

A CALL FOR LEGISLATIVE ACTION TO ELIMINATE WORKPLACE HARASSMENT

PRINCIPLES AND PRIORITIES

DECEMBER 2018

On behalf of the American Civil Liberties Union, The Leadership Conference on Civil and Human Rights, the National Women's Law Center, and over 50 undersigned organizations, we urge lawmakers to take legislative action to address and eliminate workplace harassment by implementing the principles and priorities endorsed below.

We are witnessing an unprecedented reckoning and demand for accountability for and prevention of workplace harassment, particularly sexual harassment, which includes sexual assault. We have been reminded, once again, that despite the longstanding prohibitions against harassment based on sex —as well as harassment based on race, color, religion, national origin, age, and disability— these reprehensible behaviors continue to infect our workplaces and deny working people, and especially working women, equal employment opportunities, safety, and dignity.

Congress must act to strengthen protections against workplace harassment and discrimination and achieve real change for those struggling to do their jobs and get ahead in the face of harassment.

We are committed to achieving reforms consistent with the principles below for all workers, in the public sector, the private sector, and the military. Because the rights of federal workers and service members are enforced through somewhat different legal systems and processes than other workers, not all of the specific policy proposals outlined below are precisely applicable to these sectors, but these workers need solutions too, including modernizing the military justice system to increase transparency, accountability, and alignment with the civilian justice system. The principles and priorities below provide specific recommendations for Congressional action, and we look forward to working with Congress to continue to develop legislative solutions consistent with these principles specifically for federal sector employees and the military.

- 1. Existing civil rights and workplace protections must be strengthened, and we will not accept a single step backward.** We look forward to working with congressional leaders to thoughtfully and strategically expand and strengthen existing civil rights and workplace protections. At the same time, we will oppose and work to defeat any legislative proposal that, in the guise of harassment-focused reform, attempts to roll back a single existing civil right or workplace protection or otherwise in any way undermines the scope and impact of existing laws. This is a moment for our nation's workplaces to move forward, not back. Our civil rights are not on the bargaining table.
- 2. Reforms must address all forms of discrimination and harassment, not only sexual harassment.** Any legislative response must encompass harassment based on sex (which includes sexual orientation and gender identity), but also other forms of workplace harassment and discrimination. Workplace discrimination and harassment based on race, disability, color, religion, age, or national origin all undermine workers' equality, safety and dignity, and are no less humiliating. Additionally, these forms of discrimination and harassment often interrelate; for example, a Black woman may experience harassment based on both her sex and race; she may be paid less than her male coworkers and also be the target of sexual comments and racial epithets. Lawmakers must craft an intersectional response that does not single out or remedy one form of discrimination or harassment while ignoring the others.

- 3. Reforms must expand legal protections against harassment and discrimination to all working people.** Anti-discrimination laws have not kept pace with changes in our nation’s workforce and workplaces and are out of step with cultural norms and expectations. Too many working people are insufficiently protected, including guestworkers, individuals in the evolving gig economy, and low-income individuals from traditionally marginalized communities. Most starkly, individuals in small workplaces (fewer than 15 employees), such as domestic workers, are denied core federal civil rights protections against harassment or discrimination at work. Additionally, individuals who are not considered “employees,” such as independent contractors (including many people working in agriculture, hospitality, and care work, who may be misclassified by employers), unpaid interns, and others who work in non-traditional employment relationships, are not sufficiently protected by federal civil rights law. Although some states and localities provide more inclusive workplace civil rights protections, all working people deserve to be protected from harassment and discrimination by federal law.

Congress should:

- Extend workplace civil rights protections against harassment and discrimination for all individuals in workplaces with one or more employees.
- Strengthen workplace civil rights protections against harassment and discrimination for independent contractors, interns, graduate students, and guestworker recruits.

- 4. Reforms must restore power to working people and limit employer-imposed secrecy.** Harassment and discrimination thrive in the shadows and those with the least power at work are the most vulnerable to harassment. For too long working people have been afraid to report harassment and discrimination, not only because they fear jeopardizing their safety, jobs, financial security, and career prospects, but also because in many instances they are prohibited from discussing or reporting discrimination or harassment due to restrictions imposed by employers such as through employment contracts and settlement agreements. The power disparity between the employer and the individual, coupled with the threat of retaliation, has often silenced working people while allowing many employers (and individual offenders) to evade accountability.

