

**Statement before House Labor and Industry Committee
on behalf of**



Presented by

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**Hearing on “Legislation Related to Workplace Harassment and Sexual
Misconduct”**

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Thank you for inviting me to provide comments to the Committee on “Legislation Related to Workplace Harassment and Sexual Misconduct.” My name is Elizabeth Milito and I am Senior Executive Counsel for the National Federation of Independent Business (NFIB) Small Business Legal Center, the legal arm of NFIB.

Today I will provide some insights into how small businesses make employment decisions and highlight some of the differences between how small business owners and large corporations handle employment and human resources matters. I will also discuss how proposed legislation related to workplace harassment and sexual misconduct might impact Pennsylvania’s small businesses.

1) Background on NFIB and its members

NFIB is the nation’s leading advocacy organization representing small and independent businesses. NFIB's national membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a “small business,” the typical NFIB member employs 5-10 people and reports gross sales of about \$500,000 a year. The NFIB membership reflects American small business, and I am here today on their behalf to share a small business perspective with the Committee.

Businesses in Pennsylvania are under incredible pressure to ensure that they provide safe workplaces for employees. The small business owners who NFIB represents work hard to do what is right, but their informal and unstructured nature and more limited financial resources means that they sometimes require greater flexibility in creating policies and solutions. Adding to employers’ angst, every year lawmakers propose measures that increase employers’ liability for incidents occurring in the workplace while at the same time attempting to eliminate tools used by businesses to screen out potentially problematic employees.

As a result, today small-business owners contend with antidiscrimination laws, family, medical and other protected leave laws, wage-hour laws, privacy laws, and workplace safety laws. They struggle to decipher the mysteries of overlapping, and sometimes even conflicting, federal, state, and local employment laws. Added to the stress of comprehending the laws is the cost of complying with the laws. Workplace compliance costs small business much more per employee

than it costs large businesses.¹ With employment matters, the problem is compounded by the fact that small businesses rarely can afford human resources professionals to guide the business with compliance.²

This means small businesses routinely feel the brunt of the regulatory excesses. So, it's no surprise that unreasonable government regulation, especially onerous paperwork burdens, continues to be a top concern. Small business owners prominently ranked "Unreasonable Government Regulations" and "Uncertainty Over Government Actions" as the second and sixth biggest problems in the quadrennial NFIB 2016 report, *Problems and Priorities*.³ And according to NFIB's monthly survey *Small Business Economic Trends*, "government requirements and red tape" consistently has ranked as a very important problem facing small business owners.⁴

In summary, my members view regulation as a serious problem. Most small business owners are unhappy with the difficulties regulation creates and the time it takes them away from their business, rather than any limitation on freedom those regulations might impose. When it comes to workplace policies and procedures, small business owners need flexibility in the means and manner of creating and implementing policies and procedures; one-size-fits all schemes do not work for small business.

2) Harassment prevention and small business

Sexual harassment has garnered lots of news coverage of late. While most of the headlines focus on big name companies, small businesses are not immune to harassment in the workplace. NFIB has warned small business owners to take the #MeToo movement seriously.⁵ Small businesses cannot ignore the risks associated

¹ See <https://www.nfib.com/content/resources/infographic/infographic-the-cost-of-compliance-75773/>.

² According to NFIB's Poll on "Business Structure" only 12 percent of small employers have one full-time employee dedicated to human resources.
<http://411sbfacts.com/sbpoll.php?POLLID=0024>

³ <https://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf>. Notably, "State/Local Paperwork" came in at eleventh place, ahead of "Federal Paperwork."

⁴ <https://www.nfib.com/surveys/small-business-economic-trends/>

⁵ See on-line resource: <https://www.nfib.com/video/legal-ease-metoo-and-the-explosion-of-sexual-harassment-allegations>.

with not preventing and stopping discrimination, including sexual harassment, in the workplace. A small business owner who discounts the possibility that discrimination might occur in their business risks financial and reputational devastation.

Employers of all sizes must now make thoughtful decisions to proactively protect their employees from unlawful discriminatory conduct, including harassment. To this end, NFIB encourages its members – regardless of how many individuals the business might employ - to train employees and supervisors on ways to promote fair, civil, and harassment-free workplaces.⁶ NFIB also recommends that employers of all sizes adopt and enforce anti-discrimination and anti-harassment policies.⁷ To assist small businesses with creating such policies, NFIB makes available on its website a free model employee handbook, which includes a non-harassment/non-discrimination policy.⁸ We also encourage members to develop or revise a complaint reporting system to increase understanding and accessibility among employees. With regards to reporting, we educate business owners on the importance of designating more than one person who can receive and investigate these claims in case the primary person designated is the one charged with harassment.

