

**Oregon State Capitol Workplace Harassment Work Group**  
**Discussion Draft – Identification of Best Practices – November 8, 2018**

**Please note:** This draft is intended to facilitate a discussion of best practices by documenting the Work Group’s evolving consensus on specific issues. Members of the workgroup are encouraged to identify any issues that would benefit from discussion and members of the public are invited to [provide comment](#) on the proposals.

## **I. Prohibited conduct**

**Consensus:** The workplace harassment policy should affirmatively promote a respectful and inclusive work environment by prohibiting more conduct than the law requires it to prohibit. The policy should continue to apply to conduct that occurs in any setting, including electronic media, when the conduct creates a work environment that is intimidating, hostile or offensive. The policy should include examples of prohibited conduct, as well as examples of conduct that may not be prohibited but that are inadvisable. A proposed definition, with examples, is included as Attachment A.

## **II. Reporting harassment**

**Consensus:** The workplace harassment policy should include:

- A confidential reporting process. The confidential reporting process provides a mechanism for an individual who wishes to remain anonymous to report conduct that violates the policy. It also can include confidential “process counseling” for individuals who believe they may have been subjected to conduct that violates the workplace harassment policy and to individuals who are, or believe they may be, the subject of a complaint.
- A nonconfidential reporting process. Individuals who believe they may have been subjected to conduct that violates the workplace harassment policy may make a nonconfidential complaint to a supervisor or other legally responsible person, or to the equity office described below. Supervisors or other legally responsible people who receive nonconfidential reports must pass the reports along to Human Resources, who will evaluate the reports and forward to the equity office if appropriate. The nonconfidential reporting process must be available to allow the institution to investigate possible policy violations in the absence of a formal complainant.
- A nonconfidential, formal complaint process. The formal complaint process is designed to trigger an investigation and a response from the equity office.

**Consensus:** A supervisor or other legally responsible person must make a nonconfidential report to Human Resources if they have reason to believe that harassment or discrimination may have occurred. This duty is triggered whenever an employee makes a complaint to a supervisor or other legally responsible person. It is also triggered when the supervisor or other legally responsible person receives information through direct observation, rumor, or otherwise, that the policy has been violated. Supervisors should not attempt to determine whether the information

relates to harassment or not. If they have reason to believe the information could possibly be related to harassment, they should report it.

Human Resources (unlike supervisors) may exercise its discretion to determine whether reports it receives involve prohibited workplace harassment and discrimination or whether they involve other interpersonal concerns. If workplace harassment or discrimination is involved, Human Resources must forward the information to the equity office.

Third parties contracting with the Legislative Assembly should be incentivized to report conduct that may constitute harassment to the equity office.

### III. The equity office

**Consensus:** The legislature should establish and fund an equity office. A substantial majority of workgroup participants believe that the equity office should be a neutral and independent office comprised of professionals employed full time by the legislature. The workgroup did, however, have a **dissenting view** about the structure of the office. One workgroup member would prefer a model whereby the entirety of the investigative function is outsourced to one or more outside entities.

**Consensus:** The equity office should be provided with as much independence as possible, including independent physical space.

**Consensus:** The staff of the equity office should be hired by, and report to, a joint legislative committee (“Equity Committee”), with an equal number of members appointed by each of the four caucuses. The office should submit a report to the Equity Committee and appear before the committee at least annually. The annual report to the committee should include:

- A description of the activities of the office since the last report.
- Non-personally identifiable statistics that identify the number of confidential reports, formal reports and formal complaints made under the policy, as well as the number of investigations conducted.
- The results, or a summary of the results, of the most recent climate survey.

**Consensus:** The equity office should have at least two staff, with duties as follows:

- Staff #1: Conducting investigations, writing investigative reports and making recommendations or decisions regarding interim safety measures. This person should not have access to confidential information in the possession of the second staff member.
- Staff #2: Conducting outreach and training, administering regular climate surveys, and providing confidential process counseling to any individual that includes an explanation of the formal complaint and reporting processes.

Both employees should be expressly authorized to outsource work (including investigations), when workload or other practical factors require. As described above, one member had a

**dissenting view** whereby the entirety of the investigative function is outsourced to one or more outside entities.

**Consensus:** The equity office should ultimately receive all reports of harassment, both confidential and nonconfidential. The equity office is empowered to investigate reports of harassment as appropriate.