Congress should:

- Prohibit employers from requiring individuals to sign employment contracts with nondisclosure or nondisparagement clauses, or nondisclosure agreements or nondisparagement agreements (NDAs), as a condition of employment.
- Prohibit employers from requiring individuals to resolve employment discrimination and harassment claims through forced arbitration and from limiting individuals’ ability to come together as a group to challenge harassment and other forms of discrimination.
- Ensure informed consent regarding nondisclosure clauses in settlement agreements and limit the abuse of nondisclosure agreements to cover up chronic or serial harassment or reduce the ability of working people to use collective action. Any legislative proposal must be carefully calibrated to ensure individuals challenging harassment and discrimination have the power to decide what information about their claims should be confidential while, at the same time, not discouraging employers from entering into settlements, or reducing the individual or collective power of workers to make their workplaces fair and safe. An agreement to keep a settlement confidential should provide a reasonable economic or other benefit to the individual that is on par with the benefit to the employer. And employees should not be subject to additional monetary damages for breach of the agreement.
- Specify that nondisclosure clauses in settlement agreements cannot explicitly or implicitly limit an individual’s ability to provide testimony or evidence, file claims or make reports to any federal or state enforcement agency, such as the Equal Employment Opportunity Commission (EEOC), Department of Labor, or state counterpart; nor can they prevent an employee from providing testimony or evidence in state or federal litigation, including class or collective actions, against the employer.

- Require employers to regularly disclose or report to a specified federal, state, or local enforcement agency (such as the Securities and Exchange Commission, the EEOC, or a state fair employment agency) the number of claims, lawsuits, and settlements involving harassment and discrimination involving the employer and the amounts paid in the aggregate to resolve such matters.
- Require employers with federal contracts to regularly disclose the number of claims, lawsuits, and settlements involving harassment and discrimination involving the employer and the amounts paid in the aggregate to resolve such matters to the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

5. Reforms must remove barriers to accessing justice. Current law creates and reinforces many procedural barriers, including short statutes of limitations, legal standards restrictively interpreted by courts, and limits on recovery, that have made it difficult for individuals to pursue claims of workplace harassment and discrimination, hold perpetrators of harassment and discrimination and employers liable, and obtain redress for the harm they have suffered.

Congress should:

- Extend the time under the statute of limitations to file a harassment or other discrimination complaint with the EEOC to three years.
- Mandate that employers are to be held vicariously liable for harassment committed by supervisors and that evidence of prevention efforts is relevant only as to mitigation of damages. Supervisors whose actions trigger vicarious liability shall include those who direct employees' daily activities, including but not limited to dates and hours of work, work assignments and location, and availability and timing of breaks.
- Remove the caps on compensatory and punitive damages (set at \$50,000 - \$300,000 depending on employer size over a quarter century ago) so that individuals who experience serious harassment and other forms of unlawful discrimination are in fact made whole for the harms they have suffered, rather than being held to arbitrary amounts based on the size of the employer. This will also put employers on notice that being held liable for harassment and discrimination will amount to more than a slap on the wrist, and lead them to change their behavior accordingly.
- Address the judicially created "severe or pervasive" liability standard so as to correct and prevent unduly restrictive interpretations by the courts that minimize and ignore the impact of harassment.
- Permit individuals to hold the individual perpetrator, and not only the employer, jointly and severally liable for damages, to ensure that those who harm others are held accountable for their actions.
- Create streamlined access to financial resources for low income individuals experiencing harassment or discrimination -- including workers' compensation, unemployment insurance, and health care coverage-- that will allow them to challenge harassment and discrimination while mitigating the related economic and health impacts.

6. Reforms must strengthen existing protections against retaliation. Although federal law provides protection from retaliation for those challenging harassment and other forms of discrimination, far too many employers continue to subject people to adverse action when they assert their rights at work. These actions, and the threat of such actions, have a chilling effect that keeps individuals from stepping forward. The risk of a pay cut, demotion, termination, damaging future career prospects, and developing a reputation within a workplace or an industry as a "troublemaker" is substantial. Efforts to address and prevent harassment will be unsuccessful if individuals are too afraid to report harassment, and perpetrators are not held accountable.

Congress should:

- Clarify that an employer may be held liable for retaliation when an individual demonstrates that protected activity was a motivating factor for the employer's adverse action, even though other factors also motivated the action.
- Clarify that reporting workplace harassment before it becomes actionable is activity protected from retaliation.
- Ensure that all working people who engage in opposition activity are protected from retaliation, including managers, human resources personnel, or other EEO advisors.
- Acknowledge that actionable retaliation includes threats to report an individual to immigration authorities.

7. Reforms must promote prevention. Prevention should be a primary goal for employers in addressing harassment and discrimination. Although civil rights laws have been interpreted to provide employers with an incentive to adopt anti-harassment and anti-discrimination policies and training, too often employers are able to shield themselves from liability by merely having anti-harassment and anti-discrimination policies or training programs in place, regardless of quality or efficacy. These efforts have frequently been ineffective in preventing harassment and discrimination in the first instance in part because they permit symbolic compliance with the law, instead of addressing behaviors that are unacceptable as well as unlawful, and that if unchecked may escalate to illegal harassment and discrimination.

