

House Sexual Discrimination and Harassment Task Force Report

Created by HR 687 of the 100th General Assembly

Contents

Forward	2
TASK FORCE MEMBERS.....	4
INTRODUCTION	5
WHAT IS SEXUAL HARASSMENT?	6
SUMMARY OF SPECIFIC LAWS AND RELATED COMPLAINT PROCEDURES	9
Title VII of the Federal Civil Rights Act of 1964.....	9
Federal Governmental Employee Rights Act of 1991	11
Illinois Human Rights Act	11
State Officials and Employees Ethics Act	13
Lobbyist Registration Act.....	15
Whistleblower Protection Act.....	15
TASK FORCE MEETINGS.....	16
LEGISLATIVE ACCOMPLISHMENTS	22
WHAT’S NEXT?.....	25
Ideas Related to Ethics Laws	25
Ideas Related to the Illinois Human Rights Act.....	26
Non-Disclosure Agreements.....	26
Mandatory Arbitration	27
Preventative Training.....	28

Forward

When we were appointed to be the leaders of the Illinois House Task Force on Sexual Discrimination and Harassment in November 2017, we took our responsibility very seriously. The issues of race and gender discrimination are not new—inequities in the workforce are well documented. But sexual harassment was an issue exploding in the headlines and across the nation. Fingers were being pointed in every kind of workforce, private and public, including our own.

We heard testimony from advocacy groups, state government officials, victims, the business community and many others. What was working? What wasn't? Based on our hearings, our Task Force proposed a series of changes that were approved by the General Assembly with strong bipartisan support. We hope these changes will strengthen the law and establish clearer procedures for people to report instances of discrimination and harassment, as well as for those who defend against those charges.

We are proud of our work on the Task Force. We count on the 101st General Assembly to continue our efforts to promote equality, to find ways to ensure that workplaces are free of discrimination and harassment, and to establish policies that will make Illinois the model for the nation. Since we established the Task Force, we passed several pieces of legislation into law and we encourage the new General Assembly to build on and review our efforts to ensure the changes are being implemented and find ways to continue to improve processes and procedures.

Some of the issues we encountered in the Task Force cannot be easily fixed by legislation. All of our witnesses agreed we need a seismic shift in workplace culture. Every workplace should be safe, a beacon of equality, inclusion and respect—to meet that goal is not just a function of the law but of our commitment, at every level, to those values.

Each of us, wherever we are, has a responsibility to call out inappropriate behaviors, like conversations and comments that degrade those who are different. We must hold our friends, family members, and co-workers accountable when it comes to behavior that is unacceptable, whether or not that behavior rises to the level of the legal definition of discrimination or harassment.

We count on all of us to improve the quality of relationships within the workplace. And we count on the next General Assembly to continue looking for ways to establish policies and procedures that will give confidence to victims, in both the public and the private sectors, that they can expect fair and careful consideration of the evidence without risk of retaliation for their decision to come forward.

We owe a special debt of gratitude to the two women who served as chief staffers to the Task Force, Margaret Livingston, Assistant Counsel to the Speaker of the House and Jennifer Paswater, Senior Legal Counsel to the Illinois House Republicans. They did the heavy lifting, always with grace and attention to detail especially when discussing this sometimes emotional and very important topic.

Sincerely,

Barbara Flynn Currie, Chair House Sexual Discrimination and Harassment Task Force

Sara Wojcicki Jimenez, Minority Spokesperson House Sexual Discrimination and Harassment Task Force

TASK FORCE MEMBERS

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INTRODUCTION

In November 2017, House Resolution 687 (Currie) established the bi-partisan House Sexual Discrimination and Harassment Task Force (“Task Force”) and directed the Task Force to report to the General Assembly.

The Task Force met over a dozen times, gathered testimony and proposals from agencies, attorneys, advocates, and officials, and provided various recommendations to the General Assembly which resulted in significant improvements to the laws surrounding sexual harassment. The purpose of this report is to:

- (1) Review Illinois and federal laws that address when conduct in the workplace constitutes sexual harassment and discrimination, and the procedures for processing a complaint;
- (2) Summarize the Task Force’s activities; and
- (3) Examine proposals received by the Task Force that the 101st General Assembly may choose to consider.

All information presented within this report is for informational purposes and should not be considered legal advice, nor represent official positions of the House of Representatives as a whole or the individual members of the Task Force.

The Appendices included with this report are:

Appendix A: Resources for employees, public and private with concerns or allegations of workplace misconduct

Appendix B: Chart of legislative changes in other states

Appendix C: List of all Task Force meetings and witnesses

Appendix D: Documents presented to the Task Force at meetings in chronological order

WHAT IS SEXUAL HARASSMENT?

The U.S. Equal Employment Opportunity Commission's ("EEOC") 2016 Select Task Force on the Study of Harassment in the Workplace found that anywhere between 25% to 85% of women report having experienced sexual harassment in the workplace. More recent polls indicate that nearly half (48%) of employed American women have reportedly experienced sexual, verbal, or physical harassment at work.¹

When the EEOC Select Task Force asked employees if they had experienced "sexual harassment," only 25% of respondents answered yes; whereas, when the EEOC Select Task Force asked again, but identified specific conduct that constitutes harassment, the number climbed to 60%.² These numbers indicate a fundamental misunderstanding of what is and what is not sexual harassment.

Sexual harassment is a form of employment discrimination on the basis of a person's sex (gender/sexual orientation) under federal law. While what constitutes sexual harassment may be discrimination on the basis of sex, discrimination on the basis of sex is not always sexual harassment. Discrimination on the basis of sex, like discrimination on the basis of race, color, religion, or national origin, can include adverse employment actions taken simply because an individual is a male or female. People who experience sexual harassment in the workplace may also be subject to discrimination on the basis of their gender and/or their race or national origin at the same time.³

Sexual harassment is generally defined under the law as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.⁴

¹Melissa Chan, "Nearly Half of the Women Working in America Have Been Harassed on the Job", *Time Magazine*, Oct. 30, 2017, <http://time.com/5002182/sexual-harassment-work-me-too/> (poll by NBC News and Wall Street Journal).

² EEOC Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (Jun. 2016) https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

³ The testimony provided to the Task Force by the plaintiffs against Ford Motor Co. showed the additional burden faced by women of color in the workplace, and especially those that work in traditionally-male dominated fields. *See* Jan. 11, 2018 Task Force Meeting on page 17.

⁴ This language is codified in the Illinois Human Right Act (775 ILCS 5/2-101(E)), the State Officials and Employee Ethics Act (5 ILCS 430/5-65), several cases interpreting the Civil Right Act, and the Equal Employment Opportunity Commission Policy Guidelines (<https://www.eeoc.gov/policy/docs/currentissues.html>). Each have important distinctions, some of which are discussed in this report.

There are generally two types of sexual harassment: (1) quid pro quo; and (2) hostile work environment.

1. Quid Pro Quo (“this for that”): In quid pro quo sexual harassment, an employer or supervisor makes submission to unwanted sexual advances or conduct an implicit or explicit condition of employment or employment benefits or uses such submission (or refusal) as a basis for making employment decisions concerning the victim. To qualify as quid pro quo sexual harassment, the harasser must be in a position of power over the victim and have the authority to grant or deny the victim employment or employment benefits. One instance may be enough to constitute sexual harassment, even if the threat is not acted upon.

