NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

Testimony of
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Regarding the Sexual Misconduct Sunshine Amendment Act of 2018 (B22-0907)
Before the District of Columbia Council Committee on the Judiciary and Public Safety

October 4, 2018

Thank you for the opportunity to submit this testimony regarding B22-0907, the Sexual Misconduct Sunshine Amendment Act of 2018, on behalf of the National Women's Law Center. The National Women's Law Center has been working since 1972 to secure and defend women's legal rights and has long worked to remove barriers to equal treatment of women in the workplace, including workplace harassment.

The timing of today's hearing is particularly appropriate, given that this month marks the one-year anniversary of the "Me Too" hashtag going viral, when millions of survivors worldwide shared their stories of sexual harassment and violence and demanded accountability. For too long, individuals have suffered workplace harassment in silence, with little or no accountability for harassers. As the case of Harvey Weinstein revealed,[1] employers' use of nondisclosure agreements (NDAs) is longstanding and has played a disturbing role in silencing victims and allowing serial harassers to operate with impunity. Accountability is long overdue, and this one-year anniversary provides an opportunity to respond to the systemic problems the movement has highlighted.

B22-0907 is an important step in the fight to end harassment in the workplace and hold harassers accountable. The National Women's Law Center supports this bill's effort to limit the use of harmful nondisclosure agreements in the workplace and urges the Council to give serious consideration to our recommendations for further clarifying and strengthening the bill.

I. WORKPLACE HARASSMENT IS A PERVASIVE PROBLEM AGGRAVATED AND PERPETUATED BY THE ABUSIVE USE OF EMPLOYER-IMPOSED SECRECY AGREEMENTS.

Despite laws at the federal, state, and local levels prohibiting sexual harassment as a form of sex discrimination, sexual harassment remains a widespread problem, affecting workers in every state, in every kind of workplace setting and industry, and at every level of employment. One in four women reports that she has experienced sexual harassment at work.[2] In Federal Fiscal Year 2017, the most recent year for which data are available, nearly 27,000 harassment

[1] Ronan Farrow, *Harvey Weinstein's Secret Settlements*, THE NEW YORKER, Nov. 21, 2017, https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements.
[2] LANGER RESEARCH, ABC NEWS & WASHINGTON POST, *One in Four U.S. Women Reports Workplace Harassment* (Nov. 16, 2011), http://www.langerresearch.com/uploads/1130a2WorkplaceHarassment.pdf.

charges were filed with the EEOC;[3] nearly one-quarter of those charges alleged sexual harassment.[4] The EEOC reports that the volume of sexual harassment charges has increased in recent months.[5]

Since the Time's Up Legal Defense Fund, housed and administered by the National Women's Law Center Fund, was launched on January 1, 2018, the Fund has received over 3,500 requests for assistance from people experiencing workplace sexual harassment and assault and related retaliation. These requests come from individuals working in a wide range of industries and every state in the country. Overwhelmingly, the requests are coming in from women – particularly those in low-wage jobs, who are often the people with the most to lose by speaking up and often those who are most affected financially.

What the requests for assistance have also confirmed is that for women in low-wage, middle class, and high-wage jobs, sexual harassment often occurs along with other forms of sex discrimination – including gender and race-based pay discrimination, and discrimination on the basis of pregnancy. It also occurs at the intersections of identities, with many women experiencing harassment based on their race and sex combined, or their national origin and sex, or their disability and sex.[6]

But these data points do not even begin to represent the extent of sexual harassment in the workplace, given that a survey found that 70 percent of workers who experience sexual harassment say they have never reported it.[7] Whether suffering harassment from supervisors, coworkers, or third parties, such as customers, most victims of harassment are suffering in silence. Working people are often afraid to report harassment and discrimination, not only because they fear jeopardizing their safety, jobs, financial security, and career prospects, but also because harassers and employers use a variety of legal tools in order to limit how, when, why, and to whom an employee can disclose details about harassment. Through employment agreements—entered into upon hiring at a new job—and settlement terms——agreed to when resolving a sexual harassment complaint—employees can be forbidden by contractual terms, like

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[3] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N (EEOC), ENFORCEMENT AND LITIGATION STATISTICS, ALL CHARGES ALLEGING HARASSMENT FY 2010-FY 2017, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.

