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**Testimony of
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Before the New York State Legislature: Joint Hearing on Sexual Harassment**

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Thank you for the opportunity to submit this testimony 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 harassment and other forms of discrimination.

Thank you for taking the time today to listen to survivors, working people, and advocates about the many ways in which our protections against workplace harassment need to be strengthened. In order to make meaningful, lasting change in response to the MeToo movement, it is absolutely crucial that survivors and workers, especially low-wage workers, women of color, immigrants, and LGBTQIA and gender nonconforming individuals who are most severely impacted by sexual violence, not just be heard, but be centered in the content and creation of these policies.

Legislators across the country are actively working to strengthen state anti-harassment and anti-discrimination laws. Last year, over 100 bills were introduced in state legislatures to strengthen protections against workplace harassment and by October 2018, 11 states had enacted some of these measures into law. At the beginning of 2019, over three hundred state legislators representing 40 states, including New York, signed a letter of commitment pledging to strengthen protections against sexual harassment and violence at work, in schools, homes, and communities in at least 20 states by 2020.¹

New York has been a leader in raising awareness about and enacting long overdue policy reforms to stop and prevent workplace harassment. But while the legislature took important steps last year to strengthen anti-harassment protections, there remains much work to be done. Many of the protections enacted last year need to be strengthened and additional protections are needed to ensure access to justice, increase transparency and accountability, and incentivize meaningful prevention efforts.

For New York to remain a leader in fighting for workplace equality and against harassment, we urge you to consider the recommendations below.

I. WORKPLACE HARASSMENT REMAINS A SUBSTANTIAL BARRIER TO EQUALITY, DIGNITY, AND SAFETY AT WORK FOR NEW YORKERS.

Since #MeToo went viral nineteen months ago, increasing numbers of individuals who have experienced sexual harassment or assault at work have come forward to disclose their experiences. Many of these individuals remained silent for years because the risks of speaking

out were too high. With good reason, many feared losing their jobs or otherwise hurting their careers, feared not being believed, and feared that nothing would be done about the harassment. Moreover, the laws and systems in place designed to address harassment were inadequate to provide redress and justice, and instead subjected victims to additional devastating economic, physical, and psychological consequences, while protecting offenders.

Sexual harassment is a widespread problem, affecting workers in every state, in every kind of workplace setting and industry, and at every level of employment. In FY 2018, approximately 27,000 harassment charges were filed with the Equal Employment Opportunity Commission (EEOC); over one-quarter of those charges alleged sexual harassment—a 13.6 percent increase over the prior fiscal year.² The rates of workplace harassment, particularly sexual harassment, are likely much higher than the data suggests. Approximately three out of four individuals who experience harassment never talk to a supervisor, manager, or union representative about the harassing conduct.³ Moreover, retaliation remains a significant problem, and continues to be the leading basis of charges filed with the EEOC.⁴

The Time's Up Legal Defense Fund, housed and administered by the National Women's Law Center Fund, was launched on January 1, 2018, and has received approximately 5,000 requests for assistance, with close to 400 requests from individuals in New York related to workplace sex discrimination.⁵ The vast majority of these requests for help involved workplace sexual harassment and related retaliation. Over one-third of the requests from New York have been from workers in the arts and entertainment fields, health care, and education services. Significant numbers of individuals working in local government, information and communication, food services, and finance and insurance have also sought assistance. The majority of those who have reached out from New York have identified as low-income. The breakdown of these requests reflects reports in the media about persistent harassment in the entertainment and financial industries,⁶ as well as our analysis of national EEOC data which shows that food services and health care are among the industries with the highest numbers of sexual harassment charges filed by women.⁷

II. KEY RECOMMENDATIONS FOR STRENGTHENING NEW YORK'S PROTECTIONS AGAINST WORKPLACE HARASSMENT AND DISCRIMINATION.

A. EXTEND RECENTLY ENACTED PROTECTIONS AGAINST SEXUAL HARASSMENT TO ALL FORMS OF HARASSMENT AND DISCRIMINATION.

While we commend the legislature for taking important steps last year to stop and prevent harassment by limiting the use of non-disclosure agreements (NDAs) and mandatory arbitration, mandating anti-harassment trainings, and extending protections to independent contractors, these protections are currently limited to sexual harassment claims only. The same is true of important legislation passed a few years prior that eliminated the Human Rights Law's four-employee employer size threshold for bringing a claim, but only for sexual harassment claims.