## IV. Confidential reports

**Consensus:** The non-investigatory half of the equity office should be empowered to receive confidential reports about workplace harassment. Confidential reports are designed to encourage reporting. The identity of confidential reporters may not be disclosed. Because of due process concerns, confidential reports may not be used as the basis for any disciplinary action.

There should be one exception to the office's duty to provide confidentiality: for cases when it is necessary to disclose a confidential report in order to prevent imminent physical harm to any individual.

The equity office may access and use aggregate, non-personally identifiable data based on confidential reports. This data will allow the institution to observe patterns of behavior, take non-investigatory steps to remedy training, culture or climate, encourage reporters to come forward in a non-confidential way, and take other necessary actions.

**Consensus:** The equity office may informally reach out to respondents of confidential reports, if it is possible to do so without disclosing the identity of the reporter directly or indirectly. In such conversations, the equity office may provide formal or informal training or advice regarding expected standards of behavior.

**Outstanding Issues:** Continue exploring methods of confidential reporting and data collection, while protecting individuals from harm.

## V. Non-confidential reports

**Consensus:** Human Resources should be empowered to receive non-confidential reports about potential workplace harassment.

If a legislative supervisor or other legally responsible person knows or reasonably should know about workplace harassment, the institution as a whole is also "on notice" and has a duty to take reasonable measures to stop the harassment. For this reason, legislative supervisors or other legally responsible persons should continue to be required to report conduct that may violate the policy to Human Resources. Non-supervisors should be encouraged to make such reports. This form of reporting is not confidential.

Human Resources should determine whether the report is potentially a report of workplace harassment based on protected class, or whether it involves interpersonal difficulties or other

matters. If the report is potentially a report of workplace harassment, Human Resources will forward the report to the equity office. If it is not, Human Resources should address the report.

## VI. Complaints

Who may file a complaint?

**Consensus:** Any individuals who believe they have been subjected to workplace harassment, or believe they have witnessed workplace harassment, may file a complaint. Complaints should be submitted under penalty of perjury.

The equity office should evaluate complaints to determine whether an investigation is necessary to determine if harassment occurred. If the office determines that an investigation is necessary, it should initiate an investigation promptly.

Principles of due process require investigations to be based on evidence which is provided to a respondent. For this reason, complaints may only be filed by individuals based on their own personal knowledge; that knowledge (and the complainant's sworn statement) is evidence. Neither the institution itself, nor the equity office, is an individual with personal knowledge; therefore, they do not have "standing" to initiate a complaint.

Who may be the respondent?

**Consensus:** Any individual over whom the Legislative Assembly has the power to impose a remedy may be the subject of a complaint. This includes but is not limited to legislators, legislative employees (partisan and nonpartisan), government contractors, public and private sector lobbyists, and members of the public who visit the building.

Should there be time limitations?

**Consensus:** Time limitations should **either** be eliminated **or** extended to four years.

## VII. Protecting reporters, complainants and respondents.

**Consensus:** The policy should have the following provisions regarding interim remedial measures:

- Empower the equity office to separate the complainant and respondent through "no contact" orders.
- Recognize that the equity office may involve law enforcement in severe situations.
- Empower the equity office (with the assistance of Human Resources) to require other appropriate interim remedial measures depending on the severity or egregiousness of the allegations, including temporary reassignment, alternative work environments, paid and unpaid leave and the temporary removal of potentially offending individuals.

**Consensus:** The policy should have the following provisions to protect complainants and respondents:

- Require the equity office investigator to check in with complainants and respondents on a regular basis or upon request.
- Require the equity office to provide as much privacy as possible, given the need to investigate and provide interim remedies.

**Consensus:** The policy should:

- Require legislative employees (including legislators) and registered lobbyists to attend training on the harassment policy, available methods of reporting, and supervisors' obligations to report violations. Such training should also address the challenges associated with consensual relationships in the workplace.
- Require legislative employees (including legislators) to attend training on their statutory obligation as mandatory reporters of child abuse.
- Retain provisions indicating that consent may be withdrawn.

**Consensus:** The policy should include and explain protections against retaliation. It should provide a safe place to report or make a complaint about retaliation, in the same way as reporting or complaining about harassment.

**Consensus:** The policy should provide the contact information for outside entities such as the Equal Employment Opportunity Commission and the Bureau of Labor and Industries.