Conduct that falls into this category typically occurs when an employee or job applicant suffers an adverse employment action, such as a termination, demotion, pay cut, or rejection of employment, for refusal to engage in unwelcome sexual activity. For example, a supervisor that threatens to fire an employee if he or she does not go on a date with or otherwise engage in certain sexual acts with the supervisor has likely engaged in quid pro quo sexual harassment.

2. Hostile Work Environment: Hostile work environment sexual harassment occurs when an employee is subjected to sufficiently severe or pervasive sexually offensive speech or conduct that it creates an intimidating, hostile, or offensive working environment which affects the victim’s job performance. Unlike quid pro quo sexual harassment, the harasser could be a supervisor, a co-worker, or a non-employee.

Examples of conduct that may create a hostile working environment include:

- Verbal: Sexual innuendos, suggestive comments, insults, sexual language, and jokes about sex, anatomy, gender, or gender-specific traits, sexual propositions, threats, repeated requests for dates, or statements about other employees, even outside of their presence, of a sexual nature.
- Non-Verbal: Suggestive or insulting sounds (whistling), leering, obscene gestures, sexually suggestive bodily gestures, “catcalls”, “smacking” or “kissing” noises.
- Visual: Posters, signs, drawings, pictures, or calendars of a sexual nature, viewing pornographic material or websites.
- Physical: Touching, unwelcome hugging or kissing, pinching, brushing the body, any coerced sexual act, or actual assault.
- Digital/Electronic: “Sexting” (electronically sending messages with sexual content, including pictures and video), the use of sexually explicit language, harassment, cyber stalking and threats via all forms of electronic communication, including e-mail, texts, and social network websites.⁵

Whether conduct is severe or pervasive enough to create a hostile work environment is very fact specific and is determined on a case-by-case basis by the courts and administrative

⁵ See Illinois Department of Human Rights’ Model Policy on Sexual Harassment: <https://www2.illinois.gov/dhr/PublicContracts/Documents/SexualHarassmentModelPolicyStatement.pdf>

agencies. It usually takes more than one incident to create a hostile work environment. However, the more severe conduct is, the less pervasive it needs to be. A singular instance of conduct that is severe may rise to the level of creating a hostile work environment.

Ultimately to be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to not only the victim but also to any reasonable person.

Harassers and victims of sexual harassment can be male or female. Additionally, victims of sexual harassment are not limited to those who are the intended target of the harassment. Persons who witness sexual harassment against another can themselves be the victims of sexual harassment.

Sexual harassment that is a violation of the law is distinct from other types of behavior that may be considered inappropriate for the workplace. Generally, rude behavior, bullying, disrespect, petty slights, annoyances, and non-severe isolated incidents will not rise to the level of meeting the legal standard of sexual harassment, particularly if such behavior is not sexual or gender-based.

SUMMARY OF SPECIFIC LAWS AND RELATED COMPLAINT PROCEDURES

Sexual harassment is prohibited by several federal and state laws, including Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e-3(a)), the Governmental Employee Rights Act of 1991 (42 U.S.C. § 2000e-16(a-c)), the Illinois Human Rights Act (775 ILCS 5/*et seq.*), the State Officials and Employees Ethics Act (5 ILCS 430/5-65), and the Lobbyist Registration Act (25 ILCS 170/4.7). Retaliation against an employee for reporting sexual harassment or participating in an investigation or hearing concerning sexual harassment is similarly prohibited, as well as by the Illinois' Whistleblower Protection Act (740 ILCS 174/*et seq.*).

These laws provide the legal remedies for addressing most sexual harassment complaints. As a result, sexual harassment in the workplace is generally a civil law issue and not a criminal matter. However, certain kinds of conduct that may be sexual harassment, may also be criminal (*e.g.*, criminal sexual assault).⁶ If an individual engages in this type of criminal conduct, they, or their employer, may also be liable for sexual harassment. Furthermore, under Illinois law, victims of certain types of sexual harassment may have other civil remedies available to them, including the ability to bring a lawsuit in civil court for traditional torts or gender violence.⁷ Whether a victim of sexual harassment may have remedies beyond those described below will depend on the circumstances and facts.

Title VII of the Federal Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers with 15 or more employees,⁸ federal, state and local governments, employment agencies, and certain labor organizations from discriminating against employees (including job applicants)⁹ on the basis of race, color, religion, national origin, or sex. Sexual harassment has been recognized as a form of illegal sex discrimination under Title VII since the U.S. Supreme Court's 1986 decision in *Meritor Savings Bank v. Vinson*.¹⁰ Additionally, the Civil Rights Act of 1964 prohibits an employer from discriminating against any of its employees or applicants for employment because he or she has opposed any unlawful sexual harassment under the Act, or because he or she has made a charge, testified, assisted, or participated in any manner in an investigation,

⁶ See Illinois Criminal Code of 2012 (720 ILCS 5/*et seq.*) (*e.g.*, battery, criminal sexual assault, criminal sexual abuse, stalking, transmitting obscene messages, etc.).

⁷ See *Maksimovic v. Tsogalis*, 177 Ill.2d 511 (Ill. 1997) (Common law torts, *e.g.*, assault, battery, intentional infliction of emotional distress, false imprisonment, etc.); Gender Violence Act (740 ILCS 82/*et seq.*); Civil No Contact Order (740 ILCS 22/*et seq.*); Stalking No Contact Order (740 ILCS 21/*et seq.*); Illinois Domestic Violence Act (750 ILCS 60/*et seq.*).

⁸ Religious corporations, associations, educational institutions, and societies are not employers under Title VII with respect to the employment of individuals of a particular religion to perform work connected with the carrying out of its activities.

⁹ "Employee" does not include a person elected to public office in any State or political subdivision of a State. Furthermore, Title VII excludes any person who is (i) chosen by such elected public officer to be on the official's personal staff, (ii) appointed on the policy making level or (iii) an immediate adviser to the official with respect to the exercise of the constitutional or legal powers of the office. If the person is covered by civil service laws of the State, the person is not excluded from being an employee under Title VII.

¹⁰ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

proceeding, or hearing under the Act. Remedies for retaliation under federal law are the same as those available for other violations of the Act.

Employers are strictly liable under Title VII for sexual harassment by a supervisor against their employees when they culminate in tangible employment action. However, if tangible employment action has not occurred, an employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements: (i) the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (ii) the complainant unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.¹¹

The U.S. Equal Employment Opportunity Commission (“EEOC”) is responsible for enforcing federal employment discrimination laws. Complaints of sexual harassment under Title VII must be filed with the EEOC within 180 days after the alleged unlawful practice occurred. However, for employees in Illinois and other states with similar prohibitions on employment discrimination, the deadline for filing a complaint is extended to 300 days. Once a charge is filed, the individual’s name and basic information about the allegations of discrimination are disclosed to the employer.

The EEOC either (i) dismisses the charge with no further investigation and issues a Notice of Right to Sue and closes the charge; (ii) sends the charge for further investigation; or (iii) sends the charge to mediation between the parties. Upon receipt of a Notice of Right to Sue (sometimes called a Right to Sue letter), a complainant may file an action in a federal district court within 90 days of receipt if he or she wishes to continue the case.

