feb. 24, 2018), <https://www.usatoday.com/story/news/2018/02/24/why-statehouse-interns-especially-vulnerable-sexual-harassment/363507002/>.

⁸ Jen Fifield, *Why Statehouse interns are especially vulnerable to sexual harassment*, USA TODAY (Feb. 24, 2018), <https://www.usatoday.com/story/news/2018/02/24/why-statehouse-interns-especially-vulnerable-sexual-harassment/363507002/>.

Another governmental sphere in which sexual harassment and abuse of power has become an urgent and public matter in recent years is the judiciary. Judicial clerkships are temporary roles that typically last one year, and they are usually held by high-achieving young lawyers early in their legal careers. Competition for these prestigious positions is fierce, as the roles provide an exclusive opportunity to work closely with a judge and opens up an alumni network of former clerks at the height of the legal profession. It is also an employment arrangement wherein the judges as supervisors have a tremendous amount of unchecked authority over their clerk employees, who are dependent on their recommendations and mentorship and bound by rules about confidentiality.

In December 2017, as the internet hashtag #MeToo had just recently gained popularity, fifteen women who had worked with then-Chief Judge of the U.S. Court of Appeals for the Ninth Circuit Alex Kozinski accused him of inappropriate behavior including sexual harassment and groping.⁹ In response to a public outcry, he resigned from his position without submitting to a full investigation.¹⁰ One woman among the accusers who had clerked for him was Heidi Bond, also known by the pseudonym Courtney Milan, who wrote about suffering from mental health problems and ultimately leaving the legal profession entirely as a direct result of the sexual harassment and abuse she received from Judge Kozinski.¹¹ When she sought out advice from Judge Scirica of the Third Circuit, acting as chair of the Committee on Judicial Conduct and Disability, about the limits of her duty of confidentiality towards Kozinski, he told her “I cannot think of any person, persons, or institution that can give you an answer on this.”¹²

After his resignation, Kozinski pivoted to a lucrative private practice and has argued at least one case before the Ninth Circuit Court he once resided over, raising concerns about whether he was ever personally held accountable for his actions.¹³ The federal judiciary did take some action in response to this and other accusations, including a revision its code of conduct,¹⁴ following an in-depth report by a working group created by Chief Justice Roberts.¹⁵ These reforms clarified that a duty of confidentiality does not extend to reporting misconduct, and recommended strengthened and streamlined reporting mechanisms as well as expanded training. On February 13, 2020, the U.S. House Judiciary Committee’s Subcommittee on Courts, Intellectual Property and the Internet invited testimony about workplace conduct in the federal judiciary that made it clear the structural impediments to a safe workplace persist and are not remedied by the removal of “bad apples”.¹⁶

⁹ Melissa Heelan Stanzione, *Ninth Circuit Judge Alex Kozinski Announces Immediate Retirement*, Bloomberg Law (Dec. 18, 2017), <https://news.bloomberglaw.com/business-and-practice/ninth-circuit-judge-alex-kozinski-announces-immediate-retirement/>.

¹⁰ *Id.*

¹¹ Heidi Bond, *Kozinski* (last visited Dec. 10, 2020), <https://www.courtneymilan.com/metoo/kozinski.html>.

¹² *Id.*

¹³ Natalie Rodriguez, *Kozinski’s Return to Court Sparks #MeToo Ethics Questions*, Law360 (Dec. 10, 2019).

¹⁴ United States Courts, *Judicial Conference Approves Package of Workplace Conduct Reforms* (Mar. 12, 2019), <https://www.uscourts.gov/news/2019/03/12/judicial-conference-approves-package-workplace-conduct-reforms>.

¹⁵ United States Courts, *Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States* (Jun. 01, 2018), https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf.

¹⁶ *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet*, 116th Cong. (2020). <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2791>.

The depth of the problem of sexual harassment within the judicial system raises concerns about the courts themselves, where survivors of sexual harassment and violence might hope to find remedies. The problems with unfettered authority and problematic power dynamics in judge-clerk relationships also plays out in other political and governmental spheres such as legislative offices and political campaigns, and these offices should be held to similar scrutiny.

Suggested Mechanisms:

The changes in the Draft Policy that relate to the inclusion of non-traditional workers are both definition changes and structural changes.

Definitions

First and foremost, the scope and applicability of the policy has been altered to specifically include “both traditional employees and non-traditional workers.” Non-traditional workers “include but are not limited to: interns, fellows, clerks, contractors, sub-contractors, and volunteers.”

Training

From a structural standpoint, specific reporting procedures, training programs, and informational tracking mechanisms have been proposed to address the vulnerabilities of non-traditional workers. First, the Draft Policy requires public offices and party organizations to provide “specific training to both non-traditional workers on their options when it comes to reporting and traditional workers on their liability to non-traditional workers when it comes to harassment.” The intention being that this training will increase the reporting of sexual harassment when it does occur and prevent traditional employees from believing that their harassment of vulnerable workers can or will go unsanctioned.

The Draft Policy also encourages the home organization of these non-traditional workers, be it universities, non-profit organizations, or contracting firms, to hold their own sex-based harassment training programs for their students and members. This will serve to better inform future interns, fellows, volunteers, and other non-traditional workers of their rights when working with these government agencies and party organizations.¹⁷ These trainings will also be preventative, as they will cover the psychological, economic, sociological, and legal repercussions of sex-based harassment and will be training the next generation of political leaders.

Recruitment and Hiring

Beginning with recruitment and hiring of these non-traditional workers, the Draft Policy requires all positions to have a structured recruitment and hiring process. This is meant to reduce the informality of these roles and to prevent “whisper networks” from controlling who has access to positions. Throughout the recruitment and interviewing process, job applicants should have access

¹⁷ See NACE Staff, *Developing Sexual Harassment Training for Interns, Employees*, N.A.C.E. (Feb. 19, 2018), <https://www.nacweb.org/talent-acquisition/internships/developing-sexual-harassment-training-for-interns-employees/> (discussing a sexual harassment training made part of a required professional skills course for undergraduates at the University of Wisconsin-Oshkosh).

to reporting mechanisms detailed in the policy. Job applicants should be encouraged to decline positions where they feel uncomfortable, including prestigious opportunities like clerkships, without threat of retaliation in future hiring opportunities.

