Good morning Chairman Kauffman, Chairman Galloway and members of the Committee. On behalf of the Pennsylvania Restaurant and Lodging Association, I wish to thank the House Committee on Labor and Industry for convening this hearing on sexual harassment. My name is Sarah Yerger, I am a principal in a law firm where I practice labor and employment law and represent primarily employers and management. Before working in private practice, I worked in the PA Attorney General's office defending the Commonwealth and its agencies and individuals in civil litigation actions, primarily in discrimination and harassment cases. Thank you for offering me the opportunity to testify today.

Reports of sexual harassment have sparked a national debate that is playing out in the media, in corporate boardrooms and thanks to this committee, in the PA legislature. Harassment and discrimination are symptoms of a problem involving culture issues and gender inequity in the workplace. Despite employer policies and training, sexual harassment continues to persist across industries and workplaces. Many companies do have well established sexual harassment training programs and anti-harassment policies, but these investments seem to have made little headway in effectively addressing a problem that pervades the workplace. The discussion has begun to turn to why that is and what are the root causes of discriminatory and harassing behavior and what are solutions that don't just skim the surface, but which challenge social norms that contribute in creating the culture in which sexual harassment occurs in the first place.

The PRLA membership is very committed to ensuring the well-being of its employees. As an industry of first jobs and a gateway to career building and because a high percentage of hospitality employees are women, the PRLA wants to do all it can to prevent workplace harassment, and we welcome legislation that ensures all workers have a safe environment. However, we also want to be certain that those efforts are reasonable and sustainable and that well-meaning legislation, as this is, does not have either unintended consequences that actually cause the legislation to do harm rather than good or just skim the surface without effectively addressing the issues.

We already have laws, which are interpreted by caselaw, which provide many protections for employees. Title VII and the PHRA prohibit sexual harassment in the workplace. The laws impose a duty on employers to prevent and stop sexual harassment of employees. Under the laws, an employer's responsibility is twofold: take reasonable care to prevent sexual harassment and take reasonable care to stop sexual harassment that is occurring. The laws do not define the steps that constitute reasonable care. However, courts, through individual cases, have said that an employer may satisfy the responsibility to prevent harassment by having an anti-harassment policy and distributing it, as well as educating employees how to make a complaint for harassment. If an employer has a policy but does not enforce it or does not investigate complaints, then the employer is not taking reasonable care. An employer must be aware of the harassment before the employer can be liable for stopping it so an employee should follow the employer's reporting procedures if he or she is being harassed. No one should have to tolerate sexual harassment in the workplace and employers, including the hospitality industry, already have a "duty of care" for whoever walks through the door, be they guests or staff. Failing to protect employees from customer sexual harassment already can have negative legal implications for employers and caselaw has defined on an individual basis how employers must protect their employees.

Training/Policy

One of the proposed bills requires mandatory interactive training for employees every 2 years, and that employers have a model sexual harassment policy. To the point above, training is a reasonable requirement and the proposed legislation allows for training employees so that people know what sexual harassment is and how to report and address it when they see it. However, in the hospitality business, a significant number of alleged harassers are not employees but are customers or vendors and employers can't train customers, so even with this proposed legislation, a large segment of alleged harassers will not be considered.

Furthermore, the bills provide that the PHRC is responsible to draft a model policy, implement the proposed legislation, monitor employers and enforce penalties. The PHRC is already overworked and understaffed and now they will have additional responsibilities, which means additional taxpayer funding is necessary to fulfill these new statutory obligations.

Another concern about the proposed legislation is enforcement and the penalties. It may be difficult for employers with large workforces to be expected to comply with the interactive requirement every two years. Additionally, the fines for failing to properly provide interactive training could be exorbitant. For example, what if a large hotel with 500 employees hires a consultant to provide interactive training, the hotel is doing what it should to provide training but because of scheduling of the trainer and/or employees, multiple employees don't receive their training within the 24-month period. The proposed bill could allow for a $1,000 fine per employee for that hotel. The hotel could be doing everything right but because of the remedial nature of the statute face insurmountable fines.