If the charge is sent to mediation and mediation is successful, the parties sign an agreement and the charge is closed. If mediation is unsuccessful, the charge may then be sent for further investigation.

If the EEOC investigates the charge further, the parties may reach a settlement, or the complainant may request a right to sue letter prior to the EEOC making a finding on the evidence. Otherwise, the EEOC determines whether or not the evidence shows a violation of law. Upon the EEOC making a finding that the law has been violated, it attempts to make a conciliation between the parties. If this fails, the EEOC may file a lawsuit on behalf of the plaintiff. However, if the respondent is a state or local government, the case is transferred to the Department of Justice where a suit may be filed in federal court.¹² A complainant may request a right to sue letter at any point and file in federal court.

The most common penalty for an employer who is found liable of violating Title VII is paying wages, salary, and fringe benefits that would have been earned by the employee, had the discriminatory act not occurred. An employer may also be required to pay an employee for lost

¹¹ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

¹² For a more complete view of the EEOC process, see Appendix D, “Title VII and GERA Sexual Harassment and EEOC Complaint Processing,” presented by Muslima Lewis, Senior Attorney Advisor, EEOC Office of Legal Counsel. March 27, 2018.

compensation during the period between judgment and reinstatement or, if reinstatement is not feasible, instead of reinstatement.

If the employee prevails under a Title VII case, the employer may also be ordered to pay plaintiff's attorney fees, compensatory damages for future economic loss, emotional distress, pain and suffering, inconvenience, mental anguish, and loss of enjoyment of the life of the employee. Penalties are capped based on the size of the employer.

In cases where an employer has been found guilty of malicious discrimination and/or discriminating against an individual with reckless indifference, punitive damages may be available to the plaintiff. However, punitive damages are generally not available against public entities or federal, state, or local governments.

Injunctive relief (forcing an employer to do or stop doing something) may be available where an employee has been subjected to intentional discrimination. These can include: reinstating the employee to their previous position, requiring the employer take corrective or preventative action or discontinue specific discriminatory practices.

Federal Governmental Employee Rights Act of 1991

The federal Governmental Employee Rights Act of 1991 ("GERA") prohibits sexual harassment against Presidential appointees and employees who are chosen or appointed by an elected state or local official to: (i) be a member of the elected official's personal staff; (ii) serve the elected official on the policymaking level; or (iii) serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The analysis and procedures for sexual harassment claims under the GERA are the same as under Title VII. However, complaints must be filed within 180 days of the alleged violation under the GERA. Retaliation is prohibited in the same manner as sexual harassment claims under Title VII.

Illinois Human Rights Act

The Illinois Human Rights Act ("IHRA") is the state's primary law governing discrimination in employment, housing, education, finance, and public accommodation. Sexual harassment has been prohibited specifically under the Act since 1984.¹³

Under the IHRA, it is a civil rights violation for any employer (including public employers), employee, agent of any employer, employment agency or labor organization to engage in sexual harassment against employees, including unpaid interns.¹⁴ Notably, unlike Title VII of the Civil Rights Act of 1964 and the GERA, this prohibition applies to conduct by employers with as few as one employee, with limited exceptions.¹⁵

Employers are responsible for sexual harassment by supervisors against their employees or job applicants, regardless of whether the supervisor was not the individual's direct supervisor, the

¹³ Public Act 83-89, which codified the prohibition, was sponsored by Task Force Chair, Rep. Barbara Flynn Currie.

¹⁴ "Employees" under the IHRA does not cover elected public officials and their immediate staffs, or principal administrative officers of state or local governmental bodies.

¹⁵ "Employer" does not include certain religious organizations.

employer knew of the conduct, or took corrective measures.¹⁶ An employer is also responsible for sexual harassment of its employees by non-employees or non-managerial and non-supervisory employees if the employer becomes aware of the conduct and fails to take reasonable corrective measures.

The Illinois Department of Human Rights (“IDHR”)¹⁷ investigates complaints under the IHRA, and the Illinois Human Rights Commission (“IHRC”)¹⁸ adjudicates complaints.

A complainant must file a complaint with IDHR within 300 days of the alleged violation. The complaint may be investigated or the parties may voluntarily choose mediation. Pursuant to Public Act 100-1066, complainants may opt out of the IDHR investigation and file an action in circuit court if they notify IDHR within 60 days that they are choosing to opt out.

After notice and an investigation, IDHR issues its findings to the parties. If IDHR finds “substantial evidence” of harassment, the complainant may file with IHRC or the circuit court to obtain a legal remedy. If IDHR dismisses the charge for lack of substantial evidence, the complainant may file a request for review (like an appeal) with the IHRC or file a complaint with the circuit court stating their case, *i.e.*, why they disagree with IDHR’s finding.¹⁹

The IHRA further prohibits (i) retaliation, (ii) aiding and abetting or coercing a person to violate the Act and (iii) interference with the performance of IDHR’s or IHRC’s duties. Specifically, it is a separate civil rights violation for:

“[A] person, or two or more persons to conspire to: (A) retaliate against a person because he or she has opposed that which he or she reasonably believes and in good faith believes to be unlawful discrimination, sexual harassment in employment...because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under [the Illinois Human Rights Act];...(B) aid, abet, compel or coerce a person to commit any violation of [the] Act; [or] (C) willfully interfere with the performance of a duty or the exercise of a power by the Commission or one of its members or representatives or the Department or one of its officers or employees.”²⁰

Upon a finding of a civil rights violation, an IDHR hearing officer may recommend and/or the IHRC may enter an order requiring the respondent to (i) cease and desist; (ii) pay actual

¹⁶ *Sangamon County Sheriff's Dept. v. Illinois Human Rights Commission*, 233 Ill.2d 125 (2009) (employers are strictly liable for sexual harassment by supervisory employees, even where the supervisory worker has no authority to affect the terms and conditions of the complaining employee's employment and regardless of whether the employer was aware of the harassment or took measures to correct it)

¹⁷ Janice Glenn, the current Director of IDHR, and the Deputy Director, Alex Bautista, oversee the Charge Processing, Human Resources, and Fair Housing Departments. *More information:* <https://www2.illinois.gov/agencies/IDHR>

¹⁸ IHRC is currently made up of 13 part-time Commissioners, 5 administrative law judges. Philip Dalmage is the current Executive Director. *More information:* <https://www2.illinois.gov/sites/ihrc/Pages/default.aspx>

¹⁹ IDHR does not make credibility determinations in processing charges alleging unlawful discrimination or sexual harassment. If a case determination hinges on conflicting evidence, IDHR’s policy is to make a finding of “substantial evidence” so that a trier of fact (either IHRC or a circuit court) can resolve the issue of credibility.

²⁰ 775 ILCS 5/6-101.

damages; (iii) reinstate or promote the complainant (with or without back pay, depending on the circumstances); (iv) pay attorney's fees; (v) report ongoing compliance; (vi) post notices for employees; or (vii) any other act necessary to make the complainant whole.