Reporting and Sanctions

For reporting, the Draft Policy requires government and political organizations to have specific reporting mechanisms for non-traditional workers that allow for multiple routes of reporting, allow the worker's home organization to report on behalf of the worker, and requires the compilation of "data on reports filed, how they were filed, how far into the internal investigation process they went, and what the resolution, if any, was."

Providing these workers with multiple pathways to report allows them to report to the supervisor, advisor, or organization they are most comfortable with. For interns, this may be the office they work in, but it also may be their academic advisor or university Title IX Officer. For temporary workers, it may be their on-site supervisor or the contact at their staffing agency. Regardless of their preferred reporting track, the individual who experienced harassment will have options that meet their needs.

From a sanctioning perspective, the Draft Policy also requires "formal sanctions by organizations that non-traditional workers are coming from following any confirmed sexual harassment incidents if the public office/party organization does not sanction the offender itself." This would mean that, if a research fellow to a state legislator filed a sexual harassment claim with the government reporting body, the claim was confirmed, and the legislator was in no way sanctioned, the university or organization who arranged the fellowship should step in by refusing to work with, at a minimum, that legislator in the future, though possibly that legislature as a whole.

In the case of a contractor, if they had gone through the same filing procedure as the abovementioned intern and found no resolution, the contracting organization should refuse to accept contracts from that public office/party organization until it issues sanctions against the offender.

Conclusion:

A variety of factors make non-traditional workers more vulnerable to sexual harassment in political life. These workers often have more informal roles with stronger power dynamics because of high turnover and a competitive environment. Oftentimes these workers are younger than other employees and are straddling two organizations (the government office/party organization they work for, and their university/non-profit/temp agency/etc.) which makes reporting confusing. The final nail in the coffin is that the law also is not on the side of these workers; intentionally leaving them out of the definition of "employee."

This Draft Policy aims to fill in these legal gaps and protect some of the most vulnerable workers in government and politics through increased reporting options, targeted training initiatives, and reliable sanctioning mechanisms.

Analysis of Insufficient Women's Political Representation as a Factor Contributing to VAWIP

In theory, the political system has the greatest potential of curbing the occurrence of VAWIP. However, in reality, there is a number of structural barriers in politics that have posed difficulties in the prevention of VAWIP. One such barrier is the insufficient numbers of female representation in politics, which has led to a lack of women engagement in the decision-making process and prevalent instances of exclusion. For example, in India, the Ex-Chief Election Commissioner stated that women have to protect themselves in politics, because politics is inherently violent. The gradual emergence of female political leaders in India has effectively brought women into positions of decision making, simultaneously sending a powerful message of equality to society, that women can also contribute to nation building.

In Pakistan, data shows that the percentage of women working in civil services is 5.4 per cent while the representation of women judges in superior courts is 2.91 per cent, falling significantly short from the 33 per cent required by the UN Beijing Conference of 1996 to which Pakistan is a signatory.¹ The lack of representation of women in the legal process in Pakistan has contributed to the lackadaisical enforcement of monitoring mechanism in sex-based harassment cases; female political leaders feel that the judicial process does not respect women's right to participate in violence-free politics and thus become unwilling to report VAWIP cases, further increasing the chances of more VAWIP.

Therefore, it is imperative that political parties grant more seats to women. By increasing representation of women political leaders, political parties ensure that there is a greater chance that laws and procedures can be passed to end VAWIP. To this end, more political parties should adopt policies that support women political leaders as part of their central governing documents and set effective enforcement mechanisms. Through these policies, more women will be able to be included in strategic decision making in political parties and contribute to the effort in putting an end to VAWIP.

¹ Asian Human Rights Commission (2013) Ali, Sarmad, "Gender Imbalance in Pakistan Judiciary", Forwarded News, Asian Human Rights Commission. August 7, 2013.

GENDER POLICY FOR [PARTY NAME]

1.1 COMMITMENT TO GREATER REPRESENTATION OF WOMEN

[Party Name] believes increasing women's political representation and enhancing gender equality improves our internal democracy. Ensuing inclusion and fairness from a gender perspective increases the likelihood of more transparent, fair and accountable governance within our party. We recognize that women have intersectional identities and can identify themselves in relation to their age, ethnicity, class, sexual orientation, religion or disability status, among many other dimensions. We commit to support women, especially those that belong to marginalized groups, in their efforts to maximize their potential. The policy aims to attain a critical mass of women leaders within [Party Name], enhance the decision-making powers of women, and promote equal rights and opportunities for women. The diversity of thought and representation that reside within our party positions [Party Name] to anticipate and serve the needs of our diverse constituents. We firmly believe the wide array of perspectives and beliefs that results from greater women's representation is key in moving our nation forward.

1.2 SCOPE AND MECHANISM

[Party Name]'s gender policy covers three core areas: education, recruitment and development. This policy applies not only to representation in decision-making institutions, but also includes voters, candidates, elected officials, electoral administrators, observers and civil society representatives. The framework here takes into account all stages of the electoral cycle, consisting of the pre-electoral, electoral and post-electoral periods.

1.2.1 Political Education:

1.2.1.1 Campaign Schools

We believe that education is imperative in increasing women's political participation. To this end, we must invest in campaign schools for women, providing networking and mentorship opportunities, and anti-harassment and media training. The schools can also help increase confidence and allow the learning of practical skills such fundraising and effective door-knocking approaches. Through funding and other forms of incentives, elected officials are encouraged to engage women in their communities by providing guidance, job shadowing and networking opportunities through local city and youth councils.

1.2.1.2 Mentorship

[Party Name] also values the important roles of mentorship and role-models in shaping women's decisions to enter electoral politics. We must provide resources necessary to current and past elected officials, encouraging mentorship to women seeking elected office. We must also provide female candidates with internships and other similar opportunities in political workplaces.

1.2.1.3 Social Media

We also recognize the potential of social media as a tool to educate the public on the importance of political participation. [Party Name] must continue to launch and sustain mass media campaigns highlighting the importance of women in political empowerment and specifically aim to shift societal perceptions regarding women's political participation.

1.2.2 **Recruitment:**

1.2.2.1 Gender Quotas

[Party Name] firmly sees gender quota as a highly effective means in increasing the number of women in politics. We vow to require 50% of nominated candidates be women or from other under-represented groups. The party, with candidates' permission, will collect intersectional data on candidates in nomination races, including data on sex, gender identity, age, race, ethnicity, socio-economic status, religion and sexual orientation.