To effectively address and prevent workplace harassment, legal reforms cannot be focused exclusively on sexual harassment. They must cover all forms of harassment and discrimination. Workplace discrimination and harassment based on race, disability, color, religion, age, or national origin all undermine workers' equality, safety and dignity. 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. Indeed, EEOC charge data indicate that women of color—and Black women in particular—are disproportionately likely to experience sexual harassment at work, highlighting how race and sexual harassment can be intertwined. Out of the sexual harassment charges filed with the EEOC by women, 56 percent were filed by women of color; yet, women of color only make up 37 percent of women in the workforce.⁸

As a result, legislation that focuses exclusively on sexual harassment would have the odd and impractical result of providing a worker who experiences multiple, intersecting violations with only partial protection. The MeToo 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 them more vulnerable to harassment.

Accordingly, it is crucial that these recently enacted protections against sexual harassment be amended (and future reforms be drafted) to extend to all forms of harassment and discrimination, as provided for in **S3817A/A7083A** and **A5976/S4109**.

B. STRENGTHEN PROTECTIONS AGAINST ABUSIVE USE OF NON-DISCLOSURE AGREEMENTS

We commend the legislature for passing legislation in 2018 to prohibit the use of non-disclosure agreements in settlement agreements that force harassment victims into silence, while still allowing a victim to request such a provision if it is their preference. We are concerned, however, that the informed consent provisions in the new law are inadequate to protect against an employer coercing an employee into “preferring” an NDA that they otherwise might not actually want. Given the inherent power imbalances between employer and employee—imbalances that are often magnified in the settlement context, especially when an individual may be dealing with trauma or is not represented by counsel—we are concerned that the legislation as passed may still permit employers to unduly push workers into silence.

Accordingly, we encourage the legislature to consider legislation to address the power dynamics in the settlement negotiation context, including:

- **Ensuring, as in A849-A/S5469, that workers who breach an NDA are not subject to liquidated damages.** Low-wage workers, in particular, often suffer significant economic hardship as a result of workplace violations and related retaliation, hardships that would be compounded by the harsh monetary penalties they would face for breaching an NDA provision.
- **Ensuring, as in A849-A/S5469, that an agreement to keep a settlement confidential should provide a reasonable economic or other benefit to the worker for that agreement, in addition to anything of value to which the worker is already entitled.**
- **Clarifying existing rights.** The law should specify as provided, for example, in **A869/S2037** that non-disclosure 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. We also urge the legislature to clarify that a non-disclosure agreement cannot prevent an employee from providing testimony or evidence in state or federal litigation, including class or collective actions, against the employer. Legislation clarifying such rights should also require employers to expressly state in a settlement agreement that includes an NDA that the agreement does not prohibit, prevent, or otherwise restrict a worker from exercising these rights. Vermont, for example, now requires that settlements of sexual harassment claims clearly include an explanation that an NDA does not prohibit the worker from filing a complaint or participating in an investigation with state or federal agencies, such as the EEOC, or using collective action to address worker rights violations.⁹

We also encourage the legislature to consider clearly prohibiting employers from requiring employees, as a condition of employment, to sign nondisclosure or nondisparagement agreements that prevent employees from speaking about harassment and discrimination in the workplace. Abusive NDAs do not only exist in the settlement context. Too frequently, employers impose on new hires, as a condition of their employment, contractual provisions that prevent workers from publicly disclosing details of these worker rights violations. These contractual provisions can mislead workers as to their legal rights to report to civil rights or criminal law enforcement agencies and to speak with co-workers about employment conditions. They can also prohibit workers 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.