As for a model policy, U.S. Equal Opportunity Employment Commission cautions against implementing standard policies because inflexible, one-size-fits-all approaches rarely work. As long as the PHRC gives flexibility to employers to incorporate policies they already have, their industry and employee needs, and don't create an inflexible approach, the proposed legislation requiring employers to have policies serves a valuable purpose.

Punitive damages- Expand PHRA

Another way that employers will face increased costs under the proposed legislation is by expanding the PHRA to include punitive damages. This will expand civil liability for employers making the proposed legislation penalizing rather than instructive. Title VII does have this damages remedy; however, there is a sliding scale cap under Title VII for damages that is not in Pennsylvania's proposed amendment to the PHRA. Because Title VII has caps on damages that the proposed bills do not, plaintiffs' awards for punitive damages are limited under Title VII. If punitive damages are enacted under the PHRA, there should be caps to keep awards limited, like under Title VII- enough to compensate the victim and force employer to act but not so high as to financially cripple the employer.

Expansion of Employer Definition under PHRA from 4 to 1 employee

The bills also propose that the definition of employer should be changed from 4 employees to 1. It is our understanding that this will be addressed by NFIB who has many more members who have this concern.

Statute of Limitations- Expand PHRA to include 2 year SOL up from 180 days

There is a value behind time-bars and statutes of limitations which I would like to share. Law has as its purpose "justice." A time-bar involves two points in time: the time of the event, and the time of the initiation of the legal proceedings looking into that event. As these two points in time separate more, the ability of any legal body to accurately to resolve disputes about the facts making up the event - a necessary precondition to giving each person his or her due - becomes more problematic. Testimony, or the introduction of other evidence, is the basis for fact-finding in court. Yet, over time, memories fade, relevant persons die or become unavailable, documents are mislaid, lost, or stolen, physical evidence deteriorates. The hospitality industry, with its seasonal and part time employees, will be impacted more than in other industries because relevant persons are more likely to be unavailable in a two-year limitation period.

Civil statutes of limitations also save defendants from having to defend themselves against stale charges and keep those stale cases out of court. They provide repose for the parties and certainty by notifying potential defendants of the length of their exposure to liability, and they give plaintiffs an incentive to litigate claims without unreasonable delay. We understand that the legislature must balance these justifications for civil statutes of limitations with the interests of the injured party and give the party a fair chance to litigate a valid claim. Plaintiffs should be able to sue for compensation when injured, but at some point the defendant's right to be free of stale claims must be balanced with the plaintiff's rights. If the reason behind extending the SOL is because sexual harassment victims do not come forward until many years later, a 2-year extension won't solve that problem. In fact, many of the media reported incidents were well beyond even a 2-year statute.

Plus, there are tolling doctrines which stop the statute of limitations from running even if the accrual date has passed. While statutes of limitation tip the balance in favor of defendants, tolling doctrines reset the balance when circumstances beyond the plaintiffs' control prevent them from filing suit within the limitations period. The discovery rule and the doctrines of equitable tolling and estoppel can save an otherwise time-barred claim. The tolling doctrines provide an avenue to prevent injustice on a case-by-case basis.

Finally, there is the continuing violation doctrine, as applied by the courts, which serves to mitigate a short statute of limitations. The continuing violation theory allows a court to examine harassing events that occur outside the 180-day limitations period so long as they form part of a pattern of harassing conduct that continues into the 180-day limitations period.

Because of the discovery rule, equitable tolling and the continuing violations theory, plaintiffs do already have some recourse on a case-by-case basis to show reasons for not coming forward sooner. Extending

the SOL will cause employers to have to defend against stale charges at the risk of loss of the evidence to defend claims. "Justice" between two parties requires truth in fact-finding and the passage of time itself defeats "justice."

Conclusion

We applaud the proposed bills' efforts to stop harassment, but for many organizations, a major shift in culture is also what is necessary. Respectfully, the solution is beyond training and awareness as offered by some of the proposed bills. We have tried that for years with limited success. We need to prioritize organizational culture, power balance and equity and address implicit bias to create a dynamic where sexual harassment does not exist and simply can't thrive. Thank you for the opportunity to address these important issues.