1.2.2.2 Selection Committee

[Party Name] must also include more women in the party's candidate selection decision-making body to counteract potential implicit bias. The party vows to enable the inclusion of 50% women and diverse individuals in the central and selection committees.

1.2.2.3 Online Harassment

To combat the increased prevalence of online attacks against female candidates, the relevant stakeholders will maintain an active monitoring of the party's social media accounts for abusive or hateful communications.

1.2.2.4 Transparency

[Party Name] must ensure greater transparency and consistency in nomination processes by establishing clear and objective criteria in candidate selection. We must also publicly report on our efforts in recruiting female candidates after every federal general election.

1.2.2.5 Funding

We must create financial incentives for all registered party members to nominate more female candidates in general elections and by-elections.

1.2.3 **Development:**

1.2.3.1 Support Services

Structural barriers remain a discouragement to female candidates pursuing a career in electoral politics. [Party Name] must implement family-friendly and gender-sensitive initiatives such as parental leave, access to full-and part-time childcare services and support for work-life balance, including flexible working time arrangement.

1.2.3.2 More Decision-making Power

We pledge to reserve 30% of the party's leadership positions for female elected officials and establish a gender committee as one of the party's central decision-making executive committees.

1.2.3.3 Governing Documents

[Party Name] must review its governing documents yearly to ensure the inclusion of gender provisions as central to the party's strategic planning. We must also undertake a periodic analysis of the language in the party's governing documents to make sure they are gender sensitive.

1.2.3.4 Training

We recognize that racism, ageism, sexism and other forms of discrimination are problems both for our party and society as a whole. [Party Name] must conduct gender and diversity sensitization courses for all stakeholders to counter the negative effects of gender-biased treatment and harassment of diverse politicians.

1.2.3.5 Gender Audits

We commit to conducting yearly gender audits, assessing both formal and informal party procedures, activities and culture from a gender perspective and identifying discriminatory practices that hinder women elected officials from advancing their political careers.

1.3 ACCOUNTABILITY OF POLICY IMPLEMENTATION

Our commitment to greater representation of women in [Party Name] is led by our female elected officials who come from all levels of the party, from the chairperson to grass-root organizers. These officials make up national and local gender committees, which are responsible for ensuring that our gender policy is articulated in the day to day running and strategic direction of the party.

1.4 POLICY ENFORCEMENT

1.4.1 Monitor

All elected officials are expected to be aware of [Party Name]'s policies around gender and share the responsibility of upholding the policies. All elected officials undergo gender-based diversity training. Gender training encompasses raising awareness about issues surrounding gender inequality and developing gender management skills. If an elected official observes that a section of this policy is not upheld, they should bring it to the attention of one of the members of the gender committee.

1.4.2 Enforce

Issues and non-compliance will be brought to the attention of the national and local gender committees and will be dealt with a case-by-case basis by members of committee and individual involved in the incident or non-compliance. The gender committees may revoke or suspend any membership for any conduct they deem non-compliant with the policy.

1.4.3 Review

The gender committees will review the gender policy with the national committee and the top-ranking officials on an annual basis.

1.5 COMMUNICATION OF POLICY

All party members will be given a policy of this policy upon registration. Updates will also be distributed annually if changes are made to the policy during the yearly review. The policy will be posted, along with the names and contact information for members of the gender committee on the party's website at: [website address].

1. Overview of the issue: the prevalence of sexual harassment in the political sphere

Sexual harassment is an endemic problem around the world. To fully fix this issue requires a two-pronged policymaking framework: one prong focused on civil law prosecution for individuals that commit punishment, and another focused on deterrence and prevention through a social media watchdog.

To help prevent violence, prevention is even more important than punishment. With the creation of a social media watchdog that constantly monitors and filters anything nefarious on social media (Facebook, Google, Twitter), authorities can quickly be alerted to take action. The watchdog would be the mediator between political leaders and social media. A 24/7 watchdog would run interference between women in politics and social media, quickly identifying the harassment injustice so corrective action can be taken. The watchdog would be a coordination tool that is proactively addressing the issue, reducing the sniping between politicians and social media companies on who is to blame for any potential harassment on various online platforms.

One area that should be explored in-depth is how to create a framework for penalties and civil law prosecution for individuals who commit sexual harassment in political campaigns, as strict penalties for perpetrators are necessary to ensure highly qualified women are not deterred from running for political office. During the 2018 US midterm elections, there were a wide range of female candidates for US political office who had to face sexual harassment. Specifically, the US House of Representatives and US Senate passed a bipartisan bill in December of 2018 to help address this issue to some extent.¹

Based on allegations of sexual harassment of female aides on Capitol Hill, the bill included the following: holding members of Congress personally liable financially for any harassment they committed, no use of taxpayer funds for settlements, and potential garnishment of wages.² While this was a start, the problem of sexual harassment (particularly online via social media) for potential Congressional candidates and the lack of enforcement for violations makes clear Congress must do much more to deter this type of behavior. In this policy lab we are proposing concrete action to ensure that political candidates face minimal sexual harassment online (based on civil law penalties that will deter perpetrators), and in the event they do face harassment, perpetrators will swiftly be brought to justice. This ultimately has the purpose of both preventing harassment and protecting the candidates.

Documented instances of sexual harassment at the US State Department underscores the necessity to act and create guidelines that can be followed on an international scale. *New York Times* reporting indicates that a lack of adequate administerability of sexual harassment

¹ Leigh Ann Caldwell, Kasie Hunt, and Alex Moe, *Congress passes overhaul of sexual harassment policies, Trump expected to sign* NBC News (last updated December 13, 2018) <https://www.nbcnews.com/politics/congress/congress-passes-overhaul-sexual-harassment-policies-trump-expected-sign-n947616>

²*Id.*

complaints and weak responsiveness has led to an underreporting of claims.³ The reporting estimates that nearly half (47%) of State Department employees who experienced and/or saw harassment first hand did not inform the reporting agency that handles the complaints.⁴ Reasons for underreporting vary, but two significant factors are fear of retaliation that will lead to diminished career prospects and a lack of belief in the reporting agency to handle it appropriately.⁵

If we apply the challenges at the State Department to the current lack of adequate reporting mechanism for political campaigns, similar problems will result. Qualified women candidates will face both a hostile work environment and a weak reporting / enforcement mechanism that can lead to underreporting of claims; such behavior will become more pervasive. Thus, it is critical that we act to create robust legal accountability standards that prevent and provide justice for this in the political campaign realm, which can then be applied to the State Department and other agencies where women currently feel less compelled to report sexual harassment misbehavior.