A1115, which requires employers to inform workers that NDAs in their employment contracts cannot prevent them from speaking with law enforcement, the EEOC, or a state or local human rights agency, is an important notice provision, but we urge the legislature to go further and directly prohibit employers from requiring an employee to enter into an NDA, as a condition of employment, that prevents them from speaking about harassment or discrimination. California, Maryland, Tennessee, Vermont, New Jersey, and Washington state¹⁰ have all recently enacted legislation prohibiting employers from requiring workers to sign such non-disclosure or non-disparagement agreements as a condition of employment.

C. EXTEND THE STATUTE OF LIMITATIONS FOR UNLAWFUL EMPLOYMENT DISCRIMINATION TO PROMOTE WORKERS' ABILITY TO ACCESS JUSTICE.

Current New York law provides for one year from the most recent discriminatory act for filing an administrative complaint for unlawful employment discrimination with the New York Division of Human Rights. Short statutes of limitations like these can hamper the ability of individuals to bring harassment or discrimination complaints. Many victims do not come forward immediately, or even within months, to report, either due to the fear of retaliation and job loss, or as a result of the trauma they are experiencing. Additionally, many workers do not have the resources to easily find and consult with advocates or attorneys about their rights and legal options. For example, many people have felt empowered by the MeToo movement to seek information or assistance from the Times Up Legal Defense Fund, only to find that they have run out of time and no longer have legal options.

Accordingly, we encourage the legislature to extend the statute of limitations for filing an administrative complaint for unlawful employment discrimination from one year to at least three years as provided, for example, in **A1042/S2036**.

In 2018, New York City extended the statute of limitations for filing claims of gender-based harassment with the New York City Commission on Human Rights from one year to within three years after the alleged harassing conduct occurred.¹¹ And states across the country from Texas to Oregon are working on legislation this session to extend their statutes of limitations. In April, Maryland signed into law legislation extending their statute of limitations for filing an administrative claim to two years.¹²

D. ADDRESS HARMFUL INTERPRETATION OF THE “SEVERE OR PERVASIVE” STANDARD.

The standard that harassment must be “severe or pervasive” in order to establish an actionable hostile work environment claim has been repeatedly interpreted by courts in such an unduly restrictive fashion that the ability of individuals to pursue claims, hold perpetrators and employers liable, and obtain redress for the harm they have suffered has been severely undermined. Despite Congress’ intent that Title VII provide a broad scope of protection from discrimination, some court decisions have interpreted the “severe or pervasive” language first articulated in the Supreme Court’s 1986 decision in *Vinson v. Meritor Savings Bank* so narrowly as to recognize only the most egregious conduct as unlawful. While the “severe or pervasive” standard applies to all forms of harassment, the cases in the sexual harassment context provide especially shocking examples of the problematic manner in which this standard has too often been applied. For example, courts have dismissed claims involving sexual groping, repeated lewd and suggestive comments, and propositions because it was “just one or two” incidents of groping and thus wasn’t sufficiently “severe,” or because the conduct did not occur with enough frequency or regularity to be “pervasive.”¹³ In applying the “severe or pervasive” standard courts have too often looked at incidents of harassing conduct in isolation, instead of in totality, and have ignored critical context that increased the threatening nature of the harassment, such as the power dynamic between the harasser and the victim. Moreover, some lower court decisions have treated “severe or pervasive” as the only relevant factor in determining whether conduct violates Title VII, when the relevant inquiry is actually whether the harassing conduct altered the terms, conditions, or privileges of employment.

