Background Report for Hearing on *Defining Harassment and Identifying Challenges* February 15, 2018 – 9:30 am

I. 2016 EEOC Report: Harassment Remains a Persistent Problem

In 2015, the federal Equal Employment Opportunity Commission (EEOC) established the Select Task Force on the Study of Harassment in the Workplace (Task Force). The Task Force arose out of the observations of its co-chairs and EEOC members, Chai Feldblum and Victoria Lipnic. When they joined the EEOC in 2010, they were "struck by how many cases of sexual harassment EEOC continues to deal with every year." The EEOC set up the Task Force to "reboot workplace harassment prevention efforts."

The Task Force spent 18 months (2015-16) taking testimony of experts from sexual harassment. It resulted in a 2016 report, called *Rebooting Workplace Harassment Prevention.*[1] The report documents the enduring problem of sexual harassment and offers recommendations for how to prevent sexual harassment. The Executive Summary describes the report's findings:

- Workplace Harassment Remains a Persistent Problem.
- Workplace Harassment Too Often Goes Unreported.
- There Is a Compelling Business Case for Stopping and Preventing Harassment.
- It Starts at the Top - Leadership and Accountability Are Critical.
- Training Must Change.
- New and Different Approaches to Training Should Be Explored.
- It's On Us. Harassment in the workplace will not stop on its own - it's on all of us to be part of the fight to stop workplace harassment.

The Task Force report provides context for the work of the bicameral Joint Committee on Rules, Subcommittee on Sexual Harassment Prevention and Response (Subcommittee). Its conclusions confirm many of the issues that have been identified for the Subcommittee to address – reporting, prevention, training, and "the fight to stop workplace harassment." A critical part of that "fight" is how the Legislature investigates and responds to allegations of sexual harassment. In order to enforce federal and state law and fulfill its legal responsibilities as an employer, state law requires the Legislature to "take immediate and appropriate corrective action" if it knows or should have known about sexual harassment. Cal. Govt Code § 12940(j)(1). This paper describes the legal background on federal and state law related to sexual harassment, and provides the legal foundation for the Subcommittee to consider the testimony of the witnesses.

[1] https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_ftn2

II. The Law of Sexual Harassment

In the 54 years since the Civil Rights Act of 1964 barred employment discrimination based on sex, the issue of sexual harassment has grown in importance and changed employment practices. Title VII of the Civil Rights Act made it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a). The statute did not specify or prohibit "sexual harassment," but the concept began developing in the 1970's and its law has developed ever since. While the law of sexual harassment has its foundation in federal law, California has enacted its own statutes and developed its own case law to address sexual harassment in the workplace.

A. Case Law: Development of the Law of Sexual Harassment

The origins of sexual harassment law in the Civil Rights Act makes clear the required connection between "harassment" and discrimination against one of the protected classes, including sex. The law developed in federal regulation and case law, as well as California statute and case law.[2]

The term "sexual harassment" arose out of conditions at Cornell University in the mid-1970's. Carmita Wood filed a claim for unemployment benefits from Cornell after she resigned due to unwanted touching by her supervisor. Cornell had refused her request for a transfer and attributed her resignation to "personal reasons." The *New York Times* published, on August 19, 1975, an article about sexual harassment, at Cornell and more broadly, and how government agencies were starting to respond. *See*, "Women Begin to Speak Out Against Sexual Harassment at Work." *Time* magazine also covered sexual harassment incidents at Harvard and Yale in the late 1970's, and "reported that 'antifeminist crusader' Phyllis Schlafly believed these women were 'asking for it.'"[3]

Federal Law Recognition of Sexual Harassment. In 1980, the EEOC established Guidelines, which specified "sexual harassment" as a form of sexual discrimination. Its definition included both *quid pro quo* exchanges of sex for employment benefits as well as "such conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 CFR 1604.11(a)(3) (1985). In 1986, the United States Supreme Court affirmed the EEOC regulations in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), holding that a "claim of 'hostile environment' sex discrimination is actionable under Title VII." Title VII also excludes federal and state elected officials and certain staff from the definition of "employee," which in effect denies Title VII protection. 42 USC 2000e(f); *Ramirez v. San Mateo County Dist. Attorney's Office* 639 F. 2d 509 (9th Cir. 1981).