It is clear that female political candidates face additional challenges to running for higher office when compared to men, particularly globally. Women in many cases are deemed to be “breaking the glass ceiling” and intruding upon a patriarchal male dominated political scene, which leads them to unfortunately face additional resistance, including sexual harassment and threats. Throughout the course of history, men have dominated political representation in every country and only recently have women gained prominent positions of power. Furthermore, even in many advanced democracies women have yet to achieve the highest office in government despite a multitude of qualified candidates available (such as in the US and in Japan). Thus, it is clear that strong global standards against sexual harassment will go a long way towards ensuring that women can participate fully in the political process and aim for the highest political roles unabated. It is clear they face structural and cultural challenges in doing so already; a culture of harassment only exacerbates the difficulty.

To ameliorate this issue, Bolivia has taken the lead and passed a robust law criminalizing and prohibiting any sort of physical or psychological violence (including harassment) against women who participate in politics.⁶ The actions of Bolivia have led other countries to try and pass something similar, which the US should try to do as well with respect to civil penalties (beyond the bill that was passed in December 2018). Countries looking to follow Bolivia’s lead and strengthen penalties against harassers of women who participate in politics are Peru, Ecuador, El Salvador, Mexico, and Costa Rica.⁷ Bolivia’s bold actions to codify penalties against harassment and the subsequent desire for other countries to follow is notable, and something that should be lauded.

³ Pranshu Verma, *Sexual Harassment Underreported at State Department, Report Says*, New York Times (last updated October 2, 2020), <https://www.nytimes.com/2020/10/02/us/politics/sexual-harassment-underreported-state-department.html>

⁴ *Id.*

⁵ *Id.*

⁶ Saskia Brechenmacher *Fighting Violence Against Women in Politics: the Limits of Legal Reform*, IPI Global Observatory (last updated October 5, 2017), <https://theglobalobservatory.org/2017/10/fighting-violence-against-women-in-politics-the-limits-of-legal-reform/#:~:text=While%20Bolivia%20remains%20the%20only%20country%20that%20has,least%20five%20other%20countries%20have%20discussed%20similar%20bills>

⁷ *Id.*

Nevertheless, the legal administrability of the law has been shaky and in many cases the enforcement of violations has been weak and extremely narrow.⁸ Thus, the risk of passing a statute that penalizes harassment yet has weak enforcement will not do much to deter the harassment that women have to face when they run for political office. If potential perpetrators are aware that the statute has no enforcement, then the disincentive for this behavior to end will be minimal. Thus, any law that is passed to prevent harassment must ensure that its standards can be administered appropriately and enforced so that adequate deterrence is achieved.

2. Specific policy initiative: Creation of US regulatory watchdog to combat online sexual harassment in US political campaigns

The importance of a watchdog in achieving meaningful policy change is critical. Harvard Law School indicates a watchdog “critically [monitors] the activities of governments, industry, courts or other organizations and [alerts] the public or [takes] legal action when the activities appear to go against the public interest.”⁹ Watchdogs have been used in other international contexts to achieve gender equality, notably with the Irish Human Rights and Equality Commission in the legal context.¹⁰ This watchdog has recommended measures to increase female representation in the judicial system while introducing equality training and quotas that will help reduce gender barriers.¹¹ Thus, for the US to implement a watchdog that will help target and reduce online sexual harassment in political campaigns, the watchdog must have both legal enforcement power and also base its operating model off of an international framework.

To this point, a framework for a social media watchdog with enforcement power that could be emulated in the US is Ofcom in the United Kingdom. The UK passed legislation that provided Ofcom with an expanded regulatory role to crack down on potential behavior on social media, essentially changing a situation where the social media companies would police themselves into providing a watchdog with the authority to crack down on abuses.¹² The legislation passed by the UK would ensure that social media firms would have a legal “duty of care” and ensure that illegal material does not percolate throughout the internet, and that users are protected from such information.¹³ Ofcom has broad regulatory authority in determining which companies have breached that legal standard, and what the effective remedy must be.¹⁴

The example set by the Ofcom watchdog in the UK is something that the US can successfully emulate in an attempt to reduce and deter sexual harassment for political candidates who are running for office. First, the US must clearly establish guidelines as to what would be the legal “duty of care” and what behavior crosses the line. This would be up to Congress, and

⁸ *Id.*

⁹ *Watchdog*, Harvard Law School (visited December 8, 2020), <https://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-interest-work-types/watchdog/>

¹⁰ *Watchdog recommends measures to boost women’s representation in judiciary and law firms*, Irish Legal News (last updated March 9, 2020), <https://www.irishlegal.com/article/watchdog-recommends-measures-to-boost-women-s-representation-in-judiciary-and-law-firms>.

¹¹ *Id.*

¹² Shannon Connellan, UK watchdog to hold social media companies to account over harmful content, Mashable (last updated February 12, 2020), <https://www.prolificlondon.co.uk/social-media/tech-news/2020/02/ofcom-become-uks-first-social-media-watchdog>

¹³ *Id.*

¹⁴ *Id.*

one such hypothetical language that could be effective is as follows: “online behavior related to harassment, threats, or vulgar language will be subject to civil law enforcement penalties as set forth by [HR].” Such a proposal passed in Congress would clearly lay out the type of behavior that would be deemed subject to the watchdog, and having broad language would be effective in making sure that all potential abuses are brought to light. The legislation empowering Ofcom, for instance, provides social media companies with a duty of care to remove content that relates to “terrorist content, child abuse, and fake news”, among other options.¹⁵ Giving the US watchdog similar broad authority is necessary if this watchdog is to have appropriate enforcement and deterrence mechanisms.