If a complainant takes their case to circuit court, a court may award a plaintiff actual and punitive damages, and grant injunctive relief or other action as appropriate.²¹

State Officials and Employees Ethics Act

The State Officials and Employee Ethics Act ("Ethics Act") prohibits State officials and State employees in Illinois from engaging in sexual harassment. Notably, unlike the sexual harassment prohibitions under federal law and the Illinois Human Rights Act, this prohibition can apply regardless of an employment relationship with the person subjected to the harassment and regardless of the physical location where the victim is assigned to work. This means that State officials and employees are prohibited from engaging in hostile working environment sexual harassment against other State officials, employees of another caucus or agency, and lobbyists. The Ethics Act also requires units of local government and other entities, such as public transit agencies, to prohibit their employees from engaging in sexual harassment as defined by the Act.

Allegations of sexual harassment against state officials and employees are investigated by Inspectors General. Each Constitutional office has its own Inspector General, with the Office of the Executive Inspector General for the Agencies under the Governor overseeing the most employees. The Legislative Inspector General, who is appointed by three-fifths of the members elected to each house of the General Assembly, investigates complaints against members of the General Assembly and state employees employed by the legislative branch.

The complaint procedure is similar for all Inspectors General. Complaints can be made at any time and an inspector general can investigate upon their own initiative; however, the Inspector General cannot investigate violations alleged to have occurred more than one year prior to the complaint unless there is reasonable belief that fraudulent concealment has occurred. Complaints can be made anonymously, and the identity of the complainant will be kept confidential unless the complainant agrees to the release of his or her name.

Upon conclusion of the investigation, if the Inspector General does not find sufficient evidence that a violation has occurred, the Inspector General closes the investigation and may provide a written statement of his or her decision to the subject. Even if the Inspector General closes an investigation, the Inspector General may resume the investigation later if circumstances warrant or if the Ethics Commission requests further investigation.

If the Inspector General finds evidence of a violation, the Inspector General issues a summary report detailing the allegations and findings to the ultimate jurisdictional authority or head of the

²¹ 775 ILCS 5/10 *et seq.*; See also *Maksimovic v. Tsogalis*, 177 Ill.2d 511 (Ill. 1997) ("If behavior toward an employee constitutes a traditional tort, such as battery or assault, the employee may file a tort in civil court, even the employer's actions may also be considered sexual harassment in violation of the IHRA.").

State agency and the subject of the report. The ultimate jurisdictional authority or the state agency head has 20 days to respond in writing.²²

Within 30 days of receipt of the ultimate jurisdictional authority's response (or if the ultimate jurisdictional authority fails to timely respond), the Inspector General notifies the respective Ethics Commission and the Attorney General if he or she believes that a complaint should be filed with the Commission.

If the Inspector General does not believe that a complaint should be filed, the summary report is filed with the Commission. If the Commission disagrees with the Inspector General's findings, it can request the Inspector General investigate further or refer the matter to the Attorney General for further review. If the Commission does not request further review, it may choose to publish the summary report and responses. Publication of a summary report is within the discretion of the Ethics Commission unless the summary report resulted in the termination of an employee or a suspension for 3 or more days.

If the Inspector General asks the Attorney General to pursue the matter and the Attorney General agrees there is reasonable cause to believe a violation has occurred, the Attorney General files a complaint with the Ethics Commission and represents the Inspector General before the Ethics Commission on the complaint.

If a complaint is brought before the Ethics Commission and the Commission determines the complaint does not sufficiently allege a violation, the complaint is dismissed. If the Commission finds the complaint sufficiently alleges a violation, a hearing is conducted after notice is made on all parties. Upon finding a violation after the hearing, the Commission may impose punishment and must publish the findings and relevant investigation documents, including the summary report and responses.

Violation of the prohibition on sexual harassment may be punished by a fine of up to \$5,000 per offense and be subject to discipline or discharge by the appropriate ultimate jurisdictional authority or State agency head. Each violation of the prohibition on sexual harassment is a separate offense, meaning \$5,000 per instance of harassment. Any penalty imposed by an Ethics Commission is separate and in addition to any penalties imposed by a court of law, State or federal agency.

Furthermore, the Ethics Act prohibits retaliation for filing a complaint, participating in an investigation or otherwise reporting a good faith belief that a violation of law has occurred. Specifically, no State official, member of the General Assembly, State employee, or State agency can take any retaliatory action against a person because he or she discloses or threatens to disclose what he or she reasonably believes is in violation of a law, rule, or regulation; provides information in an investigation of a violation of the Ethics Act; or assists or participates in a proceeding to enforce the Ethics Act.

²² When a legislator is the subject of the investigation, he or she also has the ability to respond in addition to the ultimate jurisdictional authority.

Lobbyist Registration Act

The Lobbyist Registration Act prohibits lobbyists and entities that lobby the State government from engaging in sexual harassment. As with the Ethics Act, this prohibition can apply regardless of an employment relationship with the person subjected to the harassment and regardless of the physical location where the victim is assigned to work. Thus, lobbyists and lobbying entities are prohibited from engaging in hostile work environment sexual harassment against State officials, employees, and other lobbyists. Complaints under the Act are overseen by the Secretary of State's Office of the Inspector General and the Executive Ethics Commission. The procedures for those complaints are the same as those described above under the Ethics Act.

If a lobbyist violates the prohibition on sexual harassment in the Lobbyist Registration Act, he or she is guilty of a business offense and subject to a fine of up to \$5,000. Also, the Executive Ethics Commission may strike or suspend a lobbyist or lobbying entity's registration under the Lobbyist Registration Act for a period of up to 3 years if it finds the lobbyist engaged in sexual harassment. These are separate penalties from those imposed by a court of law.

Whistleblower Protection Act

The Whistleblower Protection Act prohibits an employer from retaliating or threatening to retaliate against an employee for disclosing information to a government or law enforcement agency or in a court, administrative hearing, legislative committee, or any other proceeding, when the employee has reasonable cause to believe that the information discloses a violation of State or federal law, rule, or regulation. A violation is a Class A misdemeanor. Additionally, an employee may bring a civil action for relief necessary to make the employee whole, including back pay, compensation for damages, and court costs and attorney's fees.

TASK FORCE MEETINGS

The Task Force set out to (1) educate the Task Force members and the general public on what types of behaviors constitute sexual discrimination and harassment, (2) detail the different procedures to investigate and address sexual discrimination and harassment allegations, and (3) review various training programs.²³

The Task Force held thirteen meetings over the course of twelve months. Six were held in Chicago and seven were held in Springfield. Procedurally, the Task Force functioned like a regular House Committee subject matter hearing. All meetings were posted on the General Assembly's website with 6-days' notice.

All agendas and documents presented to the Task Force were posted to the Task Force's page on the Committees page of the Illinois General Assembly's website²⁴ (a PDF of documents presented is available in Appendix D in chronological order).

- At the first meeting on November 29, 2017, Women Employed educated the Task Force on the definition of sexual harassment, examples of retaliation, and best practices to help prevent and address harassment in the workplace. They highlighted five core principles for preventing and addressing harassment identified by the U.S. Equal Employment Opportunity Commission ("EEOC"): (1) committed and engaged leadership; (2) consistent and demonstrated accountability; (3) strong and comprehensive harassment policies; (4) trusted and accessible complaint procedures; and (5) regular, interactive training tailored to the audience and the organization. Women Employed also recommended an additional four best practices: (1) employees should be trained to recognize sexual harassment and step in as active bystanders; (2) employers should keep records on complaints and their outcomes, include evaluating supervisors' responses to complaints; (3) employees should be regularly surveyed anonymously to assess the effectiveness of the policies and their implementation and enforcement; and (4) an independent person should be available to receive complaints. (See Women Employed's Power Point in Appendix D).

