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Hearing on Legislation Related to Workplace Harassment and Sexual Misconduct

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Good morning Chairman Kauffman, Chairman Galloway, and distinguished members of the House Labor & Industry Committee. My name is Christopher Durham, and I am a Partner at Duane Morris LLP specializing in management-side employment law. In my practice, I provide counseling and advice to businesses of all sizes in the Commonwealth and other jurisdictions, and represent businesses in employment disputes, including the defense of workplace harassment and employment discrimination claims. I frequently speak and write on employment law and issues affecting the workplace.

Thank you for the opportunity to present testimony on several pieces of legislation related to workplace harassment and sexual misconduct that would impact Pennsylvania employers. I testify today in my individual capacity, based on my experience representing employers on a wide-variety of legal issues, including the laws that the various bills under discussion today seek to amend.

The #MeToo Movement that launched a little under a year ago has had an undeniable effect on the American workplace, and a positive impact on the way that employers in Pennsylvania and across the country are talking about and addressing the important issues of workplace harassment and sexual misconduct. I have had conversations with numerous clients on these subjects, all of whom I believe are making a genuine and voluntary effort to combat workplace harassment and sexual misconduct by, among other things: updating policies and procedures relating to equal employment opportunity and unlawful harassment; training members of management and other employees on the subjects of workplace harassment and sexual misconduct; and taking steps to address allegations of workplace harassment and sexual misconduct swiftly, fairly and, where wrongdoing is found, firmly. On the one hand, we have come a long way in the last year or so. On the other hand, we have a long way to go, but I see in the vast majority of the Pennsylvania employers whom I have the privilege to serve a renewed determination to ensure that they are fulfilling their legal and moral obligation to provide employees with a work environment that is safe and free from unlawful discrimination and harassment.

Although you did not ask me here to talk about the #MeToo Movement, I think that context is important. As we discuss today various pieces of legislation borne out of the #MeToo Movement – each of which is offered with the noble intention and objective of curbing workplace harassment and sexual misconduct – I think it is important not to lose sight of that objective, and to carefully consider the potential negative impact of legislation on Pennsylvania employers that extends beyond the issues these bills seek to address. As an employment lawyer who advises employers regarding employment-related legal issues, I see the potential

consequences, possibly unintended in many cases, that otherwise well-meaning legislation often can have. It is through this lens – one that is laser-focused on preventing workplace harassment and sexual misconduct, without straying from that objective by, for example, substantially expanding employer liability for other conduct or depriving duly-elected judges of discretion that the legislature long has seen fit to vest in them – that I believe the legislation we discuss today must be viewed.

To be clear, I am not here to speak in favor of or against any particular bill. Rather, I hope that my testimony will be helpful to the Committee as it does its vital work and grapples with how to best to address these important issues and further what I hope are shared policy goals to prevent workplace harassment and sexual misconduct, while minimizing unintended consequences that could be detrimental to Pennsylvania employers.

Finally, I note that my testimony is limited to those pending bills that would impact private employers in the Commonwealth.

House Bill 2280 expands the scope of employer coverage under the Pennsylvania Human Relations Act (PHRA) to all employers in the Commonwealth. As an initial matter, it is worth noting that the PHRA's current coverage of employers with at least four employees is far more expansive than, for example, federal anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964 (15 employees), the Americans with Disabilities Act (15 employees) and the Age Discrimination in Employment Act (20 employees). Furthermore, the potential impact of on small businesses of expanding the PHRA's coverage to all Pennsylvania employers should not be ignored. In enacting the PHRA, the legislature chose a four-employee coverage threshold, most likely to allow a business to begin to get off the ground and grow revenues without facing a potentially costly, even if meritless, PHRA complaint, investigation and lawsuit. House Bill 2280 would expose the smallest of start-ups to these risks and costs on Day One. I work with a lot of larger businesses who view PHRA complaints and lawsuits as part of the "cost of doing business." But far from just the "cost of doing business," to the smallest of businesses with few resources at their disposal, I fear that a PHRA complaint, investigation and/or lawsuit could, quite literally, cost an entrepreneur her business. Finally, I do not think that expanding the employer coverage of the already-expansive PHRA would materially, if at all, serve the goal of reducing workplace harassment and sexual misconduct in Pennsylvania.

House Bills 2282 and 2475 address similar issues – both would amend the PHRA to expand its coverage beyond the employment relationship to unpaid interns and volunteers, and both would impose obligations upon employers relating to proactive steps to address workplace harassment and discrimination. I would like to address each in turn.