Second, the US Watchdog must also look out to have protections for female minority political candidates, because these individuals and their campaigns will likely face even more threats than normal. Minority women face the bear brunt of harassment, as they are both underrepresented in politics and when they do aspire to run for office, they face greater threats than other women. Research by Catalyst indicates women of color are at an increased risk of sexual harassment and assault than white women.¹⁶ Furthermore, women of color are further disadvantaged in the more lenient treatment of their perpetrators.¹⁷ Thus, the watchdog must adequately ensure that women of color who run for political office receive additional protective measures given the increased risks they face.

Third, the US watchdog should have international support and backing, and this can be achieved through either a United Nations resolution or work with a variety of UN committees. These include the United Nations Human Rights Council and UN Women, two UN entities that are committed to expanding human rights and female equality around the globe. The US is active in both UN committees and can work with other nations to pass a resolution signifying the importance of female political participation in the process and the protection of such individuals (and their campaign staff) from harassment. It may be difficult to get robust international funding for this US specific regulatory watchdog, as the US Congress would likely have to fund most of it, but it is worth working with other nations to see if there can be global cooperation on funding for global initiatives that will incentivize female political participation.

Providing Ofcom with expanded regulatory powers is a temporary measure meant to lead to an “online harms regulator” down the line, and the US can similarly create a temporary agency for 6-9 months as sort of a test run.¹⁸ The US can take a look and see how the watchdog is performing and what will be necessary to tweak before creating a more permanent agency. Daily, weekly, and monthly reports should be sent to the US watchdog in the meantime to make sure that there is adequate transparency on what exact abuses are occurring, on what specific platforms, and whether the Watchdog is holding up effectively. As discussed in the US State Department example, there is a concern that there will be an underreporting of potential harassment claims if the Watchdog is deemed to not be effective. Thus, making sure that the system will have the appropriate reporting and enforcement mechanisms are key factors that will determine its ultimate success.

¹⁵ Emma Woollacott, *UK TV and Radio Watchdog Set To Police All Social Media*, Forbes (last updated February 12, 2020) <https://www.forbes.com/sites/emmawoollacott/2020/02/12/uk-tv-and-radio-watchdog-set-to-police-all-social-media/?sh=277c24446a8f>

¹⁶ <https://www.catalyst.org/2018/02/13/sexual-harassment-and-women-of-color/>

¹⁷ *Id.*

¹⁸ *Id.*

It is critical that the law passed by Congress as it relates to the Watchdog covers not only campaign staffers and volunteers, but also officials in the campaign. It is important that protections from online harassment do not just extend to the candidate, because there are other individuals in a political campaign who may be at risk of receiving such harassment material. If the law does not protect them, then that will deter such individuals from volunteering or working for political campaigns, and that would be a less than ideal result for both political participation and a functioning democracy.

There is no doubt that to be effective the Watchdog needs appropriate funding from Congress. Congress should appropriate funds for this Watchdog as part of a bipartisan political transparency initiative. Democrats had a record number of women elected to Congress in 2018, and Republicans similarly had a record number of women elected to Congress in 2020. Coupled with the election of the first female Vice-President in US history in VP-Elect Kamala Harris, it is apparent that increased female representation in politics is a trend for both political parties. Thus, funding for this initiative should be bipartisan. As the breadth of the online media apparatus continues to expand and more and more Americans get their news from non-traditional media, it will be even more necessary to increase funding over time. Otherwise, the Watchdog will not be able to track all potential abuses if it can only monitor a few platforms due to a lack of funding.

Thus, what Congress can do effectively is provide for increased funding for this Watchdog every single month and continue to escalate funding over a multi-year period. Funding should ramp up significantly around election season; the elections in 2022 and 2024 are two near term events for which the Watchdog must be up and running effectively. Given that we have elections in the near future, an effective watchdog that is adequately funded by Congress and has robust legal administrability can ultimately reduce harassment female political candidates face online, create deterrence through appropriate civil prosecution penalties for perpetrators, and create a more healthy environment for political discourse at a time when that has never been more necessary in modern US political history.

Female Leadership Equality in the MLB

In a groundbreaking hiring in the sports world, the Miami Marlins hired Kim Ng as the first female general manager in Major League Baseball history.¹ Ng's hiring is a watershed moment for gender equality in professional sports leadership, as she is the first female general manager in the major four US professional sports leagues.² As general manager of the Marlins she will have control over baseball related on-field personnel decisions; former Yankees legend and Marlins CEO Derek Jeter indicated "her leadership of our baseball operations team will play a major role on our path toward success".³ Ng herself underscored the significance of her hiring for gender equality in sports leadership, stating "when I got into this business, it seemed unlikely a woman would lead a Major League team, but I am dogged in my pursuit of my goals."⁴ MLB Commissioner Rob Manfred further illustrated how important her hiring was, stating "Kim's appointment makes history in all of professional sports and sets a significant example for the millions of women and girls who love baseball and softball."⁵

Ng's experience working at the highest level of professional baseball is extensive. The *New York Times* reports she has held senior positions with two of the most prominent franchises in the sport: the New York Yankees and the Los Angeles Dodgers.⁶ Before taking on her most recent role with the Marlins, she worked in MLB's senior vice president of baseball operations, illustrating her diversity of leadership experience within the league office and with individual

¹ ESPN News Services, *Miami Marlins hire Kim Ng as MLB's first female general manager*, ESPN (last updated November 13, 2020), https://www.espn.com/mlb/story/_/id/30310018/miami-marlins-hire-kim-ng-mlb-first-female-general-manager

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Tyler Kepner and James Wagner, *Miami Marlins Hire Kim Ng, Breaking a Baseball Gender Barrier*, New York Times (last updated November 18, 2020), <https://www.nytimes.com/2020/11/13/sports/baseball/kim-ng-miami-marlins.html>

teams.⁷ Many executives within the game, including former Dodgers general manager Dan Evans, have stated that her ascension to running a team's baseball operation was long overdue by more than a decade, given the breadth of her qualifications.⁸ Former Yankees' assistant general manager Jean Afterman said Kim not only has the intelligence, vision, and experience to be a GM, but also has leadership qualities that are "gender blind".⁹ Her responsibilities as general manager will be similar to those of other heads of baseball operations around the game, including making player trades and negotiating contracts with free agents.¹⁰

It cannot be ignored how significant this decision is for racial diversity within MLB as well. Kim becomes the second individual of Asian ethnicity to lead a baseball operation, and she becomes one of only four current general managers who is an ethnic minority.¹¹

