

**Written Submission of Testimony to the Workplace Harassment Commission of Maryland
Friday, April 27, 2018, at 11:00am
Miller Senate Building**

Tina Tchen and Antonio Reynolds
Partners, Buckley Sandler LLP

- **Introduction of Tina Tchen and Antonio Reynolds**
 - Tina Tchen is a partner at the law firm of Buckley Sandler LLP and head of the firm's Chicago office. In addition to firm activities, she is one of the founders of the Time's Up Legal Defense Fund, which provides legal support to women and men who have experienced sexual harassment in the workplace. Immediately prior coming to Buckley Sandler, she spent eight years at the White House. There she served as an Assistant to President Barack Obama, Executive Director of the White House Council on Women and Girls, and Chief of Staff to First Lady Michelle Obama. Over the course of her career, she has handled complex civil litigation and enforcement matters in both state and federal courts across the country. As a partner in corporate litigation at Skadden, where she practiced for 23 years, she represented major global corporations and their officers and directors in a wide range of matters, including shareholder class and derivative actions, securities litigation, corporate takeover battles, consumer class actions, and constitutional issues.
 - Antonio Reynolds is a partner in Buckley Sandler LLP's Washington, D.C. office. As a former Assistant U.S. Attorney for the District of Maryland, he advises clients on a wide range of complex investigations, litigation, and government enforcement actions. Among other matters, he assisted in an independent investigation of a state Attorney General's office relating to the alleged use of government email to distribute pornographic materials, as well as materials that might be deemed to be racist, sexist, and/or homophobic. In addition, he has responded to investigations and other inquiries by the U.S. Congress, the Department of Justice, the U.S. Attorney's Office, the Securities and Exchange Commission, the Consumer Financial Protection Bureau, the Federal Trade Commission, state Attorneys General, and various state banking regulators.
 - As reflected in their background, both Tina and Antonio are corporate lawyers, not employment lawyers. They therefore approach workplace issues, including sexual harassment, as matters of overall corporate governance, or enterprise governance. Creating a workplace culture of equity, diversity and safety should be a core enterprise imperative, not just the concern of the human resources or employment office. This includes attacking sexual harassment and workplace harassment of all forms.

inadequacies relating to policies addressing sexual and other discriminatory workplace harassment in the private and public sectors; and (2) restore public confidence in the ability of the Commonwealth to protect the victims of sexual and other discriminatory workplace harassment in employer settings and their ability to safely report harassment.⁴

- **Providing Whistleblower Protections California (2017 CA A.B. 403):** California has adopted a bill that imposes criminal and civil liability on legislative members and employees who interfere, or retaliate against, a legislative employee who makes a sexual harassment complaint.⁵
- **Prohibiting Confidential Settlement Terms:** Washington has enacted a bill preventing nondisclosure agreements in connection with civil or administrative actions relating to sexual harassment. West Virginia has introduced, but not yet enacted, a similar bill.
 - **Washington (2017 WA H.B. 1506):** Effective June 2018, in any civil judicial or administrative action relating to sexual harassment or sexual assault, any provision of a nondisclosure policy or agreement including any arbitration agreement or decision that would limit, prevent, or punish disclosure is contrary to public policy and unenforceable.⁶
 - **West Virginia (2018 W. Va. H.B. 4456):** The purpose of the proposed bill is to prohibit confidential settlement terms, including those relating to the identity of the accused and the financial terms agreed to, in contested cases involving sexual harassment, sexual abuse, or sexual assault. A contested case means a proceeding before an agency (any state board, commission, department office or officer, except those in the legislative or judicial branches).⁷
- **Prohibiting Payment of Settlements with Public Funds.** Several states have proposed bills that would prohibit the use of public funds to settle sexual harassment claims.

⁴ H. Res. 684, Gen. Assemb., Reg. Sess. (Pa. 2018), <http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2017&sessInd=0&billBody=H&billType=R&billNbr=0684&pn=3395>.

⁵ Assemb. B. 403, Reg. Sess. (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB403.

⁶ S.B. 6068, Reg. Sess. (Wash. 2018), <http://apps2.leg.wa.gov/bills/bills/BillNumber=6068&Year=2017&BillNumber=6068&Year=2017>.

⁷ H.B. 4456, Reg. Sess. (W. Va. 2018), http://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=hb4456%20intr.htm&yr=2018&sesstype=RS&i=4456; see also W. Va. Code § 29A-1-2(a), (b).

(1) investigate, and (2) where necessary, litigate and prosecute allegations of sexual harassment, abuse, and misconduct in Illinois State government and political campaign organizations. The special counsel can issue subpoenas, demand sworn testimony and open a statewide grand jury.¹²

- **Investigating Harassment Allegations**

- Investigations of harassment allegations must be handled with the same rigor and care used for investigations of other serious claims of misconduct or malfeasance. In addition, attention must be paid to the sensitive nature of these allegations, both for the claimant and the accused, and for any involved witnesses or bystanders. This includes carefully balancing of confidentiality for those involved, with the transparency that is important to maintaining confidence in the process, especially for public bodies such as the state legislature and government offices.
- Three out of four sexual harassment victims who come forward report experiencing retaliation, and fear of retaliation is clearly one of the major reasons workers do not report incidents of harassment. Harassment investigations must include monitoring the working conditions of the claimant or any reporters or witnesses, and not just in the immediate aftermath of the report, but throughout the investigation and for an extended period after the conclusion of the investigation.
- Requiring appointment of an independent investigator with respect to complaints against state government employees is an important step in ensuring that individuals feel comfortable coming forward with allegations and protected from retaliation. However, to maximize the effectiveness of any investigation, including one led by an independent investigator, the process should be clearly defined in a written procedure.
- A central part of conducting an effective investigation involves collecting documentary evidence and other information needed to fully investigate a complaint. This is particularly important where an independent investigator is involved.
- Unless they are armed with the tools required to compel production of documents and other information, independent investigators can face difficulty getting key documents. This is especially the case in matters involving conduct of government employees, because employees' emails and other documents may contain sensitive information that should not be reviewed outside of the agency and that may be commingled with other information that is central to the investigation. As a result, employees may be unwilling to turn over documents

¹²H. Res. 890, 100th Gen. Assemb., Reg. Sess. (Ill. 2018), <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=91&GA=100&DocTypeId=HR&DocNum=890&GAID=14&LegID=112074&SpecSess=&Session>.

sector, and making improvements will require continuous review, monitoring and innovation.

Thank you for having us here today.

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