

The background of the cover is a photograph of the New York State Capitol building in Albany. The building is a large, ornate structure with a red-tiled roof and multiple windows. In the foreground, there is a green lawn and a paved walkway. The text is overlaid on the image in white and purple boxes.

Fixing Albany's #MeToo Problem: What's Next?

**Policy Recommendations to
Protect Employees of Elected
and Appointed Officials from
Gender-Based Discrimination
and Harassment**

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About the Sexual Harassment Working Group:

The Sexual Harassment Working Group consists of seven former New York State Legislature staffers, all of whom experienced, witnessed, or reported sexual harassment while working for the state. On March 22, 2018 the Sexual Harassment Working Group publicly urged the New York State Legislature and Governor Andrew Cuomo to conduct a meaningful, transparent process to review and establish the state's sexual harassment policy. Instead, our elected officials passed incomplete and, in some cases, ill-conceived laws without sufficient input from experts, advocates, or victims. Although some of these new state laws do add protections, they fall far short of where we need to be in order to protect workers from the egregious misconduct that continues to dominate Albany headlines.

Recognizing that New York must continue to do more, we drafted our own policy recommendations which stem from extensive conversations with experts and advocates. As we've stated before, true progress must include listening to the people who have reported abuse and endured the process. Throughout the summer and in the upcoming legislative session, we plan to advocate for these recommendations and other harassment protections, while calling for public hearings and transparency as we move forward.

Acknowledgments:

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INTRODUCTION

On March 11, 2018, over 100 current and former public officials and employees of New York State government released an Albany Harassment Open Letter¹, calling on “the State of New York to convene a task force to examine the pervasiveness of the problem of sexual harassment throughout the state in both the public and private sectors and to evaluate the effectiveness of current policies and laws.” This open letter was written not by lobbyists or advocates, but by those who “suffered degrading acts of sexual harassment in the workplace or know someone who has.”

The letter is only the tip of the iceberg at describing the gender-based harassment that plagues the halls of Albany. Despite this plea to bring to light how and why most sexual harassment victims continue to suffer in silence, the state responded by pushing through a package of legislative budget bills in a process that lacked transparency or input from stakeholders, including victims. While Governor Cuomo hailed the legislative package as the “strongest and most comprehensive anti-sexual harassment protections in the nation,”² the new legislation still leaves many victims vulnerable to gender-based harassment and without adequate protections or redress.

Gender-based harassment can cause severe physical and psychological harm including Post Traumatic Stress Disorder.³ It is an expression of power, not sex, which exists as a form of discrimination, subjugation and humiliation. Gender-based harassment not only creates a hostile work environment, it creates tangible economic costs for victims by derailing career paths and increasing the likelihood of financial strain due to unemployment, career uncertainty, and diminished responsibilities, hours or pay.⁴

In response to the lack of leadership and transparency on sexual harassment in state government in the wake of the #MeToo movement, we have formed the Sexual Harassment Working Group. We are seven former New York State legislative employees who experienced, witnessed, or reported sexual harassment by former Assembly Members Vito Lopez and Micah Kellner, former Counsel to Speaker Sheldon Silver Michael Boxley, and Senator Jeff Klein.

Collectively those elected and appointed officials committed acts of gender-based harassment and discrimination including rape, forcible touching, groping, quid-pro quo sexual demands, retaliation, and creating a hostile work environment. The responses by our employers within the New York State Legislature were indifferent, dismissive, confrontational, and punitive. Our investigations were stymied by political allegiances, our stories sensationalized against us in the media, and the doors to professional opportunities in our chosen field closed.

When we and other victims of gender-based harassment by elected officials have sought redress for damages, the State of New York and the New York State Assembly have successfully argued in New York State or federal court to dismiss the claims, making arguments that the federal Title VII’s sexual harassment protections did not apply to “personal staff” of elected officials, that the Assembly was not an “employer,” and that our individual harassers were not liable for their abuse.

The political climate and the lack of legal protections are why victims don’t come forward. Many of those that do, do so out of desperation, and risk their future careers. Albany has yet to move the needle on progressive gender-based harassment reform for its own most vulnerable employees.

We urge the New York State Legislature to give gender-based discrimination and harassment reform the time and attention it deserves by holding public hearings and listening to stakeholders, especially victims. In the wake of #MeToo, we have seen the United States Congress, states, and cities across the country hold public hearings as legislative bodies across the nation grapple with the complexity of how

both workplace culture and legislation impact prevention and redress of gender-based harassment. New York State, however, has not held a state hearing on Sexual Harassment since Governor Mario Cuomo created a Sexual Harassment Task Force in 1992.⁵

Since the passage of the budget in April 2018, our Sexual Harassment Working Group has held numerous group strategy sessions, conducted research, collaborated on drafting, and consulted with experts in the field to recommend policy and legislative changes to provide protection and encourage victims to come forward. These recommendations include:

- 1. Strengthen Statewide Legal Definitions Related to Gender-Based Discrimination and Harassment** by adding “sex and gender” to the list of classes protected from discrimination in the New York State Constitution; easing the unreasonable burden presented by the “severe or pervasive” standard for sexual harassment by adopting the standard of “less well” which is currently in place in the laws of New York City; adding a definition of “employee” in the New York State Human Rights Law as “someone for hire”, including employees of elected and appointed officials; and clarifying that under New York State Human Rights Law, public entities, including those that elected officials represent, are “employers.”
- 2. Reform and Appropriately Fund a Truly Independent New York State Division of Human Rights that Oversees all Discrimination Harassment Policy Enforcement. This includes Requirements for Employees of State Elected or Appointed Officials**, including designating the New York State Division of Human Rights as the sole state entity to receive, investigate, and resolve discrimination and harassment complaints of state government employees; creating uniformity in discrimination policies across all state agencies; and appropriately funding the Division in order to receive and investigate all discrimination and harassment complaints; requiring the New York State model sexual harassment policy to include comprehensive reporting requirements and a right to an investigation; and mandate tracking and public reporting of aggregated discrimination and harassment complaints.
- 3. Increase Protections for Victims Seeking Redress for Damages** by amending New York State Human Rights Law to allow for individual liability for discrimination; amending New York State laws to include employer liability where a manager or supervisor has constructive notice of discrimination; providing greater protections against victim coercion to sign nondisclosure agreements; passing a “Sunshine in Litigation” law to prevent serial harassers from hiding behind nondisclosure agreements; adding “tolling” provisions where a victim has reported discrimination, and increase time limits to file in agencies and in court.

POLICY RECOMMENDATIONS TO PROTECT EMPLOYEES OF ELECTED AND APPOINTED OFFICIALS FROM GENDER-BASED DISCRIMINATION AND HARASSMENT

1. STRENGTHEN STATEWIDE LEGAL DEFINITIONS RELATED TO GENDER-BASED DISCRIMINATION AND HARASSMENT

a. Amend the New York State Constitution to include a prohibition of discrimination based on sex or gender

The New York State Constitution prohibits discrimination based on race, color, creed, and religion.⁶ Adding a prohibition against sex/gender discrimination will add strong protections that relate to gender-based discrimination and sexual harassment. It should be a clear constitutional right to receive equal treatment regardless of sex/gender.⁷

b. Improve statutory definitions of the term gender-based harassment and related standards

Adjust state law to mirror New York City statutes and case law that define gender-based discrimination and harassment in the following manner:

- Discrimination or harassment based on a protected class status is conduct that has the effect of treating an individual “less well” because of that class, including gender or perceived gender, and amounts to more than “petty slight or trivial inconveniences.”
- Gender-based discrimination includes but is not limited to sexual harassment.

Current federal and New York State laws acknowledge that sexual harassment is prohibited “on the basis of sex” or “because of sex,” but neither defines “sexual harassment.”⁸ Under current federal and New York State law, conduct must be “severe or pervasive” for there to be a finding of hostile work environment sexual harassment.⁹ The proposed language, modeled after New York City Human Rights Law, is more protective of victims than the current “severe or pervasive” standard applicable under the New York State Human Rights Law, which was borrowed from judicial decisions applying federal law.¹⁰ The existing standards effectively require victims to endure an extreme amount of sexually harassing behavior before they can seek relief in the courts. If Governor Cuomo is serious about having “zero tolerance for sexual harassment in the workplace,”¹¹ the “severe or pervasive” standard must be changed.

Define “employees” as “someone for hire,” to clarify that staff of elected officials deserve the same protections as all workers

- Update the definition of “employee” under New York State Human Rights Law (NYSHRL) and other necessary laws, mirroring the definition found

in New York State Labor Law¹² to clarify that all workers are defined as “someone for hire” and are entitled to protections against gender-based and all other forms of protected-class discrimination. This should include staff of elected officials and those excluded from protections under the federal Title VII “personal staff” exemption.

- Update NYSHRL to include that public entities represented by elected officials are “employers,” including the New York State Assembly, New York State Senate, and the New York State Executive branch.

All workers, including staff of elected officials deserve the right to a discrimination-free and harassment-free workplace.¹³ Public employees are currently covered under NYSHRL. However, the New York State Assembly (NYSA) has consistently argued it is not an “employer” under NYSHRL,¹⁴ and that employees of elected officials are not “employees” that are protected under federal Title VII because of the exemption for “personal staff” of elected officials.¹⁵ These two counterintuitive and cruel limitations have presented a double wall for employees pursuing their claims in both state and federal court, dialing back protections secured decades ago by workers. This must be corrected in state law.

2. REFORM AND APPROPRIATELY FUND A TRULY INDEPENDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS THAT OVERSEES ALL DISCRIMINATION AND HARASSMENT POLICY ENFORCEMENT, TRAINING, REPORTING, AND INVESTIGATION. THIS INCLUDES REQUIREMENTS FOR EMPLOYEES OF STATE ELECTED OR APPOINTED OFFICIALS

- a. Designate the New York State Division of Human Rights as the sole state entity¹⁶ to receive, investigate, and resolve harassment and discrimination complaints of state government employees**

When an employee makes a complaint, it should be investigated neutrally and independently by qualified individuals. Current investigation procedures for state employees across the legislature and executive branch present a maze of enforcement, lack of transparency, and are susceptible to political influence based on their governing structure and policies. Harassment and discrimination complaints need to be investigated independent of political influence.

As gender-based discrimination and harassment can also be found alongside and intertwined with other forms of discrimination (e.g., race-based or religious-based discrimination) it is important for the same independent entity to receive and resolve all of these types of claims.

b. Require the New York State Division of Human Rights (DHR) to consult with the New York State Department of Labor to develop and implement uniform gender-based discrimination, sexual harassment and other protected-class discrimination policies for all employees of state agencies, executive department, Senate chamber, Assembly chamber, and every state elected and appointed member office

While gender-based harassment is prevalent in all fields, the workplaces for employees of elected or appointed officials meet many conditions for increased risk factors for harassment.¹⁷