Congress should:

- Require employers to provide effective annual trainings to all supervisors and employees. Training should be provided in a manner that is accessible to and effective for all, including in multiple languages and formats.
- Establish a program at the EEOC that would identify and share best practices and standards for effective training programs and other interventions for employers of all types and sizes and in multiple industries and sectors. The EEOC should also be authorized and funded to investigate and develop other ways to provide resources and incentives for prevention, including by funding research, pilot programs, technical assistance, and certification or awards programs.
- Provide funding for research on effective climate surveys and the development of model climate surveys. Climate surveys have been used to assess the prevalence of harassment and discrimination in the workforce and appear to be an important tool to address and prevent workplace violations. More research is needed to ensure that climate surveys are effectively prepared and utilized, are beneficial in multiple industries and sectors and for employers of different sizes, and that follow-up obligations are well understood by employers. The EEOC, or another appropriate entity, should ensure that this research is undertaken, completed in a timely fashion, and used to develop model climate surveys for a broad range of employers and industries, which are disseminated widely.
- Establish that an employer's anti-harassment policies and procedures do not allow an employer to avoid liability, but only may serve as an affirmative defense in the calculation of damages. Moreover, such an affirmative defense should only be available after courts and factfinders have evaluated the quality and efficacy of an employer's programs and policies - including its reporting system and prevention training programs - to ensure they meet the quality standards for employers of similar size and in similar industries.
- Require employers to provide multiple internal reporting mechanisms, including options for confidential and/or anonymous reporting.
- Create a process that allows individuals to make confidential reports to the EEOC (such as through a carefully constructed and administered EEOC tip line that supplements the existing process for submitting charges of discrimination).

- Eliminate the tipped minimum wage. Reports from workers in the restaurant industry suggest that the reliance on tips to reach the regular minimum wage often results in their having to tolerate sexual harassment, other illegal harassment, and other inappropriate behavior from customers just to make a living, which in turn can perpetuate a culture of harassment in tipped industries. Equal treatment for tipped workers—that is, requiring that tipped workers are paid the regular minimum wage regardless of tips—is one way to help alleviate tipped workers’ vulnerability to sexual harassment.

8. Reforms must be accompanied by greater resource allocations to enforcement agencies.

Substantive legal reform must be accompanied by substantial additional funding for the EEOC, OFCCP, and civil rights divisions within federal agencies, including the military, to increase their capacity to conduct outreach, education, employer training, investigations, and enforcement actions, and develop new resources for working people in all sectors including for low-wage workers.

Congress should:

- Increase funding for the EEOC, OFCCP, and civil rights units in federal agencies, including the military, in order to improve outreach, education, and enforcement capacity.

If you have any questions or need additional information, please contact Vania Leveille, American Civil Liberties Union, at vleveille@aclu.org, Maya Raghu, National Women’s Law Center, at mraghu@nwlc.org, and June Zeitlin, The Leadership Conference on Civil and Human Rights, at zeitlin@civilrights.org

Supporting Organizations:

ACLU

The Leadership Conference on Civil and Human Rights

National Women’s Law Center

9to5, National Association of Working Women

A Better Balance

AFL-CIO

Alianza Nacional de Campesinas

American Association of People with Disabilities

American Association of University Women

American Federation of State, County, and Municipal Employees (AFSCME)

Autistic Self Advocacy Network

Bazon Center

Center for American Progress

Center for Public Representation

CLASP

Clearinghouse on Women’s Issues

Equal Pay Today

Equal Rights Advocates

Family Values @ Work

Feminist Majority

Futures Without Violence

Gender Justice

Human Rights Campaign

Jobs to Move America

Justice for Migrant Women

Kentucky Equal Justice Center

Maine Women’s Lobby

Mississippi Coalition Against Domestic Violence

NAACP

National Alliance to End Sexual Violence

National Asian Pacific American Women’s Forum

National Association of Councils on Developmental Disabilities

National Center for Transgender Equality

National Council of Jewish Women

National Domestic Workers Alliance

National Employment Law Project

National Employment Lawyers Association

National LGBTQ Task Force

National Organization for Women Foundation, Inc.

National Partnership for Women & Families

National Resource Center on Domestic Violence

NETWORK Lobby for Catholic Social Justice

Oxfam America

ProGeorgia

Protect Our Defenders

ROC-United

Sargent Shriver National Center on Poverty Law
SEIU

Southwest Women’s Law Center

Ultraviolet

The Women’s Law Center of Maryland

We Believe You Fund

Women Employed

Women of Reform Judaism

Women’s Law Project

Women’s Rights and Empowerment Network (WREN)

Working Ideal

Workplace Fairness

Workplace Justice Project at Loyola Law Clinic

YWCA USA