Jen Wolf, a former colleague of Ng, considers her to be both a mentor and role model.¹² Wolf's hope is that Ng's hiring will be the start of a broader trend of increased female leadership representation in MLB, stating "the most important thing for me is that this is not a one-off in all these roles...just because [Kim and other groundbreaking first time female leaders in MLB] are the first, they should by no means be the last."¹³

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Defining Sexual Harassment

Merriam-Webster defines sexual harassment as “uninvited and unwelcome verbal or physical behavior of a sexual nature especially by a person in authority toward a subordinate (such as an employee or student).”¹ Roughly speaking, this definition serves as a fair approximation for the popular understanding of sexual harassment. In this view, the requisite characteristic of sexual harassment is its sexual nature—fundamentally, it is about sexual desire. Of course, what renders this expression of sexual desire out-of-bounds is the orientation of the recipient towards the conduct, i.e., it is unwanted, unwelcome, and unsolicited.² Accordingly, the common understanding of sexual harassment contains two elements and two parties: (1) an expression of sexual desire by one, which is (2) unwanted and unwelcome by the other. This concept of sexual harassment has predominated not only in popular culture, but also in America’s corporate hierarchies³ and elite public institutions.⁴

Perhaps the most core premise of our Policy Framework—and certainly *the* core premise of our Policy Framework’s definition—is that this understanding of sexual harassment is overly narrow, underinclusive, and—most importantly—fundamentally misunderstands and misinterprets the nature and purpose of harassing conduct. It is the intention of this paper to explain why our Policies proceeds from this premise.

¹ *Definition of Sexual Harassment*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sexual%20harassment> (last visited Dec. 5, 2020).

² See *What Is Sexual Harassment?*, UNITED NATIONS, <https://www.un.org/womenwatch/osagi/pdf/whatish.pdf> (last visited Dec. 2, 2020) (defining sexual harassment).

³ See *Discrimination & Harassment Prevention*, WALMART, https://www.walmartethics.com/content/walmartethics/en_us/statement-of-ethics/our-workplace/discrimination-and-harassment-prevention.html (last visited Dec. 3, 2020) (“Verbal, visual, or physical conduct *of a sexual nature* is not acceptable in the workplace and may be determined to be sexual harassment.”) (emphasis added).

⁴ See OFF. OF CIV. RTS., U.S. DEP’T OF STATE, SEXUAL HARASSMENT POLICY (2019) (defining sexual harassment as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . .”).

Accordingly, this analysis is composed of three separate sections: Part I will describe the work of Vicki Schultz, her conception of sex-based harassment, and explain our decision to use this as our lode star. Part II will explain differences in the definition between Policy One (Prevention and Punishment of Sexual Harassment in the Virtual World of Work) and Policy Two (Prevention and Protection of Sex-Based and Gender-Based Harassment and Violence in Political Life). Finally, Part III will conclude.

I. Why Sex-Based Harassment

As described in our Framework, “it is the intention of this Policy to move . . . towards a more expansive and meaningful conception of ‘sex-based harassment’ . . . [as] proposed by Vicki Schultz”⁵ So, let’s get down to brass tacks: what is sex-based harassment and how does it differ from conventional notions of sexual harassment?

Sex-based harassment is principally “about upholding gendered status and identity . . . [rather than] expressing sexual desire or sexuality.”⁶ Consider an illustrative example: a (male) junior analyst at a private equity firm has been in the office for twenty straight hours, working against the clock to complete investor reports against the firm’s deadline. When he expresses his exhaustion to his (male) supervisor, the junior analyst is told to “quit whining like a girl and man-up.” On a regular basis for the next several months, the junior analyst is degraded by his supervisor in similar terms—asked if he needs to take a nap, addressed with female pronouns, and so forth.

Although the conduct described above would hardly fit in the ordinary conception of sexual harassment, it certainly would in Schultz’s concept of sex-based harassment. Why? Because the intent of the conduct—clearly *not* an expression of sexual interest—nonetheless emerges from the gendered status and identity of the harasser. I.e., the point of the supervisor’s actions were to

⁵ U. OF PENN. L. SCH. POL’Y LAB, FRAMEWORK FOR POLICY ON PREVENTION AND PUNISHMENT OF SEXUAL HARASSMENT IN THE VIRTUAL WORLD OF WORK 4 (2020).

⁶ Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. 17, 18 (2018).

leverage gendered norms and expectations to bully the young analyst and, in doing so, maintain and enforce their relative positions in a workplace dominance hierarchy.

It is the view of our Policy Framework that any concept of sexual harassment which excludes the manner of conduct described above not only runs the risk of missing an enormous share of the harassment experienced in the world of work (and so erases the experience of those who are harassed) but also fails to comprehend the larger socio-cultural structure from which workplace harassment emerges. Importantly, this concept of sex-based harassment would still encompass the commonly understood forms of sexual harassment. However, Schultz's view would invite us to examine these behaviors in a new light: not solely as unreciprocated expressions of sexual interest, but frequently as attempts to maintain locations in workplace hierarchies.⁷ Of course, this is not to say that the commonly understood form of sexual harassment is not a pervasive manner of workplace misconduct. Rather, it illuminates that conduct as "a telltale sign of broader patterns of discrimination and inequality. . . ."⁸

Thus, sex-based harassment can take a variety of forms which sexual harassment is not conventionally understood to. It can be male-to-male (as above), male-to-female, female-to-male, or female-to-female; it can be both sexualized and absent sexual connotations; can include the intra-male conduct above as well as intra-female degradations and slights. Unsurprisingly—and sadly—the brunt of this form of harassment frequently falls upon those in marginalized ethnic, religious, and sexual categories.

Thus, as policymakers, our hope in adopting Schultz's concept of sex-based harassment is to expand, reframe, *and yet still include* pre-existing understandings of sexual-harassment. Our intent, in other words, is to locate harassment in an exclusionary, gendered hierarchy.

⁷ See *Id.* at 19 ("Harassment provides a way for some men to monopolize prized work roles and to maintain a superior masculine position and sense of self. Women, too, sometimes act to uphold their relative positions.").