State government employees need strong protections, not just the minimum protections permitted by the 2018 updates to various New York State laws. These recent updates contain a requirement that a minimum standard of sexual harassment policies be adopted by all New York State employers.¹⁸ However, the law permits differing policies between different state agencies - instead, there must be consistent policies across agencies and legislative bodies to avoid confusion in the reporting and investigation process and to increase transparency and accountability in enforcement. The uniform policy must provide examples of the conduct which is prohibited, provide for appropriate training for all state employees, establish a clear reporting process, and outline comprehensive investigation procedures, including timelines for each step of the investigation.

c. The New York State model policy should include uniform comprehensive discrimination and harassment training for all state employees, including elected and appointed officials

When an employer takes steps to create a culture of zero tolerance for harassment and discrimination instead of treating it as a compliance exercise, victims are more likely to feel safe coming forward to report abusive behavior. Training should: include a specific portion dedicated solely to gender-based discrimination and sexual harassment; be in-person, interactive, and specified to that office; take place shortly after hire, and annually thereafter; include a detailed overview of the investigation process during and after the investigation, and time periods for each step in the investigation; include bystander intervention training; include mandatory reporter training; and undergo reviews and updates through anonymous climate surveys of employees, conducted shortly after hire and annually thereafter.

d. The New York State model policy should include comprehensive reporting requirements

A report by the United States Equal Employment Opportunity Commission (EEOC) found that on average, 87% to 94% of sexual harassment victims do not file complaints, for fear of disbelief, inaction, receipt of blame for causing the offending action, social and professional retaliation, and damage to their career or reputation.¹⁹ When victims are unclear on how to report or have to go through multiple unnecessary steps to report abuse, it can reinforce commonly held fears that prevent reporting.

The model policy should include multiple avenues for reporting, including the designation of staff positions in each office which are mandatory reporters. Mandatory reporters should include direct supervisors, and the human resources department. Each mandatory reporter who learns of an incident of discrimination or harassment should be required to report it to DHR. Specifically, each mandatory reporter should be required to report any complaints to the independent investigative body in writing, within 24 hours of receiving a verbal or written complaint. Further discussions with stakeholders are necessary to ensure victim protections, as well as protections for mandatory reporters.

e. The New York State model policy should provide a right to an investigation

The policy should also clarify that victims and employees have a right to an investigation upon making a complaint of discrimination, and also a right to the investigatory findings. The right to an investigation should exist for victims, witnesses of the discrimination or harassment, as well as for other employees in the workplace. The right to an investigation should be considered a subset of the right to a discrimination and harassment-free workplace.

f. Mandate tracking and public reporting of aggregated discrimination and harassment complaints

Ending gender-based harassment starts with transparency and accountability. The EEOC has noted that employers that “own” well-handled complaints instead of burying the fact that a complaint existed were more successful in creating better cultures of non-harassment.²⁰

New York law should require the DHR to annually report on the number of gender-based harassment and discrimination in the aggregate, by agency or government branch without naming the complainants or individuals against whom the complaint has been made. The report will include the number of discrimination complaints that have been filed, how those have been resolved, and the number of settlements or court judgments.

3. INCREASE PROTECTIONS FOR VICTIMS SEEKING REDRESS FOR DAMAGES

a. Amend New York State Human Rights Law Section 296(1)(a) to add “or employee or agent thereof” so that individuals are personally liable for discrimination, including gender-based discrimination and sexual harassment

In order to stop workplace harassment and discrimination, victims need to be able to adequately hold their employers and harassers accountable.

The federal and state standards restrict liability: federal Title VII does not provide for individual liability²¹, and New York State Human Rights Law only holds individuals liable if they have ownership interest or decision-making powers,²² or if the individual aided and abetted the harasser.²³ Without personal liability, individuals have less of an incentive to comply with the law. By amending the New York State Human Rights Law and modeling it

after New York City Human Rights Law, supervisors, managers and employees may all be held individually liable.

b. Create liability for employers who have constructive notice of discrimination, including sexual harassment

Update New York State law to include liability when a supervisor knew or should have known of discrimination, modeled after New York City Human Rights Law.²⁴

For liability of the employer, the “actual notice” standard is too burdensome and bars meritorious claims.²⁵

c. With nondisclosure agreements, strengthen New York law to provide greater protections to prevent victim coercion or loss of public benefits or rights

Although the newly enacted laws state that an employer cannot include a nondisclosure agreement unless it is the “complaint’s preference,” victim coercion is likely due to the power dynamics. Nondisclosure agreements are often used as tools to silence victims and in some cases punish a victim. A victim’s preference for privacy should not have to come at the expense of their other rights.

Include procedural protections found in other areas of discrimination law:²⁶

- *the agreement must be written in a manner that can be clearly understood*
- *specifically refers to rights or claims arising under relevant federal, state, or local laws*
- *advises that the employee consult an attorney before accepting the agreement*
- *must be supported by consideration in addition to that to which the employee already is entitled.*

Prohibit clauses requiring victims to pay liquidated damages in event of breach²⁷

Update NYSHRL to require that an agreement to settle a sexual harassment claim shall expressly state that it does not prohibit, prevent, or otherwise restrict the employee from doing any of the following:

- *lodging a complaint of sexual harassment committed by any person with the appropriate local, state, or federal agency*
- *testifying, assisting, or participating in any manner with an investigation related to a claim of sexual harassment conducted by the appropriate local, state, or federal agency*
- *file or discuss any necessary facts necessary to receive benefits such as unemployment insurance*

Clarify that any provision of an agreement to settle a sexual harassment claim that violates these rights shall be void and unenforceable.

d. Pass a “sunshine-in-litigation” law that bars the enforcement of confidentiality clauses in settlements if they conceal information related to “public hazards”

Employers and harassers should not be allowed to use nondisclosure agreements as a shield to allow predatory and abusive behavior to continue. There should be a mechanism for permitting past victims to corroborate serial harassment without subjecting them to a breach of contract.