Five years later, 1991 proved a watershed for sexual harassment controversy, starting with testimony by law professor Anita Hill that Supreme Court justice nominee Clarence Thomas had sexually harassed her when they worked together. Although the Senate confirmed Thomas' nomination, Hill's testimony before the Senate committee encouraged more women to speak out. In addition, Congress amended the Civil Rights Act to allow victims a jury trial when seeking compensatory and punitive damages under Title VII. The number of sexual harassment cases rose from 6,127 in 1991 to 15,342 in 1996.[4]

Parallel Development in State Law. The original 1959 California Fair Employment Practices Act did not prohibit discrimination based on sex or gender. Its subsequent consolidation, in 1980, with the Rumsford Fair Housing Act, however, included a state prohibition on discrimination based on sex. In 1984, the Legislature

---

[2] *See*, Justice Ming W. Chin, Justice Rebecca A. Wiseman (Ret.), Judge Consuelo Maria Callahan, David A. Lowe, *California Practice Guide, Employment Law* (The Rutter Group), Chapter 10 (Harassment) (2008-17). This paper relies extensively on the law described in this publication.

[3] http://time.com/4286575/sexual-harassment-before-anita-hill/

[4] https://now.org/blog/a-brief-history-of-sexual-harassment-in-the-united-states/

explicitly prohibited harassment as a form of discrimination, expanding the California Fair Employment and Housing Act (FEHA, Cal. Gov't Code §§ 12900-12996). FEHA established the Department of Fair Employment and Housing (DFEH) to enforce employment discrimination laws.

FEHA and its implementing regulations (CCR, Title 2, §§11000-11141) prohibit harassment of employees, applicants, unpaid interns, volunteers, and independent contractors by any persons and require employers to take all reasonable steps to prevent harassment. Government Code Section 12940 ties the prohibition on harassment specifically to discrimination against protected classes, including race, sex and gender. That statute also imposes personal liability on the employee who perpetrates sexual harassment.

B. *Quid Pro Quo* vs. "Hostile Environment" Harassment

Since the 1980 EEOC regulations, the law has recognized two forms of sexual harassment – *quid pro quo* harassment and "hostile environment" harassment. In federal law, harassment law arose out of case law interpreting Title VII of the 1964 Civil Rights Act. The 1986 *Meritor* decision addressed a dispute as to a *quid pro quo* harassment claim, but recognized "hostile environment" harassment. While each type requires proof of different factors, the U.S. Supreme Court has questioned the utility of the distinction. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). "'California case law recognizes two theories upon which sexual harassment may be alleged. The first is quid pro quo harassment, where a term of employment is conditioned upon submission to unwelcome sexual advances. The second is hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment.'" *Doe v. Capital Cities*, 50 Cal App. 4th 1038, 1045 (1996), *but see, Reno v. Baird*, 18 Cal. 4th 640 (1998).

***Quid Pro Quo* Harassment by Supervisor.** Some of the earliest cases involved *quid pro quo* harassment, where supervisor requests for sexual favors are linked to the grant or denial of job benefits. To establish a Title VII violation for *quid pro quo* harassment, employee must prove:

1) Employee was subject to unwelcome sexual advances, conduct or comments by a supervisor with immediate or successively higher authority over the employee.
2) Harassment complained of was based upon sex.
3) Employee's reaction to harassment complained of affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment.

Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982). The employer has vicarious, strict liability for the supervisor's *quid pro quo* harassment, regardless whether it was aware or should have been aware or was negligent in failing to prevent it.

Hostile Environment Based on Sex Discrimination. "Hostile environment" harassment may involve various forms of verbal and physical conduct, of both a sexual or nonsexual nature, which have the purpose or effect of creating a hostile or offensive working environment. Under Title VII or FEHA, plaintiff must allege that:

1) Employee was subjected to unwelcome sexual advances, conduct or comments.
2) Harassment was based on sex.
3) Harassment was "so severe or pervasive" as to alter the conditions of the victim's employment and create an abusive working environment.

Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986); *Thompson v. City of Monrovia*, 186 Cal4th 860 (2010) (adopting federal case law).

C. Administrative Agency Enforcement against Sexual Harassment

The Department of Fair Employment and Housing (DFEH) administers several programs to ensure fair employment conditions for all Californians under FEHA. A pamphlet on sexual harassment on the DFEH website describes the prohibition on sexual harassment, employer prevention responsibilities, and the civil remedies available to victims. A more general pamphlet on workplace discrimination and harassment describes the law and how to file a complaint with DFEH within one year of the last act of discrimination or harassment.