⁸ *Id.*

II. Differences Between Policy One and Policy Two

Before we begin with the differences, one should first note the striking similarities between the definitions. Schultz’s understanding of sex-based harassment—described above—is shared, wholesale, between the two documents. So too does each document begin with a recitation of art. 1 of the ILO Convention, which defines “violence and harassment” as well as “gender-based violence and harassment.”⁹ Our decision to begin each definition section with the ILO language reflects two values of our Policy Lab: (1) a belief that the substance of ILO Convention art. 1 shares our understanding of an expanded concept of harassment; and (2) a ringing endorsement of the manner in which the ILO Convention anchors freedom from sexual harassment in the language and urgent moral framework of international human rights law.

Of course, our two definitions *do* differ. Some of this difference is linguistic, not substantive, and merely reflect the different areas in which each policy is targeted—the world of work versus the world of politics. However, there is material included within our second Policy framework—the world of politics—which differs substantively from our first. Before we begin, it should be noted that this difference is additive, rather than subtractive, and is intended to capture particular dimensions which are unique to the domain of politics.

In particular, our definition for Policy Two homes in on conduct “designed to impair or frustrate the free-exercise of political rights and duties.”¹⁰ For obvious reasons, this language would not be included in Policy One. However, much as our understanding of sex-based harassment in the world of work invites us to consider the impact of gendered dominance hierarchies in an employment setting, that same understanding invites us to consider the impairment of a woman’s free exercise of her political rights and duties through the same lens. In both cases, it is vital for us to understand the

⁹ Convention Concerning the Elimination of Violence and Harassment in the World of Work art. 1, June 21, 2019, ILO 190.

¹⁰ U. OF PENN. L. SCH. POL’Y LAB, POLICY ON THE PREVENTION AND PROTECTION OF SEX-BASED AND GENDER-BASED HARASSMENT AND VIOLENCE IN POLITICAL LIFE 14 (2020).

properly understand the teleology of harassing and violent behavior—as a tool deployed to maintain and enforce relative hierarchical positions. Thus, we can see the frustration of a political rights and duties as merely another species of a now familiar mechanism.

Another difference: when referring to “aggression,” Policy Two contains specific language—“direct or indirect”—which we believe it is important to comment upon.¹¹ On this point, our policy framework draws inspiration from Argentine law, which contains a similar heuristic in proscribing violence against women. There, indirect violence is considered to be “any discriminatory conduct . . . that places women at a disadvantage compared to men.”¹² Our decision to adopt similar language in Policy Two reflects our desire—evoked in every corner of our two frameworks—to expand our spectrum of understanding to better capture the true purpose of harassing and violent behavior.

III. Conclusion

The choices made in our definition sections reflect a conscious effort to move beyond an outmoded concept of sexual harassment and toward one that more accurately captures the nature and purpose of harassing conduct—to enforce and preserve hierarchical positions—in in both the world of work and politics. It is our belief that, armed with this understanding, we are better positioned to set about the work of deconstructing systems which have all too frequently led to marginalization, exclusion, and violence.

¹¹ *Id.* at 15.

¹² Law No. 26.485, March 11, 2009, B.O. (Arg.).



A GENDER EQUALITY MAP:

A Mapping of Paid Family Leave and Sexual Harassment Laws

A Fifty State Mapping

Student Researchers: Cassandra Dula L'21 and Allie Gottlieb L'21

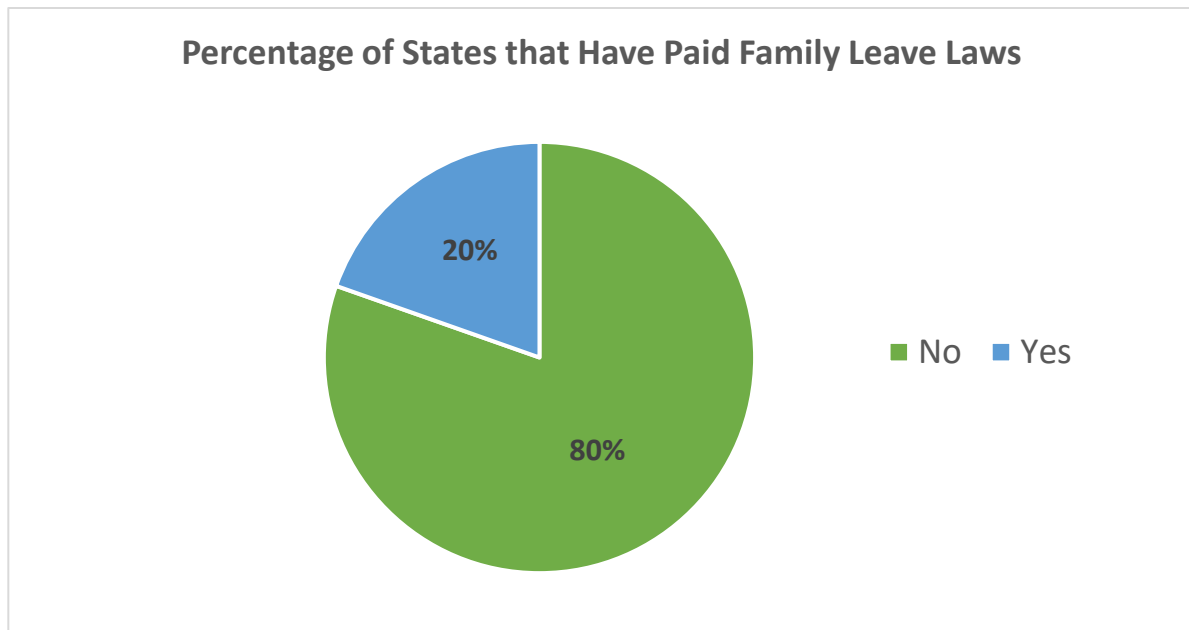
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Under the Auspices of Dean Theodore Ruger