The definition of “public hazards” should include patterns of discrimination or sexual harassment, workplace-based gender or with “patterns” being defined as discrimination or harassment of more than one individual.

If the victim requested privacy, then the employer, harasser, and other parties other than the victim would still be required to keep the victim’s identifying information and settlement amount confidential. Only other limited facts related to the existence of each settlement would be revealed and would be available in litigation discovery or to an agency investigation.²⁸

e. Increase time limits to file complaints in agencies and in court

Many victims need time to process the trauma of harassment and want to seek solutions for stopping the abuse or seeking redress for damages outside of the judicial system. They need an appropriate amount of time to understand their rights and weigh their options.

If an employee initiates a complaint through any of the available reporting options, then all applicable substantive statutes of limitations should be tolled

A victim’s right to seek redress in court should not be limited by the existence of multiple avenues of reporting or resolution. Outcomes in administrative or other proceedings are separate from financial recovery for harm but may be relevant in court.

Increase the time to file claims with the NYS DHR to three years

Currently, NYS DHR has a one-year time limit for filing a sexual harassment/discrimination claim. Victims may not be aware of their rights or be immediately ready to pursue a course of action that requires them to relive their trauma.²⁹

Amend NYSHRL to eliminate all “notice of claim” requirements. All victims should have a full three-year period to make a decision about pursuing claims

Currently, the Court of Claims Act notice of intent to sue a state government entity requires notice filed within 90 days or 6 months depending on the claim. Therefore, state employees have a shorted window under which to sue.³⁰

¹ Assemblywomen’s Letter Calling for Change (March 22, 2018) available at <https://www.nytimes.com/interactive/2018/03/11/nyregion/document-Albany-Harassment-Open-Letter.html>

² Governor Cuomo Announces Highlights of the FY 2019 Budget, available at <https://www.governor.ny.gov/news/governor-cuomo-announces-highlights-fy-2019-budget>

³ The National Center for Post-Traumatic Stress Disorder, PTSD Research Quarterly, “Sexual Harassment,” Vol. 14 No. 1 (Winter 2003) available at <https://www.ptsd.va.gov/professional/newsletters/research-quarterly/V14N1.pdf>

⁴ See Heather McLaughlin, Christopher Uggen, Amy Blackstone, The Economic and Career Effects of Sexual Harassment on Working Women, *Journal of Gender and Society*, Vol. 31 Issue 3 at 338 (May 10, 2017), available at <http://journals.sagepub.com/doi/abs/10.1177/0891243217704631> (“Harassment at age 29–30 increases financial stress in the early 30s. . . largely by precipitating job change . . . and can significantly alter women’s career attainment.”) and Claire Zillman, The Hidden Victims of Sexual Harassment: Women’s Careers, *Fortune*, (Nov. 30, 2017), available at <http://fortune.com/2017/11/30/matt-lauer-fired-sexual-harassment-jobs/> (“buried in the cringe-worthy tales of unwanted tongue kissing, awkward come-ons, and untied bathrobes is the fact that the abuse has disrupted the careers of the men’s alleged victims[]). Unlike the accused, most of these women didn’t lose their jobs involuntarily. Rather, after experiencing the alleged harassment or assault, they quit their jobs, leave their chosen industry altogether, or come away from the encounter with their ambition crushed.”)

⁵ Combatting Sexual Harassment in the Workplace: Trends and Recommendations Based on 2017 Public Hearing Testimony, Report of the New York City Commission on Human Rights and the Gender Law Clinic at Columbia Law School (April 2018) (The Commission on Human Rights reported that their “Hearing” on sexual harassment in the workplace that took place at CUNY Law School on December 6, 2017 was “the first of its kind in over three decades”) available at http://www1.nyc.gov/assets/cchr/downloads/pdf/SexHarass_Report.pdf. See also Raymond Hernandez, Ex-Assemblyman Accused of Harassment, *N.Y. Times* (Sept. 23, 1992), available at <https://www.nytimes.com/1992/09/23/nyregion/ex-assemblyman-accused-of-sexual-harassment.html>

⁶ New York State Constitution: “[Equal protection of laws; discrimination in civil rights prohibited] §11. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.”

⁷ See New York State Senate Bill S6354A (2017), sponsored by Sen. Kruger, which proposes the following amendment to the New York State Constitution: “S. 11: EQUALITY OF RIGHTS SHALL NOT BE DENIED OR ABRIDGED BECAUSE OF RACE, COLOR, CREED, RELIGION, NATIONAL ORIGIN, CITIZENSHIP, MARITAL STATUS, AGE, GENDER, SEX, PREGNANCY, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, MILITARY STATUS, PHYSICAL OR MENTAL DISABILITY, OTHER IMMUTABLE OR ASCRIPTIVE CHARACTERISTIC, OR LIKE GROUNDS FOR DISCRIMINATION, EXCLUSION, OR DISADVANTAGE, BY ANY OTHER PERSON OR BY ANY FIRM, CORPORATION, OR INSTITUTION, OR BY THE STATE OR ANY AGENCY OR SUBDIVISION OF THE STATE.”