With respect to the expansion of the PHRA to cover unpaid interns and volunteers, this change would fundamentally alter what is an *employment* statute to cover relationships outside the scope of the employer-employee relationship. The relationship between unpaid intern and company, and between volunteer and company, is materially different from the relationship between employer and employee, where the employee is economically dependent on the employer and there exists a significant power disparity. Thus, many of the considerations that underlie the PHRA's protections are not present in the relationship between a business and an unpaid intern or volunteer. This expansion also could have the unintended and deleterious effect

of discouraging Pennsylvania businesses from engaging unpaid interns, where the intern is the primary beneficiary of the relationship. Similarly, Pennsylvania businesses could curb their charitable and community service endeavors for fear that a volunteer – someone with whom the business may have little, if any, prior or ongoing relationship – could assert rights under the PHRA and subject the business to the cost and burden of defending against a PHRA complaint and lawsuit. Finally, numerous Pennsylvania employers have Employment Practices Liability Insurance (EPLI) to insure against the risk of harassment and discrimination claims by employees. While the scope and coverage under such policies varies, many such policies do not cover claims asserted by non-employees, which further heightens the risk and exposure to businesses should unpaid interns and volunteers be covered by the PHRA.

House Bill 2282 also would amend the PHRA to require employers to implement certain training for employees regarding discrimination, harassment and retaliation, and House Bill 2475 would amend the PHRA to require employers to implement certain policies and procedures designed to address workplace discrimination, harassment and retaliation. These are concepts that have merit and are worthy of debate and serious consideration, and the concepts reflect best practices that all employers should consider implementing even absent statutory dictates. That being said, I have significant concerns with these bills as drafted.

With respect to the training requirements in House Bill 2282, I offer the following comments. First, the scope of the training requirement is extremely broad – *all* employees are required to receive training, and the training requirement applies to employers of all sizes. This is far more expansive than, for example, the training requirements under California law considered to be the most comprehensive in the nation, which only apply to employers with 50 or more employees, and only require that training be offered to supervisory employees. If a training requirement is adopted in Pennsylvania, similar restrictions would be advisable. Second, House Bill 2282 would require training to include legal consequences to an employer that violates federal or state law, and educate employees regarding the process to seek redress from the PHRC and the EEOC. This would encourage employees to forego internal avenues to address concerns – which is the preferred method for resolving employer-employee disputes – in favor of litigation. Third, House Bill 2282 would impose onerous civil penalties of up to $5,000 per violation, which could expose employers who fail to meet even one of the training requirements with respect to multiple employees to financial consequences disproportionate to the offense. Fourth, House Bill 2282 would create a civil right of action for "any person claiming a violation of" the training requirements, which ostensibly would permit any person (even non-employees) to allege that an employer has failed to meet the training or recordkeeping requirements imposed by the amendments to the PHRA proposed by House Bill 2282, even absent any harm to such person. Finally, any legislation imposing an employer training requirement should provide employers with an affirmative defense to a hostile work environment claim along the lines of that established by the U.S. Supreme Court in the cases of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). It is imperative that any legislation imposing an employer training requirement under the PHRA address the foregoing significant concerns.

With respect to the policy and procedure requirements in House Bill 2475, I offer the following comments, some of which are similar to my comments on House Bill 2282. First, the scope of the policy and procedure requirement is overbroad to the extent that it applies to

employers of all sizes, because the smallest employers may not have the resources or wherewithal to adopt such policies, and should not because of the lack of such resources be required to adopted a policy prepared by the Pennsylvania Human Relations Commission (PHRC), which the legislation contemplates. Second, the recordkeeping requirements in House Bill 2475 are overly burdensome to the extent that, among other things, they would require employers to maintain prior versions of policies for at least three years after they have been superseded. Third, House Bill 2475 would impose onerous civil penalties of up to $2,000 per violation, which could expose employers who fail to meet even one of the policy/procedure requirements with respect to multiple employees to financial consequences disproportionate to the offense. Fourth, House Bill 2475 would create a civil right of action for "any person claiming a violation of" the policy/procedure requirements, which ostensibly would permit any person (even non-employees) to allege that an employer has failed to meet the policy or recordkeeping requirements imposed by the amendments to the PHRA proposed by House Bill 2475, even absent any harm to such person. Finally, any legislation imposing an employer policy/procedure requirement should provide employers with an affirmative defense to a hostile work environment claim along the lines of that established under Title VII (as referenced above). Again, it is imperative that any legislation imposing an employer policy/procedure requirement under the PHRA address the foregoing significant concerns.

