



**Testimony of Deborah J. Vagins
Senior Vice President, Public Policy and Research
American Association of University Women**

to the

**Council of the District of Columbia,
Committee on the Judiciary and Public Safety**

regarding

**The Sexual Misconduct Sunshine Amendment Act of 2018
Bill No. 22-0907**

October 4, 2018

Chairperson Allen and Members of the Committee:

Thank you for the opportunity to testify today on the critical issue of workplace sexual harassment. AAUW appreciates the Council's commitment to ending sexual harassment in the workplace, and supports the Council's latest efforts to tackle the persistent problem through limiting the use of nondisclosure agreements.

I am a District resident, as well as the Senior Vice President for Public Policy and Research at the American Association of University Women. Founded in 1881, AAUW has approximately 170,000 members and supporters – over 1,200 in D.C. alone – and 1,000 branches and more than 800 college and university partners across the country. AAUW has long fought to end discrimination in the workplace, having released our first report on pay discrimination in 1896. I also come to this issue having formerly been an employment discrimination litigator at Cohen Milstein Sellers & Toll, and a Chief of Staff and Principal Attorney Advisor at the U.S. Equal Employment Opportunity Commission.

Today, AAUW works to end discrimination and harassment in the workplace through programing, advocacy, education, and research. We support federal and state policy proposals to that end, including the comprehensive federal, bipartisan EMPOWER Act,¹ currently pending in Congress, and several bills enacted at the state level this past year from California, Louisiana, Maryland, and Washington.²

With this background in mind, I am pleased to speak with you today about AAUW's perspectives on the Sexual Misconduct Sunshine Amendment Act of 2018. We support the aims of this bill. My testimony will discuss the strengths of the bill and provide some additional suggestions for improvement.

¹ EMPOWER Act, H.R. 6406, 115th Cong. (2018); EMPOWER Act Part 1, S. 2994, 115th Cong. (2018); EMPOWER Act Part 2, S. 2988, 115th Cong. (2018).

² S. 224, 2017-18 Leg., Reg. Sess. (Cal. 2017); S. 419, 2017-18 Leg., Reg. Sess. (Cal. 2017); S. 820, 2017-18 Leg., Reg. Sess. (Cal. 2018); S. 1300, 2017-18 Leg., Reg. Sess. (Cal. 2018); S. 1343, 2017-18 Leg., Reg. Sess. (Cal. 2018); H.R. 524, 2017-18 Leg., Reg. Sess. (La. 2018); H.R. 1342, 438th Gen. Assem., Reg. Sess. (Md. 2018); H.R. 2661, 65th Leg., Reg. Sess. (Wash. 2018); S. 5996, 65th Leg., Reg. Sess. (Wash. 2018); S. 6068, 65th Leg., Reg. Sess. (Wash. 2018); S. 6313, 65th Leg., Reg. Sess. (Wash. 2018); S. 6471, 65th Leg., Reg. Sess. (Wash. 2018).

Sexual harassment is not a new phenomenon by any means, and according to a 2016 report from the EEOC, employees continue to experience harassment in the workplace at an alarming rate.³ Almost fully one third of the approximately 90,000 charges received by EEOC in fiscal year 2015 included an allegation of workplace harassment.⁴ This includes, among other things, charges of unlawful harassment on the basis of sex (including sexual orientation, gender identity, and pregnancy), race, disability, age, ethnicity/national origin, color, and religion.⁵

The same EEOC report finds that there are a number of different risk factors that lead to workplace harassment. As a relevant example of such a risk factor, workplaces where an employee's compensation is tied to customer satisfaction may make workers feel compelled to tolerate harassing behavior for fear of losing tips.⁶ In fact, another study found that tipped women workers who earn a guaranteed wage, report half the rate of sexual harassment as women in states with a sub-minimum wage, since the former do not have to accept inappropriate behavior to guarantee an income.⁷ Therefore, guaranteeing a higher wage for tipped workers would be another crucial way to support women and low-income workers who are subjected to harassment.

There are clearly inadequacies in how we as a culture look at these issues, but thanks to the #MeToo movement, there has been increased focus on this important issue over the past year. Combined with ongoing advocacy to bring about change, this movement has paved the way to examining the shortcomings in the law and offering new legislation of the kind we discuss today.

I commend the Council for focusing on the accountability for and prevention of workplace harassment. While sexual harassment in the workplace is illegal under Title VII of the Civil Rights Act,⁸ Supreme Court precedent,⁹ and the D.C. Human Rights Act,¹⁰ we still have a long way to go in ensuring the laws are robust and fully enforced, so that all working people are able to secure equal employment opportunities and carry out their jobs safely and with dignity.

As such, I would like to discuss six of the major provisions of the Sexual Misconduct Sunshine Amendment Act of 2018 and make some suggestions to strengthen the proposed legislation.

First, thank you for recognizing the harm of nondisclosure agreements in most employment contexts. Reforms must work to level the playing field of power for employees and limit employer-imposed secrecy. Nondisclosure agreements can prevent employees from discussing or reporting discrimination or harassment due to restrictions imposed by employers. This barrier only serves to exacerbate the power differentials and silence working people, which can perpetuate unsafe work environments and allow employers to evade accountability.

³ Commissioners Chai R. Feldblum & Victoria A. Lipnic, U.S. Equal Employment Opportunity Commission, Select Task Force on the Study of Harassment in the Workplace (2016), at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at Appendix C.

⁷ Restaurant Opportunities Centers United, Better Wages, Better Tips: Restaurants Flourish with One Fair Wage (2018), at http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

⁸ 42 U.S.C.A § 2000e-2 (West 2018).