D. Legislature as Employer

The Senate and the Assembly, when combined, employ approximately 2,500 staff, in capital and district offices. In addition, their offices often include interns and other volunteers, who also enjoy legal protection against sexual harassment. The laws against sexual harassment apply to the Legislature as they apply to any other employer. Government Code Section 12940(j)(1):

- Makes sexual harassment unlawful if the employer "or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action."
- Makes employers responsible for the acts of nonemployees.
- Imposes duty to prevent sexual harassment, requiring it to take "all reasonable steps."

Employer liability may require negligence in failing to take adequate remedial measures on the part of the employer for harassment by a coworker, as opposed to harassment by a supervisor. *Swenson v. Potter*, 271 F.3d 1184, 1191 (9th Cir. 2001).

Policy, Training, Investigation & Response. Federal case law provides employers a defense to lawsuits for sexual harassment based on its activities to prevent sexual harassment in the workplace. *See, Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)(*Ellerth)*; *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)(*Faragher)*. The factors that may be considered in the court assessing the sufficiency of the employer's prevention efforts include:

- anti-harassment policy, including definition of sexual harassment; identification of who to contact; bypass of harassing supervisors; description of disciplinary measures; confidentiality to the extent possible; statement that retaliation will not be tolerated; distribution to each employee (including acknowledgement of receipt)
- complaint procedure
- prompt, fair investigation
- response, including both temporary steps to address the situation while the employer determines whether the complaint is justified and permanent remedial action to correct the harassment, if necessary

Id. FEHA also requires employers to provide, every two years, two hours of "classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees." It requires that such training include "prevention of abusive conduct." Cal. Gov't Code § 12950.1.

Whistleblower Protection. California statutes also require employers to protect whistleblowers. The recent passage and the Governor's signature on AB 403 (Melendez) extends explicit protection to legislative employees for making "protected disclosures" of violations of law or legislative codes of conduct. Other statutes also offer protection to whistleblowers, including:

- **California Whistleblower Protection Act,** Cal. Gov't Code §§ 8547-8547.15 protects employees in the executive and judicial branch who report "improper governmental activity," and bars use of official authority to intimidate such employees.
- **Whistleblower Protection Act**, Cal Gov't Code §§ 9149.20-9149.23 protects employees of state or local governments from use of official authority to interfere with the right to disclose improper governmental activity to a legislative committee.
- **§ 1102.5 of the Labor Code**, prohibits all employers from interfering or retaliating against an employee for reporting to a governmental or law enforcement agency.

Assemblymember Melendez, the author of AB 403, identified the explicit exclusion of legislative staff from the California Whistleblower Protection Act as the reason for her authoring whistleblower legislation for legislative employees.

Employer Vicarious Liability. In addition to the specific statutory requirements on employers to prevent sexual harassment, the common law principle of "respondeat superior" imposes responsibility on employers for the acts of its employees and agents. The employer's liability for sexual harassment under FEHA extends

beyond the workplace, to activities that "occur in a work-related context." While an "employer's liability under the Act for an act of sexual harassment committed by a supervisor or agent is broader than the liability created by the common law principle of respondeat superior, respondeat superior principles are nonetheless relevant in determining liability when, as here, the sexual harassment occurred away from the workplace and not during work hours." *Doe v. Capital Cities*, 50 Cal App. 4th 1038, 1048-49 (1996).

The employer's vicarious liability, however, may depend, to some extent on the employer establishing the conditions that lead to the employee committing an intentional tort. *See, Lisa M. v. Henry Mayo Newhall Memorial Hospital*, 12 Cal. 4th 291 (1995)(hospital not vicariously liable for ultrasound technician's sexual assault of patient). Where an employee's action is "personal in nature, mere presence" at the workplace will not give rise to employer liability. "[I]n such cases, the losses do not foreseeably result from the conduct of the employer's enterprise and so are not fairly attributable to the employer as a cost of doing business." *Farmers Ins. Group v. County of Santa Clara* 11 Cal.4th 992 (1995).

III. Legislature's Policies and Codes of Conduct

Both the Senate and the Assembly have sought to eliminate sexual harassment from the Capitol, above and beyond the legal requirements. They have complied with the laws requiring staff and member training, and taken actions to prevent sexual harassment, consistent with federal law requirements in the *Ellerth* and *Faragher* decisions from the U.S. Supreme Court. Each house, however, has set policies that go beyond the law in setting a higher standard or expectation for behavior of members and staff.

A. Existing Legislative Policies and Codes of Conduct

Since the Legislature first passed the statutory prohibition on sexual harassment, each house has developed practices and policies to address that statutory prohibition. All members and staff receive training on sexual harassment prevention at the beginning of each session for returning members and staff, or within 6 months of start date for new employees and newly elected members. Each rules committee accepts complaints about sexual harassment and other employment issues, arranges for investigations, and imposes consequences.