⁸ Federal law: See Title VII Section 703 which states, “*It shall be an unlawful employment practice for an employer - to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s ... sex[.]*” See also U.S. Equal Employment Opportunity Commission, Laws Regulations and Guidance, Types of Harassment, https://www.eeoc.gov/laws/types/sexual_harassment.cfm, where the EEOC describes the law and explains “Sexual Harassment” as, “*It is unlawful to harass a person* (an applicant or employee) *because of that person’s sex*. Harassment can include ‘sexual harassment’ or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. *Harassment does not have to be of a sexual nature*, however, and can include offensive remarks about a person’s sex. For example, it is illegal to harass a woman by making offensive comments about women in general. Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.” See also New York State Law: NYS Human Rights Law Section 296 which states, “*It shall be an unlawful discriminatory practice*: For an employer or licensing agency, *because of an individual’s* age, race, creed, color, national origin, sexual orientation, military status, *sex*, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or *to discriminate against such individual in compensation or in terms, conditions or privileges of employment*.” law available at <https://law.justia.com/codes/new-york/2015/exc/article-15/296>.

New York law: See New York State Division of Human Rights, *Guidance on Sexual Harassment for all Employers in New York State*, <https://dhr.ny.gov/sites/default/files/pdf/guidance-sexual-harassment-employers.pdf> which describes “Sexual harassment in the form of a ‘hostile environment’ consists of words, signs, jokes, pranks, intimidation or physical violence which are of a sexual nature, or which are directed at an individual because of that individual’s sex.”

New York City law: See New York City Law Administrative Law Section 8-107 which states, “*It shall be an unlawful discriminatory practice*: (a) For an employer or an employee or agent thereof, *because of the actual or perceived* age, race, creed, color, national origin, *gender*, disability, marital status, partnership status, caregiver status, sexual orientation,

uniformed service, or alienage or citizenship status of any person: (1) To represent that any employment or position is not available when in fact it is available; (2) To refuse to hire or employ or to bar or to discharge from employment such person; or (3) To discriminate against such person in compensation or in terms, conditions or privileges of employment.” See also Administrative Law Section 8-102 (23), “The term ‘gender’ shall include actual or perceived sex and shall also include a person’s gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth” available at <https://www1.nyc.gov/site/cchr/law/chapter-1.page#8-102>

⁹ Sexual harassment is generally defined as either “quid pro quo” or “hostile work environment.” For quid pro quo harassment, a single instance may constitute harassment, whereas for hostile work environment the harassing conduct must be “severe or pervasive.” Under federal law, harassment is unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive. See United States Equal Employment Commission, Harassment, available at <https://www.eeoc.gov/laws/types/harassment.cfm>; Meritor Savings Bank, FSB v. Vinson 477 U.S. 57, 67 (1986)(Noting that for sexual harassment to violate Title VII, it must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”; see also Faragher v. Boca Raton. 524 U.S. 775 (1998). Similarly, under New York State law, conduct must be “severe or pervasive” to rise to the level of hostile work environment sexual harassment. The New York Court of Appeals has held that: “The standards for recovery under section 296 of the Executive Law are in accord with Federal standards under title VII of the Civil Rights Act of 1964[]” Ferrante v. American Lung Ass’n, 90 N.Y.2d 623; 665 NYS2d 25 (1997)(discussing the “severe or pervasive” standard).

¹⁰ In contrast to the burdensome “severe or pervasive” standards applied at the federal and state levels for hostile work environment sexual harassment, the standard applied at the New York City level has been interpreted as significantly lower. In 2009, a New York State appellate court determined that sexual harassment exists under the City Human Rights Law when an individual is “treated less well than other employees because of [] gender” and the conduct complained of consists of more than “petty slights or trivial inconveniences.” Williams v. New York City Hous. Auth., 61 A.D.3d 62, 66, 78, 80 (N.Y. App. Div. 2009). Under this standard, whether harassment was “severe and pervasive” is not relevant to the question of underlying liability, but is relevant in determining the scope of damages. Id. at 76. The broader Williams standard was explicitly written into the City Human Rights Law. N.Y.C. Local L. No. 35, §2(c), available at <https://www1.nyc.gov/assets/cchr/downloads/pdf/amendments/LocalLaw35.pdf> (“The provisions of this title shall be construed liberally...Cases that have correctly understood and analyzed the liberal construction requirement of subdivision a of this section and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of this title include Albunio v. City of New York, 16 N.Y.3d 472 (2011), Bennett v. Health Management Systems, Inc., 92 A.D.3d 29 (1st Dep’t 2011), and the majority opinion in Williams v. New York City Housing Authority, 61 A.D.3d 62 (1st Dep’t 2009).”)

¹¹ Governor Cuomo Unveils 18th Proposal of 2018 State of the State: Combat Sexual Harassment in the Workplace, available at <https://www.governor.ny.gov/news/governor-cuomo-unveils-18th-proposal-2018-state-state-combat-sexual-harassment-workplace>

¹² New York State Labor Law S. 2(5) states: “employee” means a mechanic, workingman or laborer working for another for hire.

¹³ The only exclusionary language in the text of the NYSHRL within the definition of “employer” is that an employer must have four or more employees to be covered under certain provisions of the law. See New York State Exec. L. S. 292(5): “The term ‘employer’ does not include any employer with fewer than four persons in his or her employ except as set forth in section two hundred ninety-six-b of this article, provided, however, that in the case of an action for discrimination based on sex pursuant to subdivision one of section two hundred ninety-six of this article, with respect to sexual harassment only, the term ‘employer’ shall include all employers within the state.” In turn, New York State Exec. L. 296-B applies to unlawful discriminatory practices relating to domestic workers.