[4] EEOC, ENFORCEMENT AND LITIGATION STATISTICS, CHARGES ALLEGING SEXUAL HARASSMENT FY 2010-FY 2017, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.

[5] Danielle J. Moss and Steven J. Pearlman, PROSKAUER, LAW AND THE WORKPLACE, *Proskauer Delivers #MeToo Webinar with EEOC Commissioner Feldblum*, Sept. 26, 2018, https://www.lawandtheworkplace.com/2018/09/proskauer-delivers-metoo-webinar-with-eeoc-commissioner-feldblum.

[6] Our recent analysis of EEOC charges indicates that women of color working low-wage jobs face particularly high rates of workplace harassment. NAT'L WOMEN'S LAW CTR., *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women*, Aug. 2, 2018, https://nwlc.org/resources/out-of-the-shadows-an-analysis-of-sexual-harassment-charges-filed-by-working-women.

[7] HUFFINGTON POST & YOUGOV, *Poll of 1,000 Adults in United States on Workplace Sexual Harassment* (Aug. 2013), http://big.assets.huffingtonpost.com/toplines_harassment_0819202013.pdf.

nondisclosure and nondisparagement agreements and forced arbitration agreements that funnel disputes into confidential proceedings, from speaking out about sexual harassment and assault.

Recent data shows that over one-third of the U.S. workforce is bound by a nondisclosure agreement.[8] NDAs have grown in number, and are now used not only in the context of settlement agreements, but also imposed as a condition of employment in employment contracts, where they have grown beyond traditional trade secret protections to encompass speaking up about a range of workplace conditions, including harassment, discrimination, or other violations of worker rights.[9] In Washington, D.C., the use of broad nondisclosure agreements to cover up harassment was highlighted most recently in a lawsuit filed by a restaurant manager against restauranteur Mike Isabella. The complaint in that case alleged that since 2011, employees have been required to sign NDAs preventing them from sharing any "details of the personal and business lives of Mike Isabella, his family members, friends, business associates and dealings," on pain of a $500,000 penalty per breach.[10]

Such contractual tools operate to isolate victims, shield serial predators from accountability, and allow harassment to persist at a company. Policy efforts to increase transparency regarding the incidence of harassment in a workplace are necessary to redress the power imbalance exacerbated by employer-imposed secrecy provisions, and restore victims' voices.

II. MEASURES LIKE B22-0907 HELP RESTORE POWER TO WORKERS AND TO UNCOVER THE TRUE EXTENT OF HARASSMENT AND DISCRIMINATION AT A WORKPLACE.

We commend the sponsors of this bill for introducing legislation that would prohibit employers from imposing, as a condition of employment, NDAs that prevent workers from speaking up about harassment and discrimination, and to limit employers' abusive use of NDAs in the settlement context. We also commend the sponsors for ensuring that this legislation helps to increase transparency and accountability not just around sexual harassment, but all forms of discrimination and harassment.

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[8] Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV., Jan. 30, 2018, https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change (citing Randall S. Thomas, Norman Bishara, and Kenneth J. Martin, *An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post-Employment Covenants*, last revised Sept. 6, 2017, VAND. L. REV., Vol. 68, No. 1, 2015; VAND. L. & ECON. RES. Paper No. 14-11. https://ssrn.com/abstract=2401781).

[9] *Id.*

[10] Complaint at paras. 5, 74, 75, Caras v. Mike Isabella Concepts, et al., No. 1:18-cv-00749 (filed 4/3/2018); *see also* Maura Judkis and Tim Carman, *Mike Isabella's restaurants used nondisclosure agreements to silence sexual harassment accounts, lawsuit alleges*, WASH. POST, April 3, 2018, https://www.washingtonpost.com/lifestyle/food/mike-isabellas-restaurants-used-nondisclosure-agreements-to-silence-sexual-harassment-accounts-new-lawsuit-alleges/2018/04/03/aaf6f766-373e-11e8-9c0a-85d477d9a226_story.html?utm_term=.e34684196e8b.