Assembly Policy. The Assembly first adopted a *Policy Against Sexual Harassment* in 1993 and last revised the *Policy* in 2007. The current *Policy* sets a "zero-tolerance" for sexual harassment that violates the *Policy* and bars retaliation for filing a complaint or assisting in an investigation. The definition of sexual harassment includes both *quid pro quo* harassment and "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." The policy explains how to submit a complaint to Assembly Rules Committee and its complaint policy and procedure. It also explains how to file a complaint with DFEH and other legal remedies.

Senate Policy. The Senate has had a policy against sexual harassment since 1993. (See *Zero Tolerance Against Harassment, Discrimination and Retaliation*, which accompanies this paper.) In addition to the Senate's prohibition on sexual harassment, the Senate adopted Senate Resolution 45 (2014) that set out expectations for the conduct of its members and staff. (See accompanying "Senate Standards of Conduct.")

B. 2016 DFEH Regulatory Changes Requiring Policy Updates

In 2016, DFEH revised its regulations regarding sexual harassment. CCR, Title 2, §§11019. The significant changes:

- Require an "individualized assessment" of each sexual harassment case as well as the nature of the employer as well, in fulfilling its "affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct."
- Allow DFEH to seek non-monetary preventative remedies from employers.
- Further define the sufficiency and dissemination of employer policy to employees.

These revisions may be addressed in any recommendations for a new legislative policy on sexual harassment.

IV. Regulation of Elected Official Activities

Enforcement of laws against sexual harassment involving elected officials like legislators raises issues that arise in few other enforcement contexts. Enforcement of ethics laws against elected officials offers one example. Congress and state legislatures have adopted a variety of methods to ensure the ethical activity of their elected members. The United States Constitution provides for the Congress to discipline its own members. "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." U.S. Constitution, Article I, Section 5. *See* accompanying Congressional Research Service paper on *Enforcement of Congressional Rules of Conduct: A Historical Overview*.

A. Ethics Regulation

The Council on Governmental Ethics Laws (COGEL) includes officials from state entities that enforce ethics laws against elected officials and others. COGEL works with the National Conference of State Legislatures, which offers a chart showing how each state regulates the activities of state officials, including legislators. Many states have established independent ethics commissions, with a range of authority over the activities of legislators and legislative staff. Many focus on campaign finance, while others have broader authority. State constitutions often provide the legislature with authority to discipline their own members, consistent with the federal Constitution. *See, e.g.*, Cal. Constitution, Article IV, § 5. In Congress, the ethics committees' authority over member ethics ends upon the member's resignation or expulsion.

B. California Political Reform Act and Elected Official Campaign Finance

The Fair Political Practices Commission (FPPC or Commission) offers an example of a state agency that has authority to regulate the activities of elected officials, including legislators. The Political Reform Act of 1974 created the FPPC as a nonpartisan entity (Cal. Gov. Code, § 83100 [all further statutory references to the Government Code]). The Commission is the entity tasked with "the impartial, effective administration and implementation of [the act]" (§ 83111). In furtherance of this purpose, the Commission is authorized to "adopt, amend and rescind rules and regulations to carry out the purposes and provisions of [the act], and to govern procedures of the Commission" (§ 83112). The Commission is also required to undertake other tasks, including "provid[ing] assistance to agencies and public officials in administering [the act]" and issuing both informal and formal opinions with respect to an individual's duties under the act (§§ 83113, 83114; *see also* FPPC: Interpret [describing telephone, online, and formal written advice made available]). Beyond these roles, the FPPC generally provides information and assistance to foster compliance. (*See* FPPC Information.)

As set forth above, the FPPC has jurisdiction to enforce violations of the act. Insofar as the act governs the activities of elected officials, the FPPC also has jurisdiction over those officials. (*See e.g.* Gov. Code, § 82020 [defining "elected officer" as "any person who holds an elective office or has been elected to an elective office but has not yet taken office"]; § 84104 [imposing a duty on each elected officer "to maintain detailed accounts, records, bills, and receipts necessary to prepare campaign statements, to establish that campaign statements were properly filed, *and to otherwise comply with the provisions of this chapter*"][emphasis added].) According to the FPPC, its Enforcement Division analyzes and processes over 1,500 complaints and referrals per year about potential violations of the Act." (FPPC: Enforce.)