These interpretations create significant barriers to victims’ ability to seek redress, and minimize and ignore the impact of harassment on individuals. As the state Supreme Court, Appellate Division, First Department pointed out in *Williams v. New York City Housing Authority*, this standard has “resulted in courts ‘assigning a significantly lower importance to the right to work in an atmosphere free from discrimination’ than other terms and conditions of work.”¹⁴ The harm from minimizing harassment not only extends to the court room, but trickles into the workplace. Because of the high “severe or pervasive” standard, victims may not step forward and make a complaint or seek help because they fear the harassment they are being subjected to would not be legally actionable. And, as the *Williams* court noted, setting the bar unduly high creates little incentive for an employer to create a workplace where there is no harassment.¹⁵

Accordingly, we encourage the New York legislature to pass legislation that would rectify the harm created by these interpretations of the “severe or pervasive” standard. New York City and California have passed legislation in recent years to move away from the unduly narrow interpretation of the standard for establishing a harassment claim.¹⁶

We urge the legislature to pass legislation that has the effect of ensuring that courts' analysis of workplace harassment focuses on the impact of the conduct on the individual's terms, conditions, or privileges of employment and recognizes that a wide range of circumstances may alter the terms, conditions, or privileges of employment, and that no single type, frequency, or duration of conduct is required to make a showing of severe or pervasive harassment. Moreover, the determination of whether conduct is actionable under New York employment discrimination law should be based on the record as a whole, taking into account the totality of the circumstances.

E. CLOSE LIABILITY LOOPHOLE CREATED BY *FARAGHER/ELLERTH* DEFENSE.

In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*,¹⁷ the Supreme Court established an important principle under federal law: because a supervisor's ability to harass is a direct result of the authority given to the supervisor by the employer, the employer should be liable for the supervisor's actions unless the employer can show that it took steps to prevent harassment and to address harassment when it occurred, and that the employee failed unreasonably to take advantage of the opportunities provided by the employer to report and address the harassment. In theory, this rule encourages employers to put policies in place to prevent harassment and to respond promptly and effectively when harassment occurs.

Unfortunately, in practice, the *Faragher-Ellerth* defense has been largely ineffective in preventing harassment in the first instance and has become a box-checking exercise for many employers. Courts too often fail to conduct a searching analysis of employers' anti-harassment policies and practices and their efficacy, including whether employees understand how to make a harassment claim and whether they trust the employer's system for making a claim or didn't take advantage of the system because they fear retaliation or were discouraged from filing a claim. As a result, employers are able to evade liability by showing little more than they provide training or have a policy on the books, regardless of quality or efficacy.

Accordingly, to close this loophole, we encourage the legislature to consider legislation like **S3817A/A7083A**, that establishes that an employer's anti-harassment policies and procedures may not serve as a defense to liability, but may only be considered as a factor to mitigate damages. Moreover, such a factor should only be considered after courts and factfinders have evaluated the quality and efficacy of an employer's programs and policies – including its reporting system and prevention training programs – to ensure they meet the quality standards for employers of similar size and in similar industries.¹⁸

F. PERMIT PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION CASES.

While New York law provides for uncapped compensatory damages in employment discrimination cases, it does not permit punitive damages. Punitive damages, which punish employers who act with malice or reckless indifference to an employee's rights, provide an important incentive to employers to follow the law. Twenty-one states permit punitive damages for violations of the state's anti-discrimination protections, and in at least eight of those states, the punitive damages are uncapped.¹⁹

Accordingly, we encourage the legislature to amend New York employment discrimination law as provided, for example, in **S3817A/A7083A** to permit the recovery of uncapped punitive damages for claims brought before the State Division of Human Rights or in a civil action in court.

G. REQUIRE DISCLOSURE OR REPORTING OF DISCRIMINATION CLAIMS, CHARGES, AND LAWSUITS AND THEIR RESOLUTION.

Greater transparency around discrimination complaints or formal charges filed against an employer, and the resolution of those charges (including settlements), would help alleviate the secrecy around harassment, thereby empowering victims and encouraging employers to implement prevention efforts proactively.