Keep in mind, however, that most small businesses do not employ a full-time professionally trained human resources employee, much less an in-house counsel.⁹ Therefore, it becomes much more challenging, and potentially cost-prohibitive, to adopt formal policies and procedures or implement mandated training and reporting requirements in a small business. However, even without formal human resource training or staff, small businesses can and do create effective systems to combat harassment: businesses can educate employees on what harassment is and provide examples of prohibited, inappropriate, and illegal

⁶ See e.g., on-line resource: <https://www.nfib.com/content/resources/legal/harassment-in-the-workplace-how-to-keep-your-policies-up-to-date/> and <https://www.nfib.com/webinars/harassment-prevention/>.

⁷ *Id.*

⁸ <https://www.nfib.com/content/resources/labor/how-to-write-a-great-employee-handbook/>

⁹ <https://www.cnn.com/2018/08/29/small-business-survey/index.html>. See also, NFIB Small Business Poll, Business Structure available at http://411sbfacts.com/pollresults_g.php?QID=00000000661&KT_back=1 (finding that only 12 percent of small businesses employ someone dedicated to human resources or personnel matters).

conduct; businesses can empower employees to act decisively in reporting inappropriate conduct; and businesses can create a welcoming culture, or an ‘open door’ type environment so employees feel safe and comfortable reporting harassment.¹⁰

As an example of how creative non-legislative solutions can form an effective anti-harassment system, I encourage the Committee members and staff to consider the experience of Erin Wade, Founder and CEO of Homeroom Mac + Cheese in Oakland, California.

Wade is a former labor attorney and tried to create a diverse, inclusive business with written policies to protect the staff. So, she was upset to learn that her female employees were getting unwanted attention from customers. Wade said an incident with one customer caused her to bring her entire staff together and work to create a color-coded system that enables staff to quickly alert management to inappropriate behavior by customers and vendors.

I point to Wade’s story, which is can be found in testimony she provided to the U.S. Equal Employment Opportunity Commission,¹¹ because it demonstrates that carrots, not sticks can be effective in creating harassment-free workplaces. Homeroom’s warm and safe workplace affects the restaurant’s bottom line, and, in Wade’s opinion, positive employee morale has greatly contributed to the restaurant’s success. In her words, “I left behind my career in law because I saw how broken the American legal system is and how well-intentioned laws are grossly abused by those with negative incentives. I do not believe the answer to this problem lies in legislation-it lies elsewhere.”

Good employers in Pennsylvania recognize that, try as they might, they cannot prevent all wrongful behavior. These employers implement anti-discrimination and anti-harassment policies, take reports of concerns seriously, and implement creative solutions to problems they identify. They take these actions because it’s the right thing to do, not because the General Assembly has mandated it.

¹⁰ https://www.eeoc.gov/employers/smallbusiness/checklists/harassment_policy_tips.cfm

¹¹ Wade’s testimony to the EEOC’s Select Task Force on the Study of Harassment in the Workplace, can be found at https://www.eeoc.gov/eeoc/task_force/harassment/wade.cfm.

2) Discussion of Proposed Legislation

Since *Time* magazine chose the Silence Breakers as its "person" of the year for 2017, there seems to be near-daily revelations about sexual abuse and sexual harassment. It is understandable why the Committee is focusing again on this important subject. However, I would ask that the Committee take care in addressing this problem, keeping in mind the maxim that "bad facts can make bad law."

While NFIB appreciates that Committee members want to achieve the goal of harassment-free workplaces, I wish to raise some concerns and points for your consideration. The risk of implementing bad law is particularly true with respect to the three subjects I would like to address: expanding civil liability, mandating anti-harassment training, and requiring standardized written anti-harassment policies.

Expanded Liability Provisions

As a package, the bills would significantly increase a business's potential liability through extraordinary expansion of the Pennsylvania Human Relations Act's (PHRA or The Act) coverage, by providing for additional penalties and damages, and allowing plaintiffs a longer statute of limitations. NFIB is very concerned with all these provisions. But in my statement today, I will focus on House Bill 2280, which in my opinion most directly impacts NFIB members.

HB 2280 would dramatically expand civil liability in the smallest businesses – those employing only one individual, down from PHRA's current threshold of four employees. Additionally, the bill would make businesses liable for discrimination claims from all independent contractors. Together, these two provisions represent an extraordinary expansion of civil liability that will allow for expanded classes of damages, including potentially uncapped punitive damages and attorneys' fees.

