Addressing Workplace Sexual Harassment:

Public Policy Solutions for Utah

August 11, 2022

WHITE PAPER | No. 6

UTAH WOMEN & LEADERSHIP Project

Utah State University

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Introduction

Sexual harassment continues to occur in United States workplaces despite being prohibited by law for decades. During the federal fiscal year 2021,[1] 8,191 sexual harassment claims were filed with the federal government and companion state government agencies that administer sexual harassment laws.[2] Fifty-eight of these were filed in Utah. In 2019, pre-pandemic, 11,283 claims were filed nationwide, including 90 filed in Utah. The highest number of U.S. sexual harassment claims filed—16,245—occurred in 1997, and the highest number filed in Utah—186—occurred in 2003.

These numbers represent only a tiny fraction of workplace sexual harassment. A 2016 U.S. Equal Employment Opportunity Commission (EEOC)[3] report noted surveys showing that 58% of women have experienced sex-based harassment, but only 30% of individuals raised it to a supervisor, manager, or union representative and only 6% to 13% of individuals file a formal legal complaint.[4] Another report found that about five million employees are sexually harassed at work each year, but 99.8% never file a legal claim.[5] Further, a 2020 Utah Women & Leadership Project study regarding sexist comments in the workplace found that 37% of women surveyed heard sex-based comments, but only 4% reported them to a superior.[6]

Workplace sexual harassment causes harm. Harms to individuals being sexually harassed include negative mental and physical health effects, reduced opportunities for on-the-job learning and advancement, forced job changes, unemployment, and/or abandonment of well-paying careers.[7] These "psychological, physical, occupational, and economic harms … can ruin an employee's life."[8] Sexual

[1] The federal fiscal year runs from October 1 of one year through September 30 of the next. USA.gov. (n.d.). Budget of the U.S. Government. https://www.usa.gov/budget#:~:text=Every%20year%2C%20Congress%20begins%20work,September%2030%20of%20the%20next

[2] U.S. Equal Employment Opportunity Commission (EEOC). (n.d.) EEOC & FEPA charges filed alleging sexual harassment, by state & gender FY 1997 - FY 2021. https://www.eeoc.gov/statistics/eeoc-fepa-charges-filed-alleging-sexual-harassment-state-gender-fy-1997-fy-2021

[3] The EEOC is the federal agency responsible for enforcing the federal anti-harassment law.

[4] Feldblum, C., & Lipnic, V. (2016 June). *Select task force on the study of harassment in the workplace.* https://www.eeoc.gov/select-task-force-study-harassment-workplace. Sex-based harassment includes letters, phone calls, or materials of a sexual nature; pressure for sexual favors; touching, leaning over, cornering, or pinching; pressure for dates; sexually suggestive looks or gestures; and sexual teasing, jokes, remarks or questions.

[5] McCann, C., Tomaskovic-Devey, D., & Badgett, M. (n.d.). Employer's responses to sexual harassment. *Center for Employment Equity, University of Massachusetts Amherst*. https://www.umass.edu/employmentequity/employers-responses-sexual-harassment

[6] Scribner, R. T., Madsen, S. R., & Townsend, A. (2021, November 4). *Sexist comments & responses: Study introduction and overview.* Utah Women & Leadership Project. https://www.usu.edu/uwlp/files/briefs/38-sexist-comments-study-introduction-overview.pdf. The study examined 23 categories of sexist comments. Of those, this paper draws data from six categories: accusations of using sex to get ahead, focus on physical appearance/bodies, sexual harassment, sexualizing women, unwanted sexual advances, and unwanted sexual advances.