Accordingly, the legislature should consider requiring the State Division of Human Rights to make publicly available the type and number of discrimination charges filed against a company, whether the charges were dismissed or resolved, and general information about the nature of the resolution (for instance, whether the charge was resolved through a monetary settlement). Such information could be made available on the agency's website, so that members of the public could conduct searches by company name. However, it is critical that any such effort balance transparency with steps to safeguard the identity of individuals filing charges.

Alternatively, the legislature could enact transparency initiatives requiring employers to affirmatively report to a state enforcement agency the number of discrimination complaints, lawsuits, and settlements filed against the company and the amounts paid, including through arbitration awards, which otherwise are typically secret. For example, in 2018, Maryland enacted legislation requiring employers with 50 or more employees to report to the Maryland Civil Rights Commission the number of sexual harassment settlements, the number of settlements against the same employee over the past 10 years, and the number of settlements with an NDA. The Commission was then instructed to aggregate and publish employers' responses.²⁰ New York City also enacted a similar law in 2018 requiring all city agencies to annually report on complaints of workplace sexual harassment to the Department of Citywide Administrative Services.²¹ This information will be reported to the Mayor, the Council and Commission on Human Rights, which shall post it on its website. Information from agencies with 10 employees or less will be aggregated together.

The legislature could also enact a transparency initiative limited to state contractors that requires contractors, as a condition of submitting a bid or keeping an awarded contract, to fulfill certain conditions. First, the legislature could forbid state contractors from requiring employment-related claims to be subject to mandatory arbitration, or alternatively require state contractors to disclose information relating to their use of mandatory arbitration agreements. Second, contractors could be required to report regularly to the relevant agency the type and number of discrimination complaints or lawsuits filed against the company within a particular time period, and the nature of the resolution of claims or lawsuits. A similar model previously existed at the federal level in the form of Executive Order 13673 of 2014, commonly known as "Fair Pay and Safe Workplaces." The executive order and implementing regulations required federal contractors and subcontractors to disclose violations, within the three preceding years, of 14 enumerated federal labor and employment laws and executive orders, as well as their state equivalents.²² Although the Trump Administration revoked the rule by executive order in March

2017,²³ Fair Pay and Safe Workplaces provides a valuable model for further consideration. Making even some portion of the reported information publicly available would provide job applicants and employees with valuable information about discrimination and harassment at a particular workplace. Such reporting also would encourage employers to implement practices to effectively address complaints and prevent sexual harassment.

H. ENSURE REFORMS ARE ACCOMPANIED BY GREATER RESOURCE ALLOCATIONS TO ENFORCEMENT AGENCIES.

Finally, substantive legal reform must be accompanied by additional funding for the State Division of Human Rights and other relevant agencies to increase their capacity to conduct outreach, education, employer training, investigations, and enforcement actions, and develop new resources for working people in all sectors including for low-wage workers. Without adequate resources to conduct these activities, the efficacy of many of the reforms being considered by the legislature may be undermined.

V. CONCLUSION

We appreciate your efforts to address workplace harassment and we thank you for your consideration of our recommendations. I am happy to serve as a resource as you continue to evaluate appropriate legislation and can be contacted at ajohnson@nwlc.org or 202-319-3041.

¹ 20 States By 2020 letter, <https://www.ggenyc.org/20statesby2020/> (last visited May 21, 2019).

² EEOC, All Charges Alleging Harassment (Charges filed with EEOC) FY 2010 - FY 2018, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.

³ EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS CHAI R. FELDBLUM AND VICTORIA LIPNIC, Exec. Summary (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm [EEOC TASK FORCE REPORT].

⁴ EEOC, Retaliation-Based Charges (Charges filed with EEOC) FY 1997 - FY 2017, <https://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm>, and EEOC TASK FORCE REPORT, Part 2 C.

⁵ Figures provided by the Time's Up Legal Defense Fund. For a summary of the work of the Time's Up Legal Defense Fund, see TIME'S UP LEGAL DEFENSE FUND, ANNUAL REPORT 2018 (Jan. 2019), <https://nwlc.org/resources/times-up-legal-defense-fund-annual-report-2018/>.