The Office of the Attorney General provided a comprehensive overview of the various legal violations related to discrimination and sexual harassment. They highlighted, and the Task Force discussed, the difference between violations under the Illinois Human Rights Act, Title VII of the Civil Rights Act of 1964, and the Criminal Code. The Task Force was reminded of the fact that sexual harassment is not a criminal offense handled by prosecutors, but rather a civil matter.

- On December 11, 2017, the Inspectors General ("IG") for the Offices of the Secretary of State ("SOS IG"), Comptroller, Treasurer, and for the Agencies of the Governor ("OEIG") provided testimony to the Task Force regarding the processes in their respective offices. The Comptroller's Office has approximately 280 employees, and their IG testified that they have not had a sexual harassment complaint since 2005. The Treasurer's Office has

²³ While the focus of the Task Force was sexual harassment and the prevention of sexual harassment, the root causes of gender inequality were also part of the discussion.

²⁴ <http://www.ilga.gov/house/committees/TaskForceDocuments.asp?CommitteeID=HR687&GA=100>

approximately 175 employees, and their IG testified that they have not had a sexual harassment complaint for two years.

The Deputy Inspector General for the Office of the Secretary of State discussed the new sexual harassment prohibition and training requirement for lobbyists. The SOS Deputy IG relayed to the Task Force that their office was working in consultation with IDHR to make sure the training is accurate and complete. The SOS Deputy IG testified that the office receives about 400 employee complaints a year, but they did not have a specific breakdown for sexual harassment complaints. The Secretary of State employs over 4,000 employees.

The Office of the Executive Inspector General for the Agencies of the Governor (“OEIG”) has jurisdiction over approximately 170,000 employees and receives complaints, including anonymous complaints, through formal written complaints, hotline calls, and walk-ins. In FY 2017, the OEIG received 2632 complaints and opened 107 investigations.²⁵ The OEIG also talked about some of challenges it has dealing with sexual harassment complaints, within the Ethics Act structure, because it was not created with individual “victims” in mind, but the victim being the citizens of Illinois, *e.g.*, abusing one’s public position for personal enrichment.²⁶ Neither was the Ethics Act created to be a general civility code or human resources department regulating all conduct in public employment.²⁷

- On January 11, 2018, plaintiffs in a class action lawsuit against Ford Motors claiming sexual and racial harassment at two Chicago Ford Motor plants testified before the Task Force. The women spoke of the alleged harassment they faced every day at work from supervisors, co-workers, and their own union representatives. The Task Force members also heard from Equal Employment Opportunity (EEO) Officers from the Offices of the Secretary of State, Comptroller, Treasurer, and Executive Inspector General for the Agencies of the Governor. These EEO Officers discussed the process of handling allegations of sexual harassment and discrimination at their respective agencies. The Secretary of State’s EEO officer detailed her handling of internal complaints, reporting that 2 of the 21 complaints received in 2017 were allegations of sexual harassment. The EEO officer from the Comptroller’s Office received no complaints of sexual harassment or discrimination in 2017. The Treasurer’s EEO officer has received no complaints of sexual harassment in the previous three years, and the only complaint in 2017 was for workplace bullying. (See also written testimony offered by the OEIG, Appendix D).
- On January 29, 2018, the Governor’s Office and the Illinois Department of Human Rights (“IDHR”) testified. The Governor’s Office spoke about the process they follow for complaints as well as the training that has been implemented for their employees and the agencies the office oversees. IDHR explained the process for charges received by their office and the potential outcomes of the charges. IDHR provided a power point with a flow

²⁵ It should be noted not all of these complaints are allegations of violations of the Ethics or alleging sexual harassment. It is just a total number of complaints received.

²⁶ Gift Ban (5 ILCS 430/10, *et seq.*), Prohibited Public Activities (5 ILCS 430/5-15), Revolving Door Prohibition (5 ILCS 430/5-45).

²⁷ This was discussed in more detail in the July 30, 2018 meeting of the Task Force with former Legislative Ethics Inspector General, Tom Homer on page 19-20.

chart showing the charge process. In FY 2017, IDHR received 403 charges of sexual harassment out of a total of 3201 charges. (See IDHR Power Point, Appendix D).

- The Illinois Human Rights Commission’s (“IHRC”) General Counsel and an Administrative Law Judge testified about the complaint process at the IHRC, on February 13, 2018. They acknowledged that there was a backlog of cases pending before the Commission. However, the pending cases were not all sexual harassment cases, but comprised all manner of discrimination charges under the Illinois Human Rights Act, from public accommodations to banking, to employment.²⁸
- At the February 27, 2018 meeting, Phillippe R. Weiss, Managing Director of Seyfarth Shaw at Work, spoke to the Task Force about effective training that his firm offers for managers and employees in the private sector. Co-Chairs Currie and Jimenez presented several draft ideas to the Task Force for potential legislation. They welcomed feedback from all the Task Force members in order to prepare comprehensive legislation. (See Anti-Harassment Proposal 2-27-18, Appendix D).
- Jay Shattuck from the Illinois Chamber of Commerce spoke at the March 6, 2018 meeting. The focus of the testimony was to address changes to the statute of limitations for the filing of complaints with IDHR and the backlog of cases at the IHRC. The Chamber’s concerns were that by expanding the statute of limitation from 180 to 300 days, the backlog would likely not improve. These concerns amongst others were being addressed in the negotiations of SB 20 (PA 100-1066). Further discussions between the Task Force members continued regarding the proposals from the February 27, 2018 meeting.
- On March 13, 2018, Mona Noriega, Chair of the City of Chicago’s Commission on Human Relations (“CCHR”), spoke about the enforcement of the Chicago Human Rights (“CHRO”) and Fair Housing ordinances. The CHRO prohibits sexual harassment in employment and public accommodations, it covers workplaces of all sizes in Chicago from businesses with a single employee to large corporations. Ms. Noriega also testified specifically about how the City of Chicago receives, investigates, and rules on discrimination complaints filed under these ordinances, including their complaint and hearing process. The complaint and hearing process also may include settlement negotiations if the parties voluntarily agree to those discussions. The Office of the Attorney General (“AG’s Office”) answered questions from the members and discussed the definition of “employee” and “employer” in the Illinois Human Rights Act. In the view of the AG’s Office, independent contractors and volunteers do not fall under the definition of employee. The AG’s Office declined to offer an opinion on whether having a “one-stop shop” across the state for complaints would be beneficial; however, they expressed a view that it might violate the Separation of Powers clause in the Illinois Constitution.²⁹

²⁸ The breakdown of the cases in the backlog was provided to the Task Force at the September 11, 2018 meeting, discussed on page 20-21.

²⁹ Article II, Sec. 1 Ill. Const. 1970 (“The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belong to another.”)