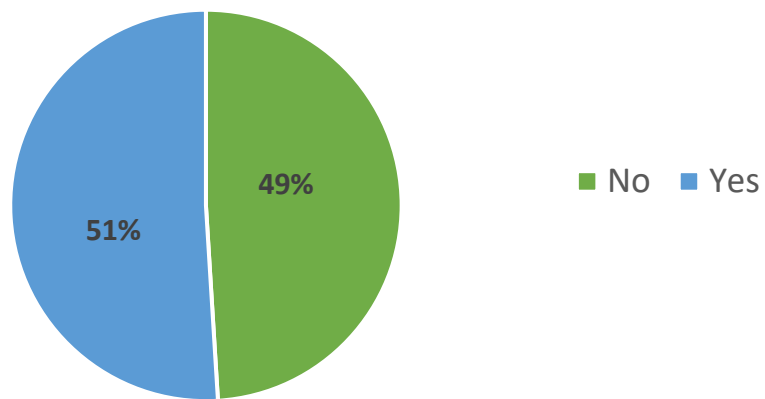
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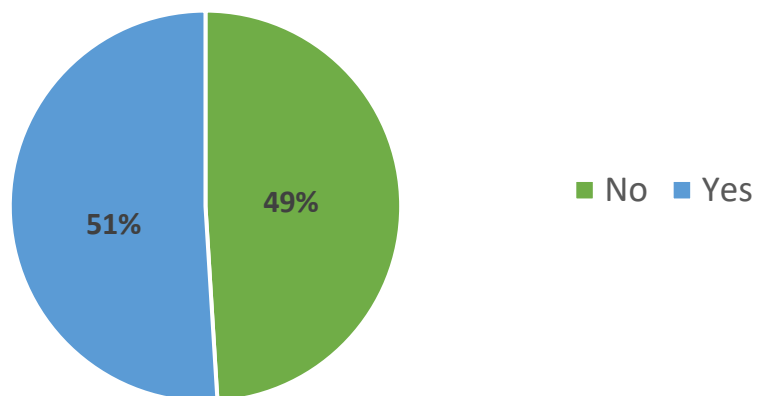


LGBTQ+ Protections in Discrimination Laws:

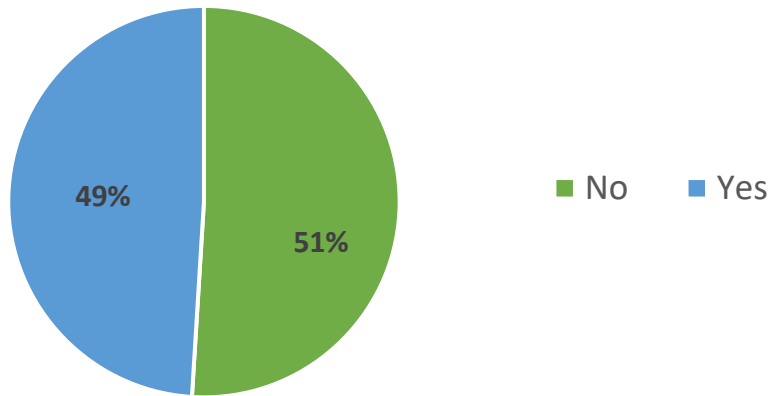
**Percentage of States that Include Any LGBTQ+ Protections in
Discrimination Laws**



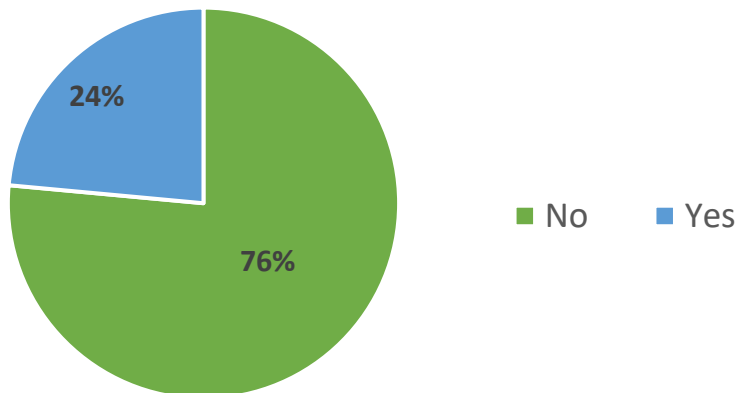
**Percentage of States that Include Sexual Orientation
Protections in Discrimination Laws**



**Percentage of States that Include Gender Identity
Protections in Discrimination Laws**

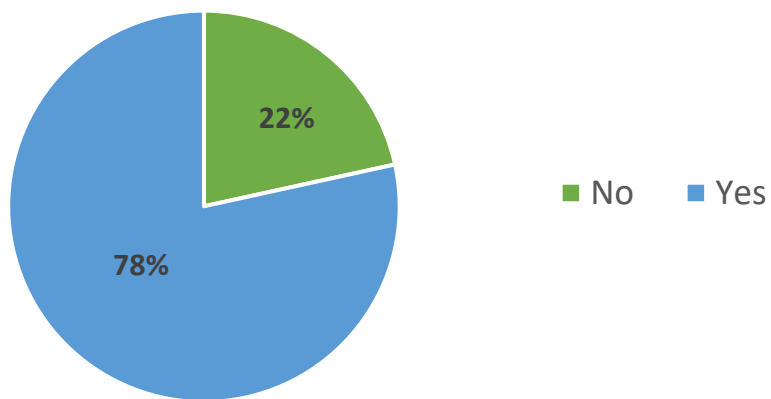


**Percentage of States that Include Gender Expression
Protections in Discrimination Laws**

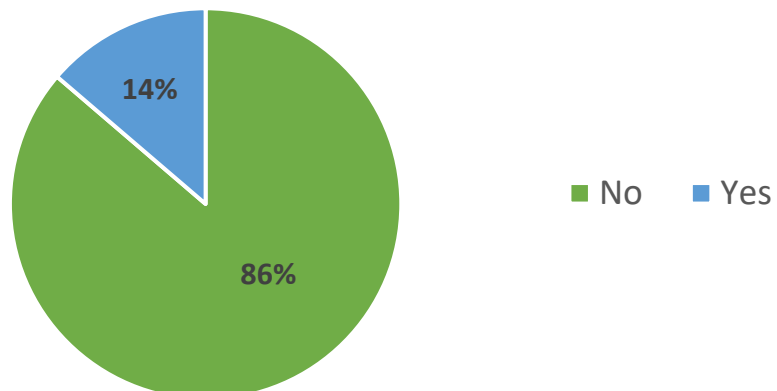


Sexual Harassment Law Protections Generally:

Percentage of States Whose Sexual Harassment Law Applies to Employers With >15 Employees



Percentage of States that Include a Training Requirement for Private Employers in Sexual Harassment Laws



Percentage of States that Protect Some Non-Traditional Workers (interns, independent contractors, etc.) in Sexual Harassment Laws