[7] Shaw, E., Hegewisch, A., & Hess, C. (2018 October). *Sexual harassment and assault at work: Understanding the costs.* Institute for Women's Policy Research. https://iwpr.org/wp-content/uploads/2020/09/IWPR-sexual-harassment-brief_FINAL.pdf

[8] Feldblum, C., & Lipnic, V. (2016).

harassment harms employers as well. These harms include legal costs, reputational damage, increased employee turnover, increased absences, and reduced productivity.[9]

The 2016 EEOC report previously cited called for a "reboot of harassment prevention efforts" and issued a call to action:

> [The EEOC] will always only be one piece of the solution. Everyone in society must feel a sense of urgency in preventing harassment [including]: … state … government agencies …. This is the only way we will achieve the goal of reducing the level of workplace harassment to the lowest level possible."[10]

With 60% of Utah's women participating in the workforce,[11] it is time for Utah's lawmakers to act on the EEOC's call for action to reduce workplace sexual harassment within our state. To frame a pathway for legislative action, this paper provides a short history and background of the federal and Utah sexual harassment laws, along with mentioning a few related recent events and federal/state law responses. This report then summarizes current federal and state harassment laws and concludes with targeted recommendations for Utah's lawmakers.

History and Background

In 1964, the U.S. Congress passed the Civil Rights Act. Title VII of this Act prohibited covered employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … sex[.]"[12] However, it was not until 1980 that the EEOC issued regulations declaring that sexual harassment violated Title VII,[13] and not until 1986 that the U.S. Supreme Court confirmed this.[14]

Utah passed its antidiscrimination law in 1969.[15] It prohibited discrimination on the basis of sex. A prohibition against retaliation was added in 1985 and another against harassment in 1989.[16] A regulation issued by the state government agency—the Utah Antidiscrimination and Labor Division (UALD) of the Utah Labor Commission—currently defines sexual harassment identical to the federal regulation, which was first adopted in 1988.[17]

Two recent events have also impacted the US sexual harassment landscape. First, as mentioned above, the EEOC issued a report in 2016, which was the 30th anniversary of the U.S. Supreme Court case recognizing that Title VII prohibited sexual harassment.[18] Report authors were struck by the number of sexual and other harassment complaints the EEOC continued to receive each year. After examining workplace harassment for 18 months, report authors concluded that "we have come a far way since that day [thirty years ago], but sadly and too often still have far to go."[19] The report's executive summary included the following key findings:

- Workplace harassment remains a persistent problem.

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[9] Feldblum, C., & Lipnic, V. (2016); Shaw, E., Hegewisch, A., & Hess, C. (2018).
[10] Feldblum, C., & Lipnic, V. (2016).
[11] Utah Department of Workforce Services. (2021 January). *2015 - 2019 women in the workforce.* https://jobs.utah.gov/wi/data/library/laborforce/womeninwf.html
[12] See 42 U.S.C. § 2000e-2(a)(1).
[13] 29 C.F.R. § 1604.11.
[14] Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
[15] 1969 Utah Laws 451 (Initial code section was Utah Code § 34-35-6(1)(a)).
[16] 1985 Utah Laws 530; 1989 Utah Laws 376 (Current code section is Utah Code Ann. § 34A-5-106(1)(a)(i)).
[17] As initially adopted in 1988, the regulation said "[t]he Division adopts the federal EEOC guidelines on sexual harassment as specified in 29 CFR Section 1604.11." Utah Admin Code § R486-1-1(K) (1988). In 1994, it was changed to specifically lay out the definition of sexual harassment, which definition is the same as that in 29 C.F.R. 1604.11 quoted in the body above. Utah Admin. Code § R560-1-2(K) (1994). The current rule is found at Utah Admin. Code § R606-1-2(J).
[18] Feldblum, C., & Lipnic, V. (2016).
[19] Feldblum, C., & Lipnic, V. (2016).