- A joint meeting of the House Task Force and the Senate’s Sexual Discrimination and Harassment Awareness and Prevention Task Force was held on March 27, 2018. The meeting addressed sexual harassment policy and legislation in other states and at the federal level. Members heard from representatives of the National Conference of State Legislatures (NCSL), the EEOC, and the Congressional Office of Compliance. The EEOC discussed federal law, Title VII of the Civil Rights Act of 1964 and the Government Employee Rights Act of 1991. The EEOC provided numerous resources regarding harassment and responses to harassment in the workplace. NCSL stated that in their survey of legislative offices on sexual harassment policies and training, Illinois was the first state to pass legislation on sexual harassment after the issue exploded in the wake of the New York Times article detailing the allegations against Harvey Weinstein.³⁰ At the federal level, the Congressional Office of Compliance recommended mandatory training for sexual harassment across the legislative branch and the adoption of comprehensive anti-harassment and anti-retaliation policies. They also supported federal proposals to extend coverage to interns and fellows and the use of employee surveys. (See Joint Task Force Hearing Packet and EEOC Complaint Process Power Point, Appendix D).
- On April 19, 2018 representatives from the Center for Public Safety and Justice at the University of Illinois at Chicago spoke about using procedural justice as an analytic framework for sexual harassment and discrimination policies and procedures. Procedural justice is a focal point in the profession of policing, and it refers to the idea of fairness in the processes that resolve disputes and allocate resources. Polly Poskin, Executive Director for the Illinois Coalition Against Sexual Assault, spoke about victims’ rights advocacy in criminal sexual assault and ways that it may help inform sexual harassment and discrimination policies and procedures. Ms. Poskin emphasized the importance of transparency in the process to build trust with the victim, hitting on the similar themes as the procedural justice advocates. She suggested a state-wide “ombudsperson” to provide legal advice to all employees.³¹ State Representative Jeanne Ives and advocate Denise Rotheimer discussed their bill to establish statutory rights for complainants under the Ethics Act, HB 4840 of the 100th General Assembly.³²
- The Task Force heard testimony on July 30, 2018 from the Honorable Tom Homer, former Legislative Inspector General. He discussed his experience as Legislative Inspector General and provided his recommendations to the Task Force. He first recommended that the legislature amend the statute to require that all founded reports and their responses and dispositions be made public unless specifically rejected by the Commission. He proposed changing the 8-person structure of the Commission to have an odd-number of members to avoid deadlocks, and/or mandating one or more members are not drawn from current General Assembly members. Other recommendations included, allowing the Legislative Inspector General to initiate investigations of all alleged violations without Commission approval, and

³⁰ Jodi Kantor and Megan Twohey, “Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades,” New York Times, October 5, 2017, <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

³¹ Discussed in further detail on page 26.

³² Some of their suggestions were incorporated into HB 138 (PA 100-588). Full Text of HB 4840 as introduced by Rep. Ives available here: <http://www.ilga.gov/legislation/100/HB/PDF/10000HB4840lv.pdf>

expanding the Commission’s jurisdiction to the Illinois Governmental Ethics Act, *e.g.*, prohibitions on “conduct unbecoming” a member of the legislature.³³ Homer recommended and encouraged transparency of the process to allow the Legislative Inspector General to inform a complainant of the status or ultimate disposition of the complaint, many of which had been incorporated into HB 138 (PA 100-588).

Representatives of the Office of the Governor testified about Executive Order (EO) 2018-08, which was created to address the backlog at the IHRC. The EO requires coordination between the Bureau of Administrative Hearings at CMS, IDHR and IHRC. There are seven points of coordination: (1) develop a benchmarking system and plan for the elimination of the backlog within 18 months; (2) review the rights and requirements at the IHRC and IDHR and identify where legislation, administrative rules and internal policies can be proposed or amended to streamline the hearing process for the IHRC and IDHR; (3) execute intergovernmental agreements to share resources and workloads through the administrative hearings process; (4) in conjunction with the Department of Innovation and Technology, develop technological solutions and share case management systems; (5) track and report quarterly to the Governor and the Director of CMS, the total number of pending cases, average and median length of time for resolution of cases, and any other information necessary to capture the backlog or delay in the processing of cases; (6) solicit feedback and survey parties that appear before IHRC and IDHR; and (7) develop and participate in training programs, including at least one Rapid Results training program.

A representative from the Women’s Bar Association of Illinois testified about the use of non-disclosure agreements (NDAs) both pre-employment, which are used in all types of disputes, and mutual NDAs which are more commonly used in dispute settlements, in sexual harassment cases or other employment disputes. They further discussed Title VII, federal labor laws, and the Employee Misclassification Act.

- On September 11, 2018, Reform for Illinois (formerly Illinois Campaign for Political Reform) (“RFI”) presented its recommendations on best practices for General Assembly ethics reporting and investigatory processes. RFI recommended: (1) allowing the Legislative Inspector General to issue subpoenas without having to request approval from the Legislative Ethics Commission; (2) increasing the statute of limitations for investigations by the IGs and Attorney General’s Office; (3) requiring publication of the IG’s summary reports in cases involving public officials where substantial evidence of wrongdoing has been found; and (4) requiring that one or more members of the Legislative Ethics Commission are not members of the General Assembly.

The Governor’s Office presented their 60-day action plan for implementation of Executive Order 2018-08. Their 60-day action plan consisted of 13 points, which included but were not limited to mobilizing and training staff, resource sharing, procurement for shared technology, and conducting a comprehensive analysis of the way cases are processed. As of September 11, 2018, the backlog statistics were 685 Commission-determined requests for review with

³³ Through debate, the Task Force acknowledged that standards and guidelines would be necessary to define “conduct unbecoming,” especially if the Commission may impose fines and other punishments that may implicate due process.

no written order, 1,518 requests for review awaiting scheduling to a Commission panel and 95 requests for review aged 7 years or older with no final disposition.

- On November 28, 2018, the Task Force met to review actions of the last year and examine whether there was progress being made with training and implementation of SB 402. The Office of the Governor reported that almost 50,000 state employees under the Governor have completed their sexual harassment training. IDHR testified on the progress of their helpline and plans to increase outreach. The helpline went live in February of 2018 and received 123 calls by the end of October 2018, 75 percent of those were related to sexual harassment and none of those calls were related to the General Assembly. The SOS IG reported two-thirds of their employees had completed training and almost all of the registered lobbyists have completed their required training. Additionally, the SOS IG has seen an increase in the volume of reporting. The OEIG provided that so far in calendar year 2018, they have received 42 complaints, 27 of which were allegations of sexual harassment. Currently, about 10 percent of the OEIG's caseload are allegations of sexual harassment.

LEGISLATIVE ACCOMPLISHMENTS

The Illinois General Assembly has taken numerous steps to address sexual harassment, improve workplace culture, and provide additional protections for victims, particularly in the public sector. Many of these measures were the result of recommendations from the Task Force and its members. The General Assembly's work has made Illinois a leader in addressing sexual harassment. (See Appendix B for actions taken by other states in 2018). Below is a summary of the General Assembly's recent actions.

[HR 687 \(Currie\)](#): HR 687 created the House Task Force on Sexual Discrimination and Harassment. It directed the Task Force to conduct a comprehensive review of the legal and social consequences of sexual discrimination and harassment, in both public and private sectors; make recommendations to the General Assembly in the form of legislation; and issue a report.