⁶ See, e.g., Diana Britton, Michael Thrasher, The Nature of the Beast, Apr 08, 2018, <https://www.wealthmanagement.com/industry/nature-beast>.

⁷ NAT'L WOMEN'S LAW CTR., OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN (Aug. 2018), <https://nwlc.org/resources/out-of-theshadows-an-analysis-ofsexual-harassment-charges-filed-by-working-women>.

⁸ *Id.* at 4.

⁹ Vermont Act 183, H.707, Sec. 1(h), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).

¹⁰ S.B. 1300, 2018 Reg. Sess. (Cal. 2018); H.B. 1596, 2018 Gen. Assemb., Reg. Sess. (Md. 2018); H.B. 2613, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018); H.707, 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018); S.B. 5996, 65th Leg., 2018 Reg. Sess. (Wash. 2018); S.121, 2018-2019 Gen. Assemb., Reg. Sess. (Nj. 2019).

¹¹ New York, N.Y., Stop Sexual Harassment In Nyc Act, Int. No. 663-A (2018).

¹² HB 679, 2019 Gen. Assemb., Reg. Sess. (Md. 2019).

¹³ See, e.g., *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 823–24 (6th Cir. 1997) (finding conduct insufficiently severe or pervasive where conduct over a four-month period involved repeated sexual jokes; one occasion of looking plaintiff up and down, smiling and stating, there's "Nothing I like more in the morning than sticky buns"; suggesting land area be named as "Titsville" or "Twin Peaks"; asking plaintiff, "Say, weren't you there [at a biker bar] Saturday night dancing on the tables?"; stating, "Just get the broad to sign it"; telling plaintiff she was "paid great money for a

woman”; laughing when plaintiff mentioned the name of Dr. Paul Busam, apparently pronounced as “bosom”); *Saxton v. American Tel. & Telegraph Co.*, 10 F.3d 526, 528, 534 (7th Cir. 1993) (finding insufficient harassment to constitute a hostile work environment where defendant supervisor placed his hand on plaintiff employees leg above the knee and rubbed her upper thigh, forced a kiss on plaintiff, and “lurched” at her in an attempt to grab her).

¹⁴ *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 73 (App. Div. 2009) (citing Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be “Severe or Pervasive” Discriminates among “Terms and Conditions” of Employment* (62 M.d. L. Rev. 85, 87 [2003])

¹⁵ *Id.* at 76.

¹⁶ S.B. 1300, Sec. 3, 2017-2018 Reg. Sess. (Cal. 2018); Int. No. 814-A (2016).

¹⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

¹⁸ A Call for Legislative Action to Eliminate Workplace Harassment (Dec. 2018), <https://nwlc-ciw49tixgw51bab.stackpathdns.com/wp-content/uploads/2018/10/Workplace-Harassment-Legislative-Principles.pdf>.

¹⁹ California, Hawai’i, Massachusetts, New Jersey, Ohio, Oregon, Vermont, and West Virginia.

²⁰ Disclosing Sexual Harassment In The Workplace Act Of 2018, S.B. 1010, Sec. 2, 2018 Gen. Assemb., Reg. Sess. (Md. 2018).

²¹ New York, N.Y., Stop Sexual Harassment In NYC Act, Int. No.653-A (2018).

²² Executive Order 13673, Fair Pay and Safe Workplaces, 79 Fed. Reg. 45309 (Aug. 5, 2014); Federal Acquisition Regulation; Fair Pay and Safe Workplaces, 81 Fed. Reg. 58562 (Aug. 25, 2016); Guidance for Executive Order 13673, Fair Pay and Safe Workplaces, 81 Fed. Reg. 58654 (Aug. 25, 2016).

²³ Executive Order 13782, 82 Fed. Reg. 15607 (Mar. 30, 2017).