**Consensus:** The respondent in a complaint should be provided with notice of the specific allegations of the complaint and an opportunity to respond to the allegations and provide witnesses, testimony and other evidence. This may have the effect of allowing the respondent to determine the identity of the complainant. Nonetheless, this is necessary to provide due process over what could lead to reputational damage, loss of professional status, or loss of other privileges for the respondent.

## VIII. Investigations

**Consensus:** All investigations under the policy should be completed as soon as practicable. The investigation into a formal complaint and the submission of a final investigative report should generally be completed within 90 days. The equity office may extend the timeline for good cause by providing notice to the complainant and respondent and explaining the justification for the extension. Both the complainant and respondent should be made aware of the investigative timelines and status of the investigation on a regular basis and upon request.

**Consensus:** Except for the contents of a formal complaint, records relating to an ongoing investigation should be exempt from disclosure under public records laws. At the conclusion of the process, the results of the investigation and the investigative file should be subject to disclosure. Other existing exemptions (e.g. medical records or internal advisory communications) should continue to apply. Workplace harassment reports (confidential or nonconfidential) that do not result in an investigation should be exempt from disclosure.

**Consensus:** The investigator should keep information obtained during the investigation as confidential as possible given the need for a sufficient investigation. The policy should not prohibit individuals from discussing the investigation, but the investigator may request that individuals not discuss the investigation in order to protect its integrity. The investigator may disclose the fact of the investigation and any relevant details to Human Resources or the supervisor of the complainant or respondent, if the investigator determines that there is a legitimate need to disclose the information.

**Consensus:** Before the investigator completes the investigative report, the investigator should give every respondent and every complainant notice of the proposed factual findings and proposed conclusions as to whether a policy violation has occurred. The respondent and complainant should be afforded no more than one week to respond.

**Consensus:** For any non-legislator alleged to have engaged in conduct that violates the workplace harassment policy, the investigator should determine the facts and determine whether the facts constitute a violation of the policy. If the investigator determines that there has been a policy violation, the investigator should provide a report to the person or entity who will determine sanctions for the violation, as described in the section on remedies, below.

**Consensus:** Any non-legislator respondent may appeal the investigator's findings and conclusions in writing to the Equity Committee. The appeal is limited to presenting newly discovered evidence, process error, or bias. The appeal should not delay the imposition of any remedies.

**Outstanding Issues:** Devise investigation process for legislators [scheduled for 10/8 work group meeting].

## IX. Remedies

**Consensus:** For **non-partisan legislative employees** who violate the policy, the respondent's supervisor, in consultation with Human Resources, should impose any discipline. The supervisor should notify the employee of the proposed discipline and give the employee an opportunity to respond before making a final determination. A final decision regarding discipline should be made within 14 days after the respondent receives the final investigatory report.

**Consensus:** For **partisan legislative employees** who violate the policy, the Equity Committee should recommend discipline to the supervising legislator. The legislator should consider the recommendation, notify the employee of the proposed discipline, and give the employee an opportunity to respond before making a final determination. A final decision regarding discipline should be made within 14 days after the respondent receives the final investigatory report.

**Consensus:** For **any other third party** (public and private sector lobbyists, members of the public, contractors, etc.) who violates the policy, the Legislative Administrator should impose an appropriate remedy that, depending on the circumstances, may include a monetary fine or a limitation on the respondent's access to the Capitol building. The Legislative Administrator

should provide the third party notice of the proposed remedy and an opportunity to respond before making a final determination. The remedy should be imposed within 30 days after the respondent receives the final investigatory report.

If the third party's conduct occurred within the scope of employment, the Legislative Administrator should provide notice of the determination and any remedial measures that are imposed to the third party's employer. If the third party is a member of the Capitol Club, the Legislative Administrator should provide notice to the Capitol Club. If the third party is a member of any other association or regulatory body that is related to the third party's Capitol activities, the Legislative Administrator should provide notice to the association or body.

**Outstanding Issues:** The Legislative Administrator has 30 days for a determination but others have 14 days. Should we make these the same?

**Outstanding Issues:** Devise remedy process for legislators [scheduled for 10/8 work group meeting].

## X. Interns, volunteers and pages

**Consensus:** The name and contact information of every intern, page and volunteer in the State Capitol should be provided to Human Resources via a standard form. Human Resources may develop a form that includes other required information.