House Bill 2286 would amend the PHRA to: (1) provide a right to a jury trial in a civil action under the PHRA; (2) extend the statute of limitations for civil actions under the PHRA from 180 days to two years; (3) authorize recovery of punitive damages under the PHRA; and (4) mandate an award of attorneys' fees to a prevailing plaintiff under the PHRA. Unlike proposals for training or policy/procedure requirements, these amendments would not further the objective of proactively combatting workplace harassment and sexual misconduct. Rather, they would drastically expand the availability of remedies available under the PHRA for *any* violation of the PHRA. Furthermore, each proposed amendment has its individual negative consequences.

With respect to the right to a trial by jury and mandatory award of attorneys' fees, these amendments would usurp the authority of duly-elected judges to apply their legal expertise and discretion in adjudicating PHRA claims and determining what remedies are appropriate where a violation is found. Providing a right to a jury trial also would likely result in unequal justice for PHRA plaintiffs simply based on where they happen to work, as it is widely known that juries in certain Pennsylvania counties are more likely to rule in favor of plaintiffs, and award more damages, than juries in other Pennsylvania counties. Providing a right to a jury trial under the PHRA would all but ensure that, even with the same facts, a discrimination plaintiff in Philadelphia County is better-positioned to prevail and recover than a discrimination plaintiff in Butler County. In addition, effectively mandating an award of attorneys' fees to a prevailing plaintiff runs contrary to the American rule, which provides that each party bears its own attorneys' fees. In the event that the legislature deems it advisable to mandate an award of attorneys' fees, such a mandate should extend to defendants who prevail at a pre-trial stage (e.g., on preliminary objections or motion for summary judgment) on PHRA claims as well.

Quadrupling the statute of limitations also likely would have negative consequences. A lengthy statute of limitations does not encourage the timely resolution of disputes, which is particularly important with respect to disputes between employees and employers. Employers in many cases also could suffer material prejudice in the defense of a PHRA claim with such a

lengthy statute of limitations. Witnesses (and those accused of wrongdoing) may leave the company's employ. Memories will fade, and documents and other evidence may be lost or destroyed. Requiring the prompt initiation of legal action encourages aggrieved employees to seek redress in a timely fashion. This not only inures to the employee's benefit, but also provides important protection for employers who, faced with a stale claim, may be at a material disadvantage in defending against such a claim. This concern is heightened by the fact that a plaintiff asserting a PHRA claim must first file a complaint of discrimination with the PHRC, the administrative adjudication of which can take months and even years. Finally, it is worth noting that the current statute of limitations of 180 days is consistent with federal anti-discrimination law.

Authorizing the recovery of punitive damages under the PHRA likewise is little more than a punitive measure aimed at employers that will have little impact on deterring workplace harassment and sexual misconduct, and is a remedy which the legislature specifically declined to include when enacting the PHRA. In addition, as drafted this amendment provides no limitation on an award of punitive damages similar to those imposed under federal anti-discrimination laws. At a minimum, if the legislature amends the PHRA to provide for the recovery of punitive damages, such damages should be capped based on metrics such as employer size and revenues (as provided under Title VII and the ADA), or limited to double damages (as provided under the ADEA).

Finally, similar to the amendments to the PHRA proposed by House Bill 2286, House Bill 2284 would amend the Pennsylvania Whistleblower Law to: (1) provide a right to a trial by jury in a civil action under the Whistleblower Law; (2) extend the statute of limitations for civil actions under the Whistleblower Law from 180 days to two years; and (3) authorize recovery of punitive damages under the Whistleblower Law. In addition to the concerns expressed above regarding these proposed amendments as they relate to the PHRA, as applied to the private sector, the Whistleblower Law does not protect against or provide a civil right of action for retaliation for complaints of workplace harassment or sexual misconduct. The proper avenue for redress for such alleged retaliation is under the PHRA. Accordingly, House Bill 2284 does not appear to address the important issues of workplace harassment and sexual misconduct, at least with respect to private employers.

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Thank you for your invitation to participate in today's hearing. The issues of workplace harassment and sexual misconduct have, at long last, been thrust to the forefront of our public discourse. This is a welcome development, and provides an opportunity for those on both sides of the aisle to come together and work toward commonsense solutions to combat these problems.

I hope that my testimony is of value as the Committee continues its hard work of crafting and considering legislation that addresses these important issues and advances the interests, and balances the rights, of Pennsylvania employee and employers.