¹⁴ Cases law is inconsistent on whether NYSA is an “employer” under NYSHRL. In Burhans v. Assembly of the State of N. Y., 2014 NY Slip Op 30587[U] (Sup. Ct. N.Y. Co. 2014), the Assembly argued that it was not plaintiffs’ employer for the purpose of imputing liability under the NYSHRL. While the court did not directly conclude whether the Assembly was an employer under NYSHRL, it provided a lengthy analysis on the subject, implying that the Assembly was not an employer and dismissing the action on other grounds. The Court explained that “The threshold question to be decided in this case is whether or not the Assembly, as a body, is an ‘employer,’ as that term is defined by both statute and common law. . . In order to determine whether or not the Assembly is an employer, pursuant to the Exec. Law, it would seem that the answer to this question would naturally flow from a plain reading, but it does not. The Court of Appeals in Patrowich v. Chemical Bank, 63 NY2d 541 (1984), held that the ‘economic reality’ test for determining who may be sued as ‘employer’ pursuant to the NYSHRL, requires a plaintiff to put forth evidence that shows that the putative employer, has an ownership interest in the enterprise or the power to do more than just carry out personnel decisions made by others.” (Burhans at 3-5). The Court further noted that, “It is uncontested that Assemblymembers do not have any ownership interest in the Assembly itself because they are all public officers... Assuming arguendo, that the Assembly could be considered plaintiffs’ employer, this Court could impose liability on the body as a whole or the individual

Assemblymembers, only where the ‘employer’ encourages, condones or approves the unlawful discriminatory acts[.]” (Burhans at 8-9). The plaintiffs subsequently filed a sex discrimination and sexual harassment complaint renaming the defendant as the State of New York. *Burhans v. the State of New York*, (Sup. Ct. N.Y. Co. Index 152906/14) (concluding that “plaintiffs adequately plead a cause of action that the State of New York may be their employer for purposes of liability under NYSHRL,” denying the defendant’s motion to dismiss the cause of action for sex-based hostile work environment, and granting the defendant’s motion to dismiss the cause of action for sex discrimination), available at <https://pospislaw.com/wp-content/uploads/2015/01/Burhans-Rivera-v.-State-of-New-York-Sup.-NY-1.15.15.pdf>; see also *Burhans v. Lopez*, 24 F.Supp.3d 375 (2014)(stating “the Court holds that Silver is an ‘employer’ under the NYSHRL and NYCHRL”) available at <https://www.leagle.com/decision/infdc020140707d17>.

¹⁵ One of the recent cases against NYS Assemblymember Dennis Gabryszak was dismissed using this argument. *Kennedy v. New York*, 167 F.Supp.3d 451 (2016) (finding that “Thus, upon review of the allegations of the Amended Complaint and the affidavit submitted by Kennedy in response to Defendants’ motion, this Court finds that she falls within the personal staff exemption to Title VII. Because this Court therefore lacks subject-matter jurisdiction over her claims against Defendants State and Assembly, their motion to dismiss the Title VII claims under FRCP 12(b)(1) is granted.”) available at <https://www.leagle.com/decision/infdc020160307930>.

¹⁶ The purpose of this recommendation is to streamline all state level complaints to one independent qualified state agency. It does not preclude a complainant from also taking advantage of other reporting avenues such the EEOC, the NYC Commission on Human Rights for NYC related complaints, or other similar options.

¹⁷ The risk factors mentioned by the EEOC include a majority homogenous male-dominated workforce, many young workers with relatively little work experience, prevalence of “high value” employees, the abundance of significant power disparities between staff and supervisors, a workplace culture that tolerates or encourages alcohol consumption, and isolated and sometimes decentralized offices that allow for a sense of isolation. Chai. R. Feldblum and Victoria A. Lipinc, U.S. Equal Emp. Opportunity Comm’n, Select Task Force on the Study of Harassment in the Workplace, at 28 (2016) https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

¹⁸ See New York State Bills A09507C and S7507 affecting various laws. The text from those bills is included as Part KK of the 2018 NYS Budget Bill, available at <http://public.leginfo.state.ny.us/navigate.cgi>. Among other changes, the provisions amend New York State Labor Law to require the New York State Department of Labor and the New York State Division of Human Rights to promulgate a model sexual harassment policy, and require all employers to adopt the model policy or a standard which meets the minimum requirements of such policy.

¹⁹ Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (June 2016) (“Studies have found that 6% to 13% of individuals who experience harassment file a formal complaint. That means that, on average, anywhere from 87% to 94% of individuals did not file a formal complaint.”), available at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm. The EEOC Task Force noted that “The range of percentages results from five studies reviewed by Cortina & Berdhal.” Id. at footnote 57. See also Lilia M. Cortina and Jennifer L. Berdahl, Sexual Harassment in Organizations: A Decade of Research in Review, *The Sage Handbook of Organizational Behavior* 469, 469-96 (J. Barling & C. L. Cooper eds., 2008) (finding that in a study of Latina women in different companies, a 17% to 20% rate for those who experienced harassment filing a formal complaint); Amy L. Culbertson & Paul Rosenfield, Assessment of Sexual Harassment in the Active-Duty Navy, 6 *Mil. Psychol.* 69 (1994) (exploring experiences of women in the Navy, and finding that 6% to 8% of those who experienced harassment filed a formal complaint); Kimberly T. Schneider et al., An Examination of the Nature and Correlates of Ethnic Harassment Experiences in Multiple Contexts, 85 *J. Applied Psychol.* 3 (2000) (finding in a study of women in different companies, that 6% to 13% of those who experienced harassment had filed a complaint); Caroline C. Cochran et al., Predictors of Responses to Unwanted Sexual Attention, 21 *Psychol. of Women Q.* 207 (1997) (in a study of male and female university staff and students, finding a 2% reporting rate); U.S. Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges (1994) (finding in probability surveys, a 6% rate of employees who had experienced harassment taking some type of formal action), available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948>

²⁰ See, e.g., Written Testimony of Patti Perez, WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), available at https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/perez.cfm.