The equity office should ensure that appropriate information and in-person training on the workplace harassment policy is provided to each intern, page and volunteer as soon as practicable. The equity office should proactively attempt to conduct exit interviews with interns, pages and volunteers. The equity office should consider expanding these interviews to all staff, perhaps beginning with legislative assistants. The equity office should build constructive relationships with universities and other institutions that regularly recommend legislative interns, volunteers or pages, for the purpose of reaching those interns, volunteers, or pages.

## XI. Training and Culture

**Consensus:** Registered lobbyists should be required to take Workplace Harassment training provided by the Equity Office. The training should be completed within the first quarter of registering and annually thereafter.

The Oregon Government Ethics Commission should be required to track which registered lobbyists have and have not attended the training and should be required to notify the Equity Committee of any registered lobbyists who fail to timely complete the required training. Working in conjunction with the Equity Committee, the Legislative Administrator should be empowered to impose fines or other remedial measures on registered lobbyists who fail to timely complete the training.

**Consensus:** Ensure that all members of the Capitol community are familiar with the Respectful Workplace policy by providing training on the policy and making policy-related information available on the Internet.

**Consensus:** The Equity Office should have a general mandate to maximize attendance at annual trainings. At least initially, the subgroup recommends:

- Records of legislator attendance at annual trainings should be publicly available and legislators should sign an anti-harassment statement, similar to those signed by employees. If attendance problems develop, the imposition of sanctions via chamber rule should be considered at that time.
- For legislative staff, including interns, attendance at training should be mandatory.
- Contractors should be required to attend an appropriately designed training and should be compensated for their attendance.
- Executive and Judicial branch employees who regularly work in the Capitol should be invited to attend annual training. The Equity Office should work with their counterparts in state government to promote consistency in trainings and policies.

**Consensus:** At least two hours of respectful workplace training should be available on multiple occasions throughout the year (e.g. quarterly or four times in two months). The participation or presence of high-level management at the training should be encouraged. In-person training should be required in the vast majority of circumstances. Online training should, however, be available, particularly for those individuals who do not have a principal office in Oregon but for whom training should be required (e.g. registered lobbyists).

**Consensus:** Training curriculum should be reviewed to identify improvements in substance and delivery. While the Equity Office should be generally empowered to identify best practices, potential substantive training improvements include:

- More clearly describing conduct that constitutes workplace harassment under the policy.
- Modeling positive behaviors and constructive working relationships.
- Encouraging active bystanders.
- Discouraging behaviors – regardless of whether they violate the policy – that do not promote a productive, inclusive work environment.
- Articulating the human impact and harm to the work environment caused by harassment.
- Tailoring training to individual groups in the Capitol community, while using consistent terms, concepts and frameworks across trainings.
- Highlighting potential pitfalls with consensual relationships in the workplace, emphasizing that consent to specific conduct may be withdrawn.

**Consensus:** Best practices include the regular use of culture (and climate) surveys to identify broader cultural issues and specific training needs. Survey results, or a summary, should be disclosed to create a continuous cycle of improvement. Highly qualified individuals should be selected to provide training and conduct surveys.

**Consensus:** Recognize an Equity Leadership Team. The Team should be recruited by the Equity Office and should:

- Be comprised of leaders from across the Capitol community who have an interest in promoting a productive and inclusive environment.
- Be provided with advanced, respectful workplace training and training related to implementing cultural change, that could lead to a credential or certification.
- Serve as a mentor or informal resource for colleagues who are interested in promoting a more respectful workplace.
- Identify additional services and training needs and communicate those needs to the Equity Office.

**Consensus:** Utilize technology to create a respectful workplace. Subgroup suggestions include:

- Using cell phone applications that allow persons subject to the policy, including participants in training, to anonymously submit questions to or otherwise interact with the equity office or trainer.
- Utilizing online conferencing software that allows for interactive training, when in-person training is impractical.
- Creating a mechanism for persons to anonymously utilize the confidential reporting process and to anonymously submit electronic evidence.

**Outstanding Issues:** Must the training be in person or online?

#### Attachment A

#### **What is a Protected Class?**

A protected class is one that is protected by applicable law. Protected classes include:

- Sex
- Race
- National Origin
- Disability
- Age
- Religion
- Marital status
- Sexual orientation
- Gender identity or expression
- Engaging in whistleblowing activity
- Opposing an employer's actions when the employee reasonably believes them to be unlawful
- Taking leaves protected by law (such as OFLA, FMLA, disability-related leave)

- Any other classes protected by applicable law (provide link to list of applicable statutes)

**What Is Harassment?** Harassment is verbal or physical conduct or visual displays that denigrate or show hostility or aversion toward a person or group because of a protected class.