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A. <u>Legislation must prohibit employers from imposing NDAs as a condition of employment.</u>

Individuals may accept employment with a company without knowing if discrimination and harassment are particular problems at that workplace. But too frequently, employers impose on new hires as a condition of their employment, employment contract provisions that prevent employees, including victims of sexual assault or other forms of harassment, from publicly disclosing details of sexual harassment or assault. These contractual provisions can mislead employees as to their legal rights to report harassment or assault to civil rights or criminal law enforcement agencies and their legal rights to speak with coworkers about employment conditions. They can also prohibit employees from publicly telling their story, which in turn makes it less likely that other victims of harassment will be emboldened to speak out and hold their employers accountable.

By prohibiting employers from forcing employees to agree to a NDA that waives their right to discuss workplace harassment and discrimination, B22-0907 would lift the veil of secrecy that enables predatory behavior, and would protect employees' right to speak with enforcement agencies and act collectively to challenge harassment, thereby increasing employer accountability. In passing this legislation, the District of Columbia would join California,[11] Maryland,[12] Tennessee,[13] Vermont,[14] and Washington state[15] which, over the past year, all enacted legislation prohibiting employers from requiring employees to sign NDAs or nondisparagement agreements as a condition of employment.

B. <u>NDAs in settlement agreements should be permitted in limited circumstances.</u>

Nondisclosure clauses in settlement agreements with a harasser or employer also often operate to prevent harassment victims from speaking out publicly about the harassment they experienced, the fact of a legal dispute and the settlement of that dispute, the settlement terms, or the identity of the parties. Here too secrecy can help hide the true extent of sexual harassment at a workplace, shield a serial harasser from accountability, and have the effect of preventing other victims from coming forward. However, it is important to note that victims sometimes want to ensure confidentiality as to these matters in order to protect themselves from retaliation or damage to their professional reputations and job prospects. Moreover, the promise of mutual nondisclosure as to some or all aspects of the settlement can provide victims with useful leverage in settlement negotiations. A policy banning all nondisclosure agreements in sexual harassment settlement agreements could make employers less likely to settle claims of harassment, forcing

[11] S.B. 1300, 2018 Reg. Sess. (Cal. 2018).
[12] H.B. 1596, 2018 Gen. Assemb., Reg. Sess. (Md. 2018).
[13] H.B. 2613, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018).
[14] H.707, 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
[15] S.B. 5996, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

victims of harassment to take up the difficult, expensive, and time consuming task of pursuing legal claims in court in order to obtain any restitution.

In light of these competing interests, we commend the sponsors of this bill for not completely banning NDAs in the settlement agreement context, and instead allowing NDAs at the request of a claimant. While we offer recommendations below[16] for ensuring that the "unless entered into at the claimant's request" clause does not become a loophole rendering the prohibition ineffective, we commend the Council for seeking to restore power to victims to decide what should be confidential.

C. Legislation must address all forms of harassment and discrimination.

We strongly commend the D.C. Council for protecting workers from employer-imposed NDAs that would prevent them from speaking up about all forms of harassment and discrimination, not just sexual harassment. Workplace discrimination and harassment based on race, disability, color, religion, age, or national origin all undermine workers' equality, safety and dignity, and are no less humiliating. Moreover, sexual harassment does not occur in a vacuum, but often occurs alongside or in combination with other forms of harassment and discrimination. For example, a Black woman may experience harassment based on both her sex and race combined; she may be paid less than her male coworkers and also be the target of sexual comments and racial epithets. As a result, legislation that focuses exclusively on sexual harassment would have the odd result of providing a worker who experiences multiple, intersecting violations with only partial protection. The Me Too movement recognizes that in order to truly put an end to the workplace harassment that holds women back and enforces gender inequality, the movement—and our policy response—must be intersectional and address the multiple forms of workplace inequality women face that leave women more vulnerable to harassment. Therefore, it is absolutely essential that this bill encompass not only harassment based on sex, which includes sexual orientation and gender identity, but also other forms of workplace harassment and discrimination.