²¹ *Cayemittes v. City of N.Y. Dep’t of Hous. Pres. & Dev.*, 641 F. Appx. 60, 62 (2d Cir. 2016). Individual defendants such as supervisors and co-workers therefore may not be held personally liable under federal law. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995). For additional explanation of how the City Human Rights Law is broader than state and federal standards, see *Malena v. Victoria’s Secret Direct, LLC*, 886 F.Supp.2d 349, 366 (S.D.N.Y. 2012). See also New York City Commission on Human Rights, *Combating Sexual Harassment in the Workplace: Trends and Recommendations Based on 2017 Public Hearing Testimony* (2018).

²² “Several states currently permit victims to sue their individual harassers under state anti-discrimination laws. In the District of Columbia, Massachusetts, Michigan, Missouri, Montana, New Mexico, and Washington, a harasser who is a

supervisor can be held individually liable for sexual harassment. In California, Iowa, and Vermont, any employee can be held individually liable for harassing another employee, regardless of whether the harassed employee is a subordinate or a coworker." Maya Raghu and Joanna Suriani, National Women's Law Center, "#MeTooWhatNext: Strengthening Workplace Sexual Harassment Protections and Accountability" (December 2017) pages 3-4; footnotes 30-39, available at <https://nwlc.org/resources/metoowhatnext-strengthening-workplace-sexual-harassment-protections-and-accountability/>. See also *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 888 (D.C. 1998) (finding individual liability for supervisors' discriminatory behavior under District of Columbia Human Rights Act); *Purcell v. Thomas*, 928 A.2d 699, 715 (D.C. 2007) (applying *Wallace* to find individual liability of supervisor for sexual harassment); *Beaupre v. Cliff Smith & Assocs.*, 738 N.E.2d 753, 764 (Mass. App. Ct. 2000) (finding individual liability for supervisor's sexual harassment under Massachusetts antidiscrimination law); *Elezovic v. Ford Motor Co.*, 697 N.W.2d 851, 857 (Mich. 2005) (finding individual liability for supervisor's sexual harassment under Michigan Civil Rights Act); *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 244 (Mo. Ct. App. 2006) (finding individual liability for supervisor's sexual harassment under the Missouri Human Rights Act); *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 669 (Mo. 2009) (endorsing several Court of Appeals decisions, including *Cooper*, to find individual liability for supervisor's sexual harassment); *Fandrich v. Capital Ford Lincoln Mercury*, 901 P.2d 112, 115 (Mont. 1995) (finding individual liability for supervisor's sexual harassment under the Montana Human Rights Act); *Williams v. Mann*, 388 P.3d 295, 302 n.2 (N.M. Ct. App. 2016) (finding individual liability for supervisor's sexual harassment under the New Mexico Human Rights Act); *Brown v. Scott Paper Worldwide Co.*, 20 P.3d 921, 928 (Wash. 2001) (finding individual liability for supervisor's sexual harassment under the Washington Law against Discrimination); but cf *Jenkins v. Palmer*, 66 P.3d 1119, 1122 (Wash. App. 2003) (declining to extend *Brown* to cover coworker harassment because coworkers do not fall under the plain reading of the statutory definition of "employer"); see Cal. Gov. Code § 12940(j)(3); *Plute v. Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1010 (N.D. Cal. 2001); *Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999) (finding individual liability for supervisor's sexual harassment under the Iowa Civil Rights Act); *Blazek v. U.S. Cellular Corp.*, 937 F. Supp. 2d 1003, 1023 (N.D. Iowa 2011) (extending *Vivian* to permit individual liability for sexual harassment by a coworker); *Payne v. U.S. Airways, Inc.*, 987 A.2d 944, 953 (Vt. 2009) (finding individual liability for supervisors' discriminatory acts under Vermont Fair Employment Practices Act); *Wyatt v. City of Barre*, 885 F. Supp. 2d 682, 700 (D. Vt. 2012) (applying *Payne* to permit individual liability for coworkers' discriminatory acts).

²³ Individual managers, supervisors and employees can be held liable for contributing to a hostile work environment under the "aiding and abetting" provision of the NYSHRL, N.Y. Exec. Law. § 296(6). However, the scope of the aiding and abetting provision of the NYSHRL is not entirely clear. *Boonmalert v. City of New York*, No. 17-1465, 2018 WL 496846, at *4 (2d Cir. Jan. 22, 2018) ("[A]n individual cannot aid and abet their own discriminatory conduct."); *Wenchun Zheng v. Gen. Elec. Co.*, No. 115 CV 1232 TJM CFH, 2016 WL 10859373, at *4 (N.D.N.Y. Jan. 12, 2016) (discussing how federal and state courts have applied different understandings of New York Exec. Law §296(6)). In particular, it is not clear whether an individual can be liable for creating a hostile work environment under an aiding and abetting theory if there is not a basis to hold an employer liable. Given this uncertainty, the legislature should clarify that individuals are liable for sexual harassment regardless of whether they are "employers" or "aiders and abettors." One way to accomplish this would be to amend 296(1)(a), which is the main employment discrimination provision in the statute, to add "or employee or agent thereof" after "employer." Doing so would mirror the main employment provision of the NYCHRL § 8-107(1). See *Gorman v. Covidien, LLC*, 146 F. Supp. 3d 509, 529 (S.D.N.Y. 2015) ("Unlike Title VII, which does not extend to individual employees, or the NYSHRL, which covers only limited classes of employees, the NYCHRL expressly creates direct liability for employment discrimination against 'an employee or agent' of the employer in question.")

²⁴ New York City Human Rights Law §8-107(13)(b)(1): "Employer liability for discriminatory conduct by employee, agent or independent contractor. a. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions one and two of this section."