- Workplace harassment too often goes unreported.
- There is a compelling business case for stopping and preventing harassment.
- Prevention starts at the top; leadership and accountability are critical.
- Harassment training must change. New and different approaches to training should be explored.
- A nationwide "It's on Us" campaign should be explored to transform the problem of workplace harassment from being about targets, harassers, and legal compliance, into one in which co-workers, supervisors, clients, and customers all have roles to play in stopping harassment.[20]

Second, in late 2017, the #MeToo movement began. This is a movement—against sexual abuse, sexual harassment, and rape culture— in which people publicize their experiences of sexual abuse or sexual harassment.[21] Following numerous sexual abuse allegations against Harvey Weinstein in October 2017, the movement spread as a hashtag on social media.[22] On October 15, 2017, American actress Alyssa Milano posted on Twitter, "If all the women who have been sexually harassed or assaulted wrote 'Me too' as a status, we might give people a sense of the magnitude of the problem."[23] Tens of thousands of people replied with #MeToo stories.[24] The movement led to high-profile terminations such as Matt Lauer from the Today show and Garrison Keillor from Minnesota Public Radio.[25]

Following these two events, Congress and state legislatures acted. Congress passed two laws. The first prohibits income tax deductions for sexual harassment settlements and related attorney fees if such settlements are subject to nondisclosure agreements.[26] The second prohibits pre-dispute arbitration agreements and class action waiver agreements relating to sexual harassment disputes.[27] Similarly, by 2020, 12 states[28] adopted laws to curtail the use of nondisclosure agreements and seven states[29] prohibited pre-arbitration agreements, class action waivers, and jury trial waivers in sexual harassment cases.[30] Additional new state laws enacted by 2020:

- expanded the employers covered by sexual harassment laws (two states)[31]
- changed the definition of sexual harassment to make it easier to prove (two states)[32]
- extended statutes of limitations to file sexual harassment claims (five states)[33]

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[20] Feldblum, C., & Lipnic, V. (2016).
[21] MeToo movement. (n.d.) In *Wikipedia*. https://en.wikipedia.org/wiki/MeToo_movement#2017_(Alyssa_Milano). The phrase was originally used in 2006 by sexual assault survivor and activist Tarana Burke. Chicago Tribune. (2021, February 4). *#MeToo: A timeline of events.* https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html
[22] MeToo movement. (n.d.).
[23] MeToo movement. (n.d.).
[24] MeToo movement. (n.d.).
[25] Chicago Tribune. (2021).
[26] 26 U.S.C. § 162(q).
[27] 9 U.S.C. § 402(a).
[28] Arizona, California, Illinois, Louisiana, Nevada, New Jersey, New York, Oregon, Tennessee, Vermont, Virginia, and Washington. Johnson, A., Menefee, K., & Sekaran, R. (2019 Dec); *Progress in advancing Me Too workplace reforms in #20statesby2020.* National Women's Law Center. https://nwlc.org/wp-content/uploads/2019/07/final_2020States_Report-12.20.19-v2.pdf; Christiansen, E. (2020, May 8). *How are the laws sparked by #MeToo affecting workplace harassment?* American Bar Association. https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/
[29] California, Illinois, Maryland, New Jersey, New York, Vermont, and Washington. Johnson, A., Menefee, K., & Sekaran, R. (2019); Christiansen, E. (2020).
[30] Christiansen, E. (2020).
[31] Maryland and New York. Johnson, A., Menefee, K., & Sekaran, R. (2019).
[32] California and New York. Johnson, A., Menefee, K., & Sekaran, R. (2019); New York State Division of Human Rights (n.d.). *Important updates to the New York State Human Rights Law*. https://dhr.ny.gov/sites/default/files/pdf/nysdhr-legal-updates-10112019.pdf
[33] California, Connecticut, Maryland, New York, and Oregon. Johnson, A., Menefee, K., & Sekaran, R. (2019).

- extended liability to individuals along with employers (one state)[34]
- allowed punitive damages (one state)[35]
- required sexual harassment training (six states)[36]
- required written sexual harassment policies (five states)[37]
- imposed reporting and disclosure requirements to state government agencies (two states)[38]

Summary of Current Federal and State Harassment Laws

UWLP researchers began this project by conducting a thorough federal and 50-state analysis of current sexual harassment laws (see Appendix A). Data were collected from all states by exploring sources based on answering 15 specific questions:

1. Is there a law that prohibits sexual harassment in the workplace?
2. Does the law define sexual harassment?
3. What employers does the law cover?
4. What employees does the law cover?
5. Does the law provide for personal liability against a company leader/supervisor or just organizational liability?
6. Are there general exceptions?
7. Is there an anti-retaliation provision in the law?
8. What is the enforcement agency?
9. Does the law give the employee an immediate private right of action in court?
10. What is the law's statute of limitations?
11. Are the following types of damages and remedies available in the law (equitable, compensatory, punitive, and attorney fees/court costs for prevailing party)?
12. Does the law require workplace sexual harassment training? If yes, of whom and how often?
13. Does the law require employers to display notice to employees of sexual harassment protection?
14. Does the law require that employers have a written sexual harassment policy?
15. Do the laws include other sexual harassment protections? (Appendix A titles this as "Other Information")

Appendix B provides a summary of the results of each of these questions. The section below includes a high-level overview of the findings of this research.

Federal: Title VII does not explicitly prohibit sexual harassment, but EEOC regulations state Title VII prohibits it and also define it. The law applies to persons with 15 or more employees and defines those protected as individuals employed by such employers. There are exceptions to definitions of employer and employee. For example, *employers* do not include the United States government, and *employees* do not include state elected officials. Title VII prohibits retaliation against those who raise sexual harassment concerns.

Individuals who feel they have been sexually harassed must file a charge with the EEOC; they cannot immediately file a lawsuit in court. Charges must be filed within 180 days of the harassment, which is extended to 300 days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. Individuals can recover equitable damages like reinstatement and back pay, compensatory and punitive damages (capped based on employer size), and attorney fees and costs. The statutory language is unclear as to whether individuals can recover damages from organization leaders, in addition to organizations. In addition, Title VII does not require employers to provide sexual harassment

[34] California. Christiansen, E. (2020).
[35] New York. Johnson, A., Menefee, K., & Sekaran, R. (2019).
[36] California, Connecticut, Delaware, Illinois, Maine, and New York. Johnson, A., Menefee, K., & Sekaran, R. (2019); Christiansen, E. (2020).
[37] Illinois, New York, Oregon, Vermont, and Washington. Johnson, A., Menefee, K., & Sekaran, R. (2019).
[38] Illinois and Maryland. Christiansen, E. (2020).

training or have a written sexual harassment policy. The required Title VII workplace poster does not mention sexual harassment.

As mentioned previously, newer sexual-harassment-protection laws preclude pre-dispute arbitration agreements and joint/class-action waivers, as well as income tax deductions for any settlement/payment related to sexual harassment and accompanying attorney fees if subject to a nondisclosure agreement.

Other States: Three states have no applicable law. Of the remaining 46 states (excluding Utah), 38 prohibit sexual harassment, 17 explicitly in their laws and 21 based on government agency regulations or websites. Eight additional states prohibit sex discrimination, but do not mention sexual harassment in their laws or government agency regulations or websites. Of the 38 states that prohibit sexual harassment, 29 define sexual harassment either in their laws or government agency regulations. Forty-five of the 46 states that prohibit sexual harassment directly or sex discrimination more broadly apply to persons with 15 or fewer employees, with one employee being the most common (21 states). Many state laws also apply to state, county, and local government employers. A few also apply to agents of another person/employer, government contractors, and/or those employing domestic employees. Twenty-five state laws define protected employees identically or similarly to the federal definition, "[a]n individual employed by an employer." Six of these connect the employee definition to pay or wages. One of these adds that full-time and part-time employees are protected. A few also protect applicants, apprentices, unpaid interns, volunteers, and/or independent contractors. Thirty-nine state laws include exceptions to their employer and/or employee definitions, or to the application of the entire law. Forty-four state laws preclude retaliation.