III. B22-0907 SHOULD BE STRENGTHENED IN SEVERAL CRUCIAL WAYS.

For this bill to truly be effective at increasing accountability and preventing harassment, we urge the D.C. Council to strengthen this bill in several important ways:

A. Extend protections against NDAs to other employment and labor law violations.

We urge the D.C. Council to extend the protections set forth in this bill to NDAs that prevent workers from speaking up about other employment and labor violations, in addition to harassment and discrimination. Violations of employment and labor laws, such as wage and hour laws, deepen the power imbalances between workers and their employers and leave workers more vulnerable to harassment. If we wish to truly address the policies and structures that allow

[16] Section III. B.

harassment to persist, and if we seek robust enforcement of worker rights laws, we must ensure that workers can speak up about all workplace abuses that undermine their economic and physical security.

B. <u>Ensure the exception to the ban on NDAs in settlements does not become a significant loophole that undercuts the protections B22-0907 provides</u>.

While we support the sponsors' decision not to ban NDAs in the settlement context completely, but instead put the power into victims' hands to decide if they want confidentiality, we are concerned that the bill, as presently drafted, will not, in practice, result in victims being empowered to make this decision. The bill's provision that a NDA can only be entered into at the "claimant's request," provides no meaningful protection against an employer coercing an employee into "requesting" a NDA that they otherwise might not want to agree to. Given the inherent power imbalances between employer and employee—imbalances that are often magnified in the settlement context, especially when a victim may be dealing with trauma or when a victim is not represented by counsel—we are concerned that the bill as drafted may still permit employers to continue to unduly push victims into silence.

Given these concerns, we encourage the Council to consider amendments to this bill to shift the power balance in the settlement negotiation context and ensure that victims truly have a voice in the process. Such provisions might include:

i. Ensuring informed consent regarding nondisclosure clauses in settlement agreements. For example, New York passed a law this year prohibiting employers from using NDAs in settlement agreements for claims involving sexual harassment unless the condition of confidentiality is the complainant's preference. The legislation further provides that where NDAs are included, the complainant must first be given twenty-one days to consider the term or condition, and then at least seven days following the execution of such an agreement to revoke the agreement. The agreement will not become effective or be enforceable until the revocation period has expired.[17]

ii. Clarifying existing rights. Specifying that nondisclosure clauses in settlement agreements cannot explicitly or implicitly limit an individual's ability to provide testimony or evidence, file claims or make reports to any federal or state enforcement agency, such as the EEOC, Department of Labor, or state counterpart; nor can they prevent an employee from providing testimony or evidence in state or federal litigation, including class or collective actions, against the employer.

iii. Providing that an agreement to keep a settlement confidential should provide a reasonable economic or other benefit to the individual that is on par with the benefit to the employer.

[17] N.Y. C.P.L.R. § 5003-b (McKinney 2018).

iv. Providing that employees who breach a NDA should not be subject to additional monetary damages for breach of the agreement.

We have also seen states take a very different approach to limiting the use of NDAs and placing the power in the victim's hands to decide whether and what matters to keep confidential. For example, New Jersey is currently considering S. 121, a bill that would ostensibly permit NDAs in settlement agreements, but deem such provisions unenforceable against the employee in all instances and unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.[18]