²⁵ Under the NYSHRL, an employer "cannot be held liable for an employee's discriminatory act [towards a plaintiff] unless the employer became a party to it by encouraging, condoning, or approving it." *State Div. of Human Rights v. St. Elizabeth's Hosp.*, 66 N.Y.2d 684, 687 (1985); *N.Y. State Div. of Human Rights v. ABS Elecs., Inc.*, 102 A.D.3d 967, 968-69 (2d Dep't 2013). This "condonation" standard means a plaintiff must show "a knowing, after-the-fact forgiveness or acceptance of an offense." *St. Elizabeth's Hosp.*, 66 N.Y.2d at 687. "The Appellate Division, first department has held under NYSHRL plaintiffs must plead that their employer knew or should have known that its employee was being harassed but failed to take proper action (see *Polidori v. Societe Generale Groupe*, 39 AD3d 404, 405 [1st Dept 2007] ["The amended complaint sufficiently alleges a pervasive atmosphere of workplace sexual harassment... and that defendant knew or should have known of the harassment before plaintiff made her formal complaint."])" See also *Cole v. Sears Roebuck & Co.*, 120 AD3d 1159, 1160 [1st Dept 2014] ["The record further shows that there are issues of fact as to whether defendant's response to plaintiff's complaints of wide spread anti-gay harassment was reasonable under the circumstances, and whether, through a lack of effective action, defendant condoned or acquiesced in the hostile work environment"]; see also *Matter of Medical Express Ambulance Corp. v. Kirkland*, 79 AD3d 886, 887-888 [2nd Dept 2010] ["Only after an employer knows or should have known of the improper conduct can it undertake or fail to undertake

action which may be construed as condoning the improper conduct”]). *Burhans v. State of New York* (Supp. NY Index 152906/14 at 10, 11).

²⁶ As referenced in “Women’s Rights Organizations Urge Albany Leadership to Adopt Strong Sexual Harassment Policies Within the FY2019 Budget,” letter, a complainant’s preference to include a condition of confidentiality may not be considered knowing and voluntary unless the agreement: 1) is written in a manner that can be clearly understood; 2) specifically refers to rights or claims arising under relevant federal, state, or local laws; 3) advises that the employee consult an attorney before accepting the agreement; 4) provides twenty-one days within which to consider the condition; 5) provides that for a period of at least seven days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired; and 6) must be supported by consideration in addition to that to which the employee already is entitled. B) An agreement to settle a sexual harassment claim shall expressly state that it does not prohibit, prevent, or otherwise restrict the employee from doing either of the following: (1) lodging a complaint of sexual harassment committed by any person with the appropriate local, state, or federal agency; or (2) testifying, assisting, or participating in any manner with an investigation related to a claim of sexual harassment conducted by the appropriate local, state, or federal agency; (3) Any provision of an agreement to settle a sexual harassment claim that violates subdivision (1) or (2) of this subsection shall be void and unenforceable.” Available at: <https://www.abetterbalance.org/resources/80-womens-rights-organizations-urge-albany-leadership-to-adopt-strong-sexual-harassment-policies-within-the-fy2019-budget/>

²⁷ In 2013, the Assembly, Assemblymember Vito Lopez, and former employees Leah Hebert and Rita Pasarell signed a settlement agreement which stated: “Each of the employees and the Member of the Assembly Vito Lopez agrees that each shall be entitled to liquidated damages of \$20,000.00 or actual and punitive damages, whichever is greater, as determined in an arbitration proceeding before [arbitrator] ... for each breach of paragraphs 17, 18, or 19 of this agreement, and any such breach [] shall be considered a material breach. The Employees and Member of the Assembly Vito Lopez in agreeing to adjudicate such claims in arbitration hereby expressly waive any right to commence any action in any other judicial or administrative forum and expressly waive the right to a jury trial concerning such matters.” Paragraph 17 provided a nondisclosure provision applying to all parties to the agreement; paragraphs 18 and 19 provided non-disparagement provisions applying to Vito Lopez, Leah Hebert, and Rita Pasarell.

²⁸ A number of states have passed “sunshine-in-litigation” laws that bar the enforcement of confidentiality clauses in settlements if they conceal information related to “public hazards.” “One might reasonably argue that a pattern of workplace-based sexual harassment on the part of a powerful individual like Cain, Ailes, or Weinstein amounts to a ‘public hazard’ to which these laws should apply.” Daniel Hemel, Vox, *How Nondisclosure Agreements Protect Sexual Predators* (Oct. 13, 2017), available at <https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreement-weinstein-sexual-harassment-nda>.

Chloe Roberts, a Florida-based labor and employment attorney, also proposed this theory, but it does not appear that any court has addressed it yet. See Chloe Roberts, Roberts & Associates Law Firm, “The Issue with Confidential Sexual Harassment Settlements,” (Nov. 21, 2016), available at <https://www.law360.com/employment/articles/863553/the-issue-with-confidential-sexual-harassment-settlements>; 69.801 Fla. Stat. (2018) (“Sunshine in litigation; concealment of public hazards prohibited”).

²⁹ New York City, as part of its Stop Sexual Harassment in NYC legislative bill package, amended section 8-109 of its administrative code to say the New York City Commission on Human Rights “shall have jurisdiction over a claim of gender-based harassment if such claim is filed within three years after the alleged harassing conduct occurred.”

³⁰ *Snickles v. State of New York* 2018 NY Slip Op 02042 (4th Dep’t 2018) in consolidated lawsuits of six employees against Assemblyman Gabryszak for sexual harassment, the court dismissed four of the claims as being untimely under the Court of Claims Act, as they had been filed more than six months after the claims accrued.