I believe the Act's current four-employee threshold strikes an appropriate balance between ensuring that victims of discrimination get their day in court while protecting the smallest of the small businesses from costs associated with defending against a meritless claim. I think that I have a unique perspective on this

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issue, because NFIB represents the very smallest businesses in Pennsylvania. Most of my members have five or fewer employees and application of PHRA to all employers would disproportionately affect my members.

As currently drafted, the bill could potentially bankrupt small-business owners who cannot afford the legal fees to defend against discrimination lawsuits and cannot afford to carry expensive liability insurance to defend against claims. Defense costs for discrimination claims taken to a jury can easily exceed \$150,000.¹² There's a reason the federal government, in Title VII of the Civil Rights Act, exempts small businesses under 15 employees. That reason is that small businesses cannot absorb \$150,000 in litigation fees. When you have a small business, you put your house on the line, credit cards on the line and you cannot afford to lose that because of defense costs against a meritless claim. The amount of money needed to fight a discrimination suit could cause a small business to close, even if the employer is successful in defending the lawsuit.

And make no mistake, meritless claims are and will be filed.¹³ We would all like to think that attorneys comply with the highest ethical standards; unfortunately, that is not always the case. In many instances, a plaintiff's attorney will just take a client at his word, performing little, if any, research regarding the validity of the plaintiff's claim. As a result, small business owners must take time and resources out of their business to prove they are not liable for whatever "wrong" was theoretically committed.

Small businesses that are wrongfully sued must expend substantial resources to defend against meritless claims or must risk the prospect of default judgments against them. Often these suits take years to resolve and rarely do small businesses have employment practices liability insurance (EPLI) that covers defense costs for discrimination claims. This means employers could still be liable for paying \$25,000-\$30,000 maybe even more just to defend themselves and "prevail" on a

¹² See *The 2017 Hiscox Guide to Employee Lawsuits*, available at <https://www.hiscox.com/documents/2017-Hiscox-Guide-to-Employee-Lawsuits.pdf> (finding 2017 average cost for claims that resulted in defense and settlement payments was \$160,000 up from \$125,000 in 2015).

¹³ See EEOC Charge Statistics – in FY 2017 the Commission received 99,109 charges and filed 184 merits lawsuits. <https://www1.eeoc.gov//eeoc/newsroom/release/11-9-17.cfm?renderforprint=1>.

motion to dismiss or motion for summary judgment. Expansion of liability claims to the smallest businesses will require that even the smallest employers will need to carry expensive EPLI insurance.

But there are other costs as well: the time and energy wasted defending meritless claims and the damage to an innocent business's reputation, which is not automatically remedied just because the claim is successfully defended or dismissed. And as much as small business owners are loath to write a check to settle what they perceive to be a frivolous claim,¹⁴ they express as much, if not more, frustration with the time spent defending against a lawsuit. A small business owner cannot recoup this time and the damage to their businesses' reputation and goodwill cannot be easily repaired.

HB 2280 also dramatically expands employers' potential liability by allowing independent contractors to assert a discrimination claim against any business for which the contractor performs a paid service. Historically, anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964, explicitly apply to workers who are classified as employees. HB 2280's expansion of PHRA to independent contractors drastically departs from the common law principles of agency enshrined in longstanding definitions of "employer" and "employee."

Independent contractor designation does not necessarily prevent legal remedies for discrimination and harassment. First, an individual's status as an "employee" or "independent contractor" is not dependent on the label assigned by a business. Indeed, the EEOC has long held that workers from a staffing agency qualify as "employees" of the company where they are staffed "in the great majority of circumstances."¹⁵ Additionally, if the harassment violates the criminal law, an independent contractor can make a complaint to the police. The

¹⁴ For the small business owner with 10 employees or less, the problem is the \$5,000 and \$10,000 settlements, not the million-dollar verdicts. When you consider that many of these small businesses only net \$40,000 - \$60,000 a year, \$5,000 paid to settle a case immediately eliminates about 10 percent of a business' annual profit.

¹⁵ Whether an employer-employee relationship exists depends on specific facts including whether the employer controls the means and manner of an employee's work performance. The EEOC lists 16 factors for distinguishing between an employee and an independent contractor. The status of an employee could be established even if only some criteria are met.

<https://www.eeoc.gov/policy/docs/threshold.html>.

Pennsylvania Crimes Code may include crimes relating to sex acts, harassment, and assault. Finally, lawsuits for personal injury related to a civil assault may be available to recover damages.