⁹ *See, e.g.*, Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

¹⁰ D.C. Code § 2-1401.01 (2018).

While AAUW strongly supports the ban on nondisclosure agreements as a condition of employment, we also support the exception to the ban on nondisclosure agreements for claimants who request otherwise in settlement agreements. This strikes an appropriate balance by ensuring that individuals who have suffered sexual harassment at work can decide to keep details confidential, which may be desirable for privacy reasons. But, it also preserves the right of a complainant to reveal information about harassment if they so choose.

In conjunction with this provision, which allows the claimant to make a choice, it is important to ensure that employers cannot take coercive action during the settlement negotiation process. Employers should be prevented from exerting pressure on claimants to choose a nondisclosure agreement in exchange for more favorable treatment or monetary outcomes in the settlement process. To strengthen this provision, I suggest adding language stating that any nondisclosure clause must be mutually agreed upon and have mutual benefit to both the employer and employee.¹¹ Additionally, while we are pleased to see that the bill includes an anti-retaliation provision, it could be bolstered to address circumstances such as this in the settlement process. The retaliation provision could be further strengthened by specifying that employers cannot limit an individual's ability to provide testimony or evidence, file a claim, or make a report. Vermont recently enacted a law to this end.¹²

Second, the definition of "sexual harassment," as provided in the Mayor's Order 2017-313, is not the language that we would recommend incorporating into this bill. It does not include all forms of sexual harassment behavior covered by federal law. For example, it is important to note that behavior does not have to be of a sexual nature to constitute sexual harassment. According to the EEOC, it can also include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.¹³ In other words, sexual harassment is not only a "come on;" it can also be a "put down" based on a person's sex.

Moreover, the definition in the Mayor's Order codifies troubling language that has developed in sexual harassment case law over time requiring that sexual harassment must be "severe or pervasive" in order to be actionable.¹⁴ While simple teasing, offhand comments, or isolated incidents may not rise to the level of discriminatory behavior, it is important to note that the liability standard should not adopt any unduly restrictive interpretations by the courts that minimize or ignore how harassment operates in the workplace.

Third, AAUW supports a broad prohibition on the use of nondisclosure agreements in most employment contexts. These agreements are problematic in harassment cases beyond sexual harassment (that is, based on race or age, for example) and in other employment and labor cases beyond harassment (that is, in discrimination in pay or promotions as well). While I think this legislation could already be interpreted expansively based on some of the provisions and definitions incorporated by reference to the Human Rights Act, the full intended scope of the legislation is not entirely clear. We recommend amending the bill to explicitly expand or clarify coverage to ban nondisclosure agreements in all unlawful employment and labor practices based on all protected classes, as a condition of employment.

Fourth, we support the definition of "employee" in this bill. It correctly captures the real life operation of sexual harassment by covering applicants and current employees, as well as including those that federal

¹¹ See *e.g.*, EMPOWER Act, S. 2994; H.R. 6406.

¹² See, *e.g.*, H.R. 707, 74th Leg., Reg. Sess. (Vt. 2018).

¹³ U.S. Equal Employment Opportunity Commission, Sexual Harassment, *available at* https://www.eeoc.gov/laws/types/sexual_harassment.cfm.

¹⁴ Mayor's Order No. 2017-313, Sec. III.

coverage does not reach, such as employees working for small employers, independent contractors, and unpaid interns.

Fifth, the damages outlined in this bill are robust. This is crucial to ensuring that any wronged individuals are made whole. It also sends the message to employers that misconduct will be taken seriously and punished accordingly, thus deterring future bad behavior.

Sixth and finally, this bill could be further strengthened by encouraging more transparency through broader reporting requirements and limiting forced arbitration. We support the provision requiring reporting of awards and settlements paid with public funds in connection to a claim of misconduct, but suggest broadening that component. All employers should be required to regularly disclose and report awards and settlements pertaining to the misconduct described in the bill. The Council should then make this information publicly available and prohibit government contracts with employers who have engaged in misconduct.

To ensure that everyone can access their day in court and a fair process, employers should be explicitly prohibited from requiring employees to resolve claims covered by this bill through a mandatory, pre-dispute arbitration process, also called forced arbitration. Forced arbitration requires employees to waive their right to pursue their claims in court, mandating processes that are often expensive, favor employers, and lack transparency and due process. This is particularly troubling in the civil rights and employment discrimination context.¹⁵ Employees often have little or no meaningful choice about the process to handle a claim and are often unaware that they have given up their rights when signing or accepting boilerplate language in forms.

I will note, that while some state laws trying to ban forced arbitration have been preempted by the Federal Arbitration Act and struck down,¹⁶ states are trying modified approaches to limiting mandatory arbitration. Earlier this year, Washington State passed a law invalidating any employment contract that requires employees to waive their rights to pursue a cause of action or publicly file a complaint, and New York passed a law prohibiting mandatory arbitration clauses that pertain to sexual harassment.¹⁷

In conclusion, AAUW supports the Council's efforts to curb some of the employer practices that can make harassment more difficult to address in the workplace. We are happy to continue to work with the Council to make the Sexual Misconduct Sunshine Amendment Act of 2018 even stronger. We thank the Council for the opportunity to testify.

¹⁵ See Arbitration Fairness Act, S.2591, 115th Cong. (2018); Arbitration Fairness Act, H.R.1374, 115th Cong. (2017).

¹⁶ 9 U.S.C.A § 2 (West 2018); Kindred Nursing Centers Ltd. Partnership v. Clark, 137 S.Ct. 1421, 1422 (2017).

¹⁷ S. 6313, 65th Leg., Reg. Sess. (Wash. 2018); S.7507, 241st Leg., Reg. Sess. (N.Y. 2017).