This may include behavior such as:

- name-calling,
- slurs,
- stereotyping,
- threatening, intimidating, or hostile acts that relate to a protected class,
- demeaning or humiliating a person because of a protected class, and
- written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of a protected class.

Behavior creates a hostile work environment when (a) it is unwelcome and (b) it is so severe or pervasive that it either affects a person's ability to function effectively in the workplace or denies someone the benefits of the workplace. "Severe" means that one incident could be significant enough to create a hostile environment; "pervasive" means that a series of less significant incidents, taken together, could create also create a hostile environment.

The legislature prohibits all harassing behavior, even if it does not rise to the level of creating a hostile environment.

*Examples of harassing behavior:*

- Telling a non-white employee to "go back where you came from."
- Imitating a person's physical disability or referring to an employee with a mental health disorder as "unhinged," a "head case," or someone likely to "go postal."
- Assuming that a black employee is an expert on hip-hop music or basketball.
- Questioning a gay employee about the mechanics of sex between him and his partner or implying that he must have a sexually transmitted disease.
- Suggesting an older worker should retire, is unable to adapt to new technology, or is "behind the times"; complaining that the workplace needs fewer "gray hairs" or more "young blood."
- Intentionally referring to a transgender employee by the wrong pronoun or using the employee's former name associated with the wrong gender ("deadnaming").
- Use of ethnic slurs, such as calling someone from the Middle East a "Camel Jockey"; calling someone from Mexico a "Wet Back"; or calling an African-American the "N-word" or "boy".

**What Is Sexual Harassment?** Sexual harassment is harassment based on sex. Sexual harassment occurs when it meets the criteria for harassment described above.

In addition, it may also include unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, when submission to the conduct is made an explicit or implicit term or condition of employment or submission to or rejection of the conduct is used as a basis for employment decisions.

The legislature prohibits all sexually harassing behavior, even if it does not rise to the level of creating a hostile environment.

Sexual harassment may include but is not limited to:

- unwanted sexual advances, flirtations, or propositions;
- demands for sexual favors in exchange for favorable treatment or continued employment;
- sexual jokes;
- verbal abuse of a sexual nature;
- verbal commentary about an individual's body, sexual prowess, or sexual deficiency;
- leering, whistling, touching, or physical assault;
- sexually suggestive, insulting, or obscene comments or gestures;
- display in the workplace of sexually suggestive objects or pictures;
- sending or forwarding e-mail of an offensive or graphic sexual nature; and
- discriminatory treatment based on sex.

*Examples of sexually harassing behavior:*

- A female employee is usually asked to make coffee while male employees of equal status are not.
- An employee eyes a coworker's rear end and comments that they must be "great in the sack."
- On Monday mornings, the supervisor emails everyone a "dirty joke of the week."
- A staffer keeps a calendar of semi-nude women posted in his office, despite a coworker's statement that she finds the calendar demeaning.
- An employee hugs coworkers even though they pull away, explaining "oh, come here, I'm just a hugger."
- A lobbyist pitches a bill regarding nonprofit boards. The legislator laughs and says, "well, sure, honey, if you got on my "board" I'd show you some results...." The lobbyist protests, but the legislator shrugs, "well, I'm just trying to lighten the conversation. If you don't like these meetings, you don't have to be here."
- A male supervisor excludes female employees from after-hours meetings because he "does not want to be accused of sexual harassment later."
- A supervisor tells an employee that he could get her a better assignment if she sleeps with him.

**What Is Retaliation?** Retaliation is the treatment of a person less favorably because the person exercised a legal right, made a good-faith complaint about unlawful conduct (such as prohibited discrimination, harassment, or retaliation), or participated in an investigation about unlawful conduct.

The legislature prohibits all retaliatory behavior, even if it does not rise to the level of behavior that the law recognizes as retaliation.

*Examples of retaliatory behavior:*

- In a staff meeting, a supervisor complains about all of the disruption that an employee's complaint is causing.
- An employee is not selected for an assignment because he is "not a team player" since he supported another employee's complaint.
- An employee returns from parental leave and is criticized because his attendance is unreliable.

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