Business owners should not be liable under PHRA for claims by individuals who are not under the direct control of the business. A great advantage of having an independent contractor is that the individual is working independently; the contractor might be working after-hours or on weekends.¹⁶ The lack of oversight would make it very difficult for a business to defend against a claim from an independent contractor. Moreover, EPLI coverage may not even be available for independent contractors, so near impossible for businesses to manage the risk of hiring a contractor.

Discrimination in the workplace should be punished and victims properly compensated. But incentivizing groundless lawsuits against small businesses also creates its own victims — owners who are forced to hire fewer workers, lay off others or even close the doors altogether. NFIB opposes expanding PHRA coverage by lowering the employer threshold to one and including independent contractors, beyond those who are currently covered under The Act under state licensing laws.

Mandatory Training

After the launch of the #MeToo movement, there was a rise in voices asserting that mandatory training is needed to stop harassment in the workplace. NFIB certainly encourages its members to consider training employees and supervisors on ways to promote a fair, civil, and harassment-free workplace. But we are very concerned about any requirement that ALL employees of businesses receive the training as proposed in House Bill 2282. While supporters of this proposal tout the benefits of sexual harassment training, formal training can be expensive.

This training can be expensive not only because of the cost of hiring a trainer or purchasing a course, but also due to the production hours lost during

¹⁶ Under the traditional common-law rule, the worker is an independent contractor if the company has the right to control only the result to be accomplished by the worker's services, and not the details and means by which that result is accomplished. *Id.*

mandated training sessions.¹⁷ Supporters of HB 2282 suggest that mandatory training will create a minimal burden on employers since the Commission will offer “free” on-line training. This claim is simply absurd, particularly considering the bill’s mandated recordkeeping.

Small employers, those with less than 100 employees, are much less likely to have a human resources employee to coordinate training and track attendance. So beyond actually filling out a form and attending the training, employers will also need to expend time figuring out what information the government is demanding. Failure to keep a certificate for even one employee could subject the business to a monetary penalty and allow for additional claims by an employee. Onerous paperwork continues to be a top concern, and our members consistently rank those costs as one of the most important issues that NFIB should be working on. HB 2282 would exacerbate the paperwork burden.

Instead of the proscriptive training HB 2282 would mandate, I would suggest the Commission make free on-line resources available to employers, as the EEOC provides.¹⁸ Such resources could educate employers on the importance of ensuring that workplaces are free of discrimination and harassment, point out the risks associated with not providing a safe workplace, and encourage businesses to train employees, managers and supervisors on anti-discrimination and anti-harassment policies.

Even if training were mandated, employers should not be required to keep documentation of employee training or fined for not having a certificate. Instead, allow for a rebuttable presumption that if the employer doesn't have the documentation, the employee didn't get the training. This will encourage employers to keep records, but if the employer has no records, it will be able to provide other evidence to show that the employee got the training.

Standardized Anti-Harassment Policy

¹⁷ Even California, a state not shy about issuing mandates on employers, requires training only for employers with 50 or more employees and only for managers. *See* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200320040AB1825.

¹⁸ *See* EEOC Small Business Resource Center at <https://www.eeoc.gov/employers/smallbusiness/index.cfm>.

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Legal action surrounding harassment and discrimination can be devastating for a small business—both financially and in terms of employee morale. So, policies should be in place not only to ensure proper behavior in the workplace but also to make reporting of harassment to supervisors as fast and easy as possible. But House Bill 2475's stick approach with a one-size-fits all idealistic policy will do little to deter harassment and discrimination in the workplace and instead serve as a nice add-on gotcha claim for plaintiffs' attorneys eager to stick it to a business owner who doesn't have an HR person and, therefore, unknowingly, failed to print out the policy and keep in a binder in the front office.

Instead of mandating a standardized policy, the Commission should encourage employers to do the following:

- Create a sexual harassment policy specifically stating the company does not tolerate it;
- Hold a training on the topic that lets employees know who they can talk to if they feel there is an issue, and do something about any situation that is brought to the attention of the owner or supervisor; and
- Create a culture where employees feel comfortable coming to the owner and supervisors if they feel something has happened;

These are things that don't cost money and they don't require a mandate from the government.

3) Conclusion

In summary, NFIB appreciates and shares the Committee's intent of ensuring that Pennsylvania's workplaces are as safe as possible for employees. We ask that you keep in mind the potential costs you are asking small businesses to bear when studying the proposed bills, and to consider less expensive alternatives that will aide employers in enforcing the existing federal and state anti-discrimination and anti-harassment laws.

Thank you for this opportunity to speak today.