[SB 402 \(J. Cullerton/Madigan\)](#): SB 402 prohibited sexual harassment by all State constitutional officers, legislators, employees, and lobbyists, regardless of an employment relationship, under the Ethics Act. In addition, the bill required all such persons to complete a sexual harassment training program every year. The bill further required the personnel policies of all constitutional officers and legislators to include a specific prohibition against sexual harassment and retaliation, information about how an individual can report the allegations of sexual harassment, and specifics on disciplinary action for violations of the policy. Those requirements also apply to local governmental entities and lobbyists. SB 402 created a hotline operated by the Department of Human Rights to receive communications and complaints regarding sexual harassment; these reports can be made confidentially. (See Appendix A for Resources).

SB 402 also subjected State officials and employees to fines of up to \$5,000 per violation, as well as discipline or termination by the appropriate jurisdictional authority, if they engage in sexual harassment. Similarly, lobbyists who engage in sexual harassment will be subject to a fine of up to \$5,000 per violation and risk the loss of their registration. SB 402 passed the House on a vote of 117-0-0, passed the Senate on Concurrence by a vote of 55-0-0, and was signed into law by the Governor as P.A. 100-554. The bill became law on November 16, 2017.

[SB 20 \(Steans/Currie\)](#): SB 20 was a result of on-going conversations between the General Assembly, the Office of the Governor, the Illinois Chamber of Commerce, ACLU of Illinois, Mandel Legal Aid Clinic of the University of Chicago, and other relevant stakeholders. The bill was in response to the backlog of cases at the Illinois Human Rights Commission ("IHRC"). The bill requires the Illinois Department of Human Rights ("IDHR") to cease an investigation if a civil action has been filed in circuit court. It extended the time limit for filing a charge alleging a civil rights violation, including discrimination and sexual harassment, with IDHR to 300 days. Complainants were given the right to opt out of the IDHR investigation process within 60 days of receiving notice from IDHR to commence a civil action. The IHRC structure was changed to 7 full time members from 13 part time members, and commissioners, who now must meet certain qualifications before appointment. Additionally, the bill required the IHRC to publish its decision within 180 days. SB 20 passed the Senate on a vote of 47-0-0 and passed the House on

a vote of 114-0-0. It was signed into law by the Governor as P.A. 100-1006 and became effective August 24, 2018.

[HB 138 \(Currie-Jimenez/Bush-Tracy\)](#): HB 138 made numerous reforms regarding sexual harassment and the State Officials and Employees Ethics Act, including allowing the Legislative Inspector General (“LIG”) to investigate complaints of sexual harassment without approval from the Legislative Ethics Commission (“LEC”). The bill addressed vacancies in the LIG position by requiring the LEC to appoint an Acting LIG within 45 days of a vacancy, establishing a bipartisan search committee made of up persons who were formerly judges or prosecutors to find qualified applicants. It further allowed the LIG position to be full time or part time, and provided for the Auditor General to serve as acting-LIG if the position is not filled within 6 months. The LEC and the Executive Ethics Commission must make public additional data about the types of complaints they receive, and the Inspectors General may provide information regarding the status of complaint, including if an investigation has been opened or closed.

The bill also required each established political party to implement a policy prohibiting discrimination and harassment and provide a method to report allegations without retaliation.

HB 138 passed the Senate on a vote of 54-0-0, and it passed the House on concurrence by a vote of 110-0-0. It was signed into law by the Governor as P.A. 100-588 and became effective on June 8, 2018.

[HB 4242 \(McSweeney/T. Cullerton\)](#): HB 4242 addressed severance agreements that involve allegations of sexual harassment or sexual discrimination. The bill required a unit of local government, school district, community college district, or other local taxing body to publish information (subject to certain exceptions) on their website and make available such information to the news media for inspection and copying within 72 hours of the body's approval of the severance agreement subject to the confidentiality provisions of the severance agreement. HB 4242 passed the Senate on a vote of 59-0-0, and it passed the House on concurrence by a vote of 108-1-0. It was signed into law by the Governor as P.A. 100-1040 and became effective August 23, 2018.

[HB 4243 \(McSweeney/T. Cullerton\)](#): HB 4243 prohibited the use of public funds, including, but not limited to, General Assembly member office allowances, to pay any person in exchange for his or her silence or inaction related to an allegation or investigation of sexual harassment committed or allegedly committed by a member of the General Assembly, *i.e.*, “hush money”. HB 4243 passed the House by a vote of 113-0-0 and the Senate by a vote of 58-0-0. It was signed into law by the Governor as P.A. 100-0748 and became effective August 10, 2018.

[HB 4953 \(McAuliffe/Bush\)](#): HB 4953 required professions regulated by the State that have continuing education requirements include at least one hour of sexual harassment prevention training for license renewals occurring on or after January 1, 2020. HB 4953 passed the House by a vote of 103-0-0 and passed the Senate by a vote of 51-0-0. It was signed into law by the Governor as P.A. 100-0762 and becomes law January 1, 2019.

[HR 783 \(Wheeler, B\)](#): House Resolution 783 urged IDHR, the Equal Employment Opportunity Commission, and the U.S. Department of Labor to investigate the alleged culture of harassment within the United Auto Workers Union at the Ford Motor Company.

WHAT'S NEXT?

The General Assembly, with input from the Task Force, was able to implement many important changes related to sexual discrimination and harassment over the last year. However, the Task Force received a number of policy recommendations that dealt with complex issues which require further analysis and more discussion with a broader range of employers, employees, and advocates to address specifics. The Task Force does not take a position on these proposals but is presenting them below to provide further information to the 101st General Assembly as it continues to address sexual discrimination and harassment.

Ideas Related to Ethics Laws

1. Publication of Reports: Reform for Illinois (“RFI”)³⁴ has suggested that all summary reports by the Inspectors General in cases involving public officials be published where there was a finding of substantial evidence of wrongdoing. Currently, the Ethics Act requires publication of a summary report where an investigation resulted in a suspension of at least 3 days or termination of an employee or the respective Ethics Commission has found a violation pursuant to a complaint. All other summary reports are subject to disclosure with approval of the respective Ethics Commission.
2. Require at least one public member on the Legislative Ethics Commission: RFI proposes the law require at least one member of the Commission cannot be a member of the General Assembly. Currently, the members of the Legislative Ethics Commission are appointed by the legislative leaders, with each leader appointing two members. The Commission members are not required to be legislators, but the Commission is currently made up of 8 legislators.
3. Unlimited subpoena power for the Legislative Inspector General: RFI proposes to allow the Legislative Inspector General to issue subpoenas without advanced approval of the Legislative Ethics Commission.
4. Increase the filing period for the Inspector General under the Ethics Act: Currently, the time within which an Inspector General, through the Attorney General, has to file a formal complaint with the relevant Ethics Commission is within 18 months of the most recent act of the alleged violation, absent fraudulent concealment. RFI notes that this may provide as little as 6 months for the investigation and reasonable cause determination. They propose that the Inspector General be given at least 12 months from the filing of the complaint to conduct the investigation and get a reasonable cause determination by the Attorney General.
5. Central Unit/Location for Sexual Harassment Enforcement: Rather than having the Constitutional officers and legislative caucuses handle sexual harassment complaints internally as employment matters, the proposal is to create one commission or entity to handle any allegations of sexual harassment within State government. This idea was discussed generally among the Task Force. Polly Poskin of ICASA has also suggested a