C. <u>Redefine key terms in B22-0907</u>.

i. **Strike the definition of sexual harassment.** B22-0907 currently defines "sexual harassment" in reference to the Mayor's Order 2017-313. We strongly urge the Council to strike this definition of sexual harassment. This separate definition of sexual harassment is not necessary because the bill's protections extend to discrimination under the D.C. Human Rights Act (DCHRA), and sexual harassment is unlawful sex discrimination under the DCHRA. Moreover, the definition of "sexual harassment" in the Mayor's Order sets forth an unduly narrow understanding of sexual harassment. The Mayor's Order requires that the harassment be "severe or pervasive" and requires that the harasser "must have been told that the conduct is unwelcome or must stop"—requirements which have operated to exclude too many victims of harassment from protection. We also note that the Mayor's Order describes sexual harassment in terms of verbal or physical conduct or materials of a *sexual* nature only. But harassment can also include a gendered dimension; that is, subjecting someone to harassment because they are a woman, or because of an individual's perceived failure to conform to gender stereotypes. Accordingly, we urge the D.C. Council to simply reference the definition of sexual harassment developed under the DCHRA.

ii. **Ensure independent contractors, interns, and volunteers are covered by the law.** While we commend the sponsors for seeking to extend protections to independent contractors, volunteers, and interns, as they are often without any legal recourse for sexual harassment and particularly vulnerable to harassment, we are concerned by the approach adopted by the bill. First, simply including these categories of professional relationships in the definition of "employee" is insufficient to clearly extend coverage to these parties. As currently written, the definition of "employer," which uses the undefined word "employ," does not clearly include these other types of professional relationships. Second, defining volunteers and interns, who may not be formally "employed" or "seeking employment," as "employees" may have unintended consequences in other areas of the law. Accordingly, we urge you to clearly extend

[18] S.B. 121, 2018 Senate, 218th Leg. (N.J. 2018).

coverage to independent contractors, volunteers, and interns either by referencing them in the definition of employer, or by adding another provision to the bill separately extending protections to individuals in these professional relationships.

iii. **Clarify the term "claimant."** The term "claimant" is left undefined in the bill, and can be interpreted as only referencing someone who has brought a formal complaint of harassment or discrimination, which not all parties might have done at the point of settlement. The Council should clarify this term to avoid inadvertently preventing individuals from asserting their rights under this law.

iv. **Define the meaning of "aggrieved."** Finally, the Council should define the term "aggrieved" in Section 4 of the bill. A favorable settlement or court decision for an employee in a case against their employer should not be used to disqualify the employee from being "aggrieved" under the meaning of this bill. Thus, the Council should clarify that "aggrieved" means any employee who was subject to a NDA in violation of the bill, regardless of whether the employee's underlying claim against the employer was resolved favorably for the employee.

IV. THE D.C. COUNCIL SHOULD ADD OTHER IMPORTANT MEASURES TO PROTECT AND EMPOWER WORKERS AND TO PROMOTE TRANSPARENCY IN THE WORKPLACE.

The D.C. Council should consider adding other important measures to protect and empower workers and increase transparency regarding the incidence of workplace harassment. These measures include:

A. Requiring employers bidding on D.C. contracts to disclose information regarding forced arbitration provisions.

Like NDAs, forced arbitration provisions in employment agreements operate to silence victims and sweep harassment under the rug by prohibiting employees from going to court to enforce their rights, and instead forcing employees to litigate harassment and discrimination claims in a private arbitration, which is frequently designed, chosen, and paid for by the employer or corporation, and conducted and resolved in secret.

B. Requiring employers to regularly report to an appropriate D.C. government agency the number of claims, lawsuits, and settlements involving harassment and discrimination and the amounts paid.

This transparency measure could be modeled on a similar provision in the pending federal Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting (EMPOWER) Act, which among other things requires public companies to

report workplace harassment incidents and resolutions to the Securities and Exchange Commission.[19]

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We appreciate your efforts to address workplace harassment by introducing this legislation and we thank you for your consideration of our recommendations. I (mraghu@nwlc.org) and my colleague, Andrea Johnson, Senior Counsel for State Policy (ajohnson@nwlc.org), are happy to serve as a resource as you continue to evaluate this legislation.

[19] EMPOWER Act, S. 2994, 115th Cong. (2018); EMPOWER Act, H. 6406, 115th Congress (2018).