³⁴ Reform for Illinois, formerly Illinois Campaign for Political Reform, issued recommendations for changes to the Ethics Act in January 2018. Some of their recommendations became law in HB 138, and those remaining were discussed at the Sept. 11, 2018 Task Force meeting.

statewide “ombudsperson” for sexual harassment for all employees, private and public. As noted by the Office of the Attorney General in their testimony to the Task Force, there are separation of powers concerns with these ideas as they related to the branches of State government. There are also questions of cost and feasibility.³⁵

Ideas Related to the Illinois Human Rights Act

1. Definition of “Employee”: The Task Force examined whether to change two specific exemptions to the definition of “employee” - (1) the exemption for elected public officials or members of their immediate personal staffs, and (2) the exemption for “principal administrative officers of the State or of any political subdivision, municipal corporation or other governmental unit or agency.” There are currently differences of opinion on the scope of these exemptions, and no clear answers have been provided to the Task Force by the Department of Human Rights.
2. Independent Contractors: The Task Force, in conjunction with the Senate Task Force, examined how to ensure independent contractors are not left without recourse if they suffer discrimination or harassment on the basis of their gender. Currently, they are not employees as defined by state and federal employment laws. Some have suggested adding them to the definition of “employee” under the Illinois Human Rights Act. Independent contractors face unique challenges under employment law at both the state and federal level. They have more control over their work than traditional employees, and often have unconventional hours, unique working conditions, and often work alone. However, because a complicated framework of legal analysis has grown over the past few decades focused on ensuring employees are not misclassified as independent contractors,³⁶ changing one aspect of that framework could have significant and far-reaching effects that require further discussion, research, analysis, and negotiation with employers, employees, and advocates.

Non-Disclosure Agreements

The use of nondisclosure agreements (“NDAs”) in employment situations generally appear in one or both of two contexts: (i) at the outset of the employment relationship stipulating what can and cannot be disclosed, and (ii) in settlements for a specific situation. Advocates have proposed limiting or banning the use of NDAs related to sexual harassment, as has been attempted in some other states.

Seven states have enacted statutory limits on the enforceability of NDA provisions in employment (Arizona, California, Maryland, New York, Tennessee, Vermont, and Washington). However, they run the gamut as to what they prohibit. For instance, Tennessee bars employers from requiring an employee or prospective employee to sign or renew an NDA with respect to sexual harassment in the workplace as a condition of employment (barring front-end NDAs

³⁵ The California Legislature created a unit within their Legislative Counsel’s Office to make factual determinations and recommendations on allegations of sexual harassment and discrimination in the workplace. Due to constitutional limitations, discipline remains up to lawmakers. California budgeted \$1.5 million for the initial creation of this unit.

³⁶ Employee Misclassification Act (820 ILCS 185); Illinois Workers’ Compensation Act (820 ILCS 305); Unemployment Insurance Act (820 ILCS 405); Illinois Wage Payment and Collection Act (820 ILCS 115).

relating to sexual harassment), whereas Arizona, California, and Washington prohibit enforcement of any provision in an NDA that would bar a party from testifying in court about the factual basis for an NDA in a settlement agreement. Arizona's limitation of NDA use only extends to allowing a party to respond to a peace officer or prosecutor or make a statement in a criminal proceeding he or she did not initiate. Vermont appears to prohibit both front-end NDAs and settlement agreements that bar complainants from exercising any right or remedy under law.

While sexual harassment and discrimination in the workplace have brought the abuse of NDAs to the forefront, a flat ban on their use was not recommended by most of the parties the Task Force has heard from in the last year, including employment attorneys who represent plaintiffs in these types of actions. It has instead been suggested that, when dealing with settlement agreements alleging sexual harassment or discrimination, the law should (i) ensure the victim/plaintiff has the option to request an NDA and have final say over its terms, and (ii) to change their mind within a reasonable time period. The reasoning is that many employees are still concerned about coming forward and may be unwilling to do so if they cannot be assured some level of confidentiality.

Regarding front-end NDAs, or those that are signed as a condition of employment, there appears general consensus that there is good public policy in using them when there is a nexus between employment and access to business or trade secrets an employer has a rational basis to ensure are not disclosed, *i.e.*, a "protectable interest".³⁷ However, there seems to be agreement that it should not include barring an employee from providing testimony in court or evidence of unlawful employment conduct. As with all issues discussed in this Section, the devil is in the details.

Mandatory Arbitration

A number of individuals and organizations have called for a ban on the use of mandatory arbitration clauses related to sexual harassment claims. Mandatory arbitration is a contract clause that prevents a conflict from going to a judicial court. When employment contracts include mandatory arbitration provisions, it means the conflict must be resolved through arbitration. While they may seem similar to NDAs, mandatory arbitration runs up against federal law and U.S. Supreme Court precedent in an entirely different way, making them particularly complicated.

Many states have attempted to limit the enforceability of mandatory arbitration provisions, usually in relation to consumer protection laws. However, the United State Supreme Court has repeatedly struck down any state law that "disfavors arbitration agreements" as preempted by the Federal Arbitration Act of 1925 ("FAA").³⁸ The general legal consensus is that it is up to Congress to amend the FAA to allow employees to litigate their sexual harassment (or other

³⁷ This issue reaches beyond the purview of the Task Force as it touches on other aspects of employment which are nationally being debating and analyzed and often overlap with issues like non-compete agreements, which the Illinois Attorney General is currently litigating. For the purposes of this report, we are focusing on NDAs, either front-end or settlement, which deal with sexual discrimination and/or harassment in the workplace.

³⁸ See *DirectTV, Inc., v. Imburgia et al.*, 136 S. Ct. 463 (2015); see also, *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017); and *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

employment) claims in a judicial court instead of arbitration even when they have signed a mandatory arbitration agreement.

That does not mean it is impossible to utilize the EEOC and state civil rights agencies, such as the Illinois Human Rights Department and the Human Rights Commission, in an employment discrimination claim. The U.S. Supreme Court, as well as several federal and state courts, has held that an arbitration agreement between an employer and an employee over employment-related disputes does not prevent the agencies from investigating claims of employment discrimination and enforcing victim-specific relief.³⁹

Preventative Training

Prevention training for sexual harassment, general workplace civility and ethics was a frequently discussed topic before the Task Force. While legislation is not necessary for any employer, public or private, to initiate training for their employees, the best methods and practices for training to prevent sexual harassment and discrimination are constantly evolving in human resource development. The EEOC Select Task Force promoted expanding beyond “compliance training”, or how not to get sued, and to focus on civility and bystander training.⁴⁰

³⁹ See *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279 (2002); *SBM Site Services, LLC v. Alvarez*, 2018 WL 735388 (U.S. Dist. D. Neb., 2018), citing *EEOC v. Cosmair, Inc. L’Oreal Hari Care Division*, 821 F.2d 1085, 1090 (5th Cir. 1987); See also *Rent-a-Center, Inc. v. Iowa Civil Rights Commission*, 843 N.W. 2d 727 (Iowa, 2014); and *Joule, Inc. v. Simmons*, 459 Mass. 88 (Mass., 2011).

⁴⁰ See EEOC Task Force Report, cited on page 6, footnote #2; Women Employed also promoted this idea; and Philip Shaw of Seyfarth Shaw discussed it as well.