Forty-four[39] of the 46 states that have applicable laws (not including Utah) have a state enforcement agency. In 29 states, individuals who feel they have been sexually harassed must file a charge with this agency; they cannot immediately file a lawsuit in court. In the remaining 17 states, an individual can file a lawsuit in court, three of these only in limited circumstances. The allowed time to file a charge or lawsuit ranges from 180 days to six years. Individuals are explicitly allowed to recover equitable damages in 40 states, compensatory damages in 30 states (capped in 14), punitive damages in 24 states (capped in 15), and attorney fees/costs in 33 states. In addition to organizations, four states explicitly allow claimants to recover damages from organization leaders as well. Four states explicitly prohibit this, three states' do not mention this, and 35 states' laws are unclear.

Nineteen states require training for at least some employees. Twenty-one require at least some organizations to display a notice of sexual harassment protections. Twelve require at least some organizations to have written policies.

The most-common, newer state laws providing sexual harassment protections prohibit nondisclosure agreements in sexual harassment settlements (14 states). Other newer state laws prohibit arbitration of sexual harassment claims, extend protections to independent contractors, and require organizations to report sexual harassment information to the government.

Utah: Utah's law prohibits sexual harassment in the workplace and UALD regulations define sexual harassment the same as the EEOC regulation. Utah's law applies to persons employing 15 or more employees, as well as the State, a political subdivision, and a board, commission, department, institution, school district, trust, or agent of the state or a political subdivision of the state. It does not apply to various religious entities and leaders, as well as the Boy Scouts. The law protects a person applying with or employed by an employer and does prohibit retaliation.

Utah's enforcement agency is the UALD. Claimants must file a charge with the UALD, and they cannot bring a lawsuit in state civil court. Charges must be filed within 180 days. Utah's law explicitly mentions that individuals can be awarded equitable relief (reinstatement, as well as back pay and benefits), and attorney fees/costs. It does not mention compensatory or punitive damages. The statutory language is

[39] One of the two excluded here is North Carolina, which does not have an agency for charges by employees of private employers, but does have one for employees of state and local government employees.

unclear as to whether individuals can recover damages from organizational leaders in addition to organizations.

Utah only requires *state* employees to receive sexual harassment training. It does not require employers to display notices to employees of sexual harassment protections or have written sexual harassment policies. Utah also has not adopted any newer types of sexual-harassment-protection laws.

Recommendations for Utah

The continuing prevalence of workplace sexual harassment, its harms, and the large percentage of Utah women in the workforce provide an incontrovertible basis for Utah to act on the EEOC's call to reduce workplace harassment. Based on our extensive research, we propose the following three areas of recommendations for Utah legislative action.

1. REQUIRE PREVENTION MEASURES AND PROVIDE EMPLOYER TOOLS.

   Utah should focus on the root of the problem—workplace sexual harassment continues despite being prohibited for decades—and require three prevention measures based on the premise that awareness is the first step to change.[40]

   a. REQUIRE EMPLOYERS TO CONDUCT RECURRENT SEXUAL HARASSMENT TRAINING: Utah should require all employers covered by its antidiscrimination act to provide recurrent sexual harassment training, not just state employers. Forty-one percent of the other 46 states with applicable laws (n = 19) require at least some employers to provide such training. However, "much of the training done over the last 30 years has not worked as a prevention tool. … Training must change."[41] The 2016 EEOC report recommended and provided specifics for four types of training: (1) all-employee compliance training on a regular basis; (2) middle-management and first-line supervisor training; (3) workplace civility training; and (4) bystander intervention training.[42] When formulating sexual harassment training requirements, Utah should review and incorporate these specifics, as well as research done in the intervening years.[43] To date, we specifically recommend the two types of training that have shown the most promising results: (2) middle-management and first-line supervisor training and (4) bystander intervention training.[44] Additionally, Utah should allocate appropriate budget and resources to the UALD to prepare models of these types of trainings. The UALD could also be tasked to prepare model training on conducting investigations, due to the EEOC's recommendation that employers "devote sufficient resources so that workplace investigations are prompt, objective, and thorough."[45]

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[40] Sudbrink, L. (2015 April 15). *The five steps of change.* American Management Association. https://www.amanet.org/articles/the-five-steps-of-change/

[41] Feldblum, C., & Lipnic, V. (2016).

[42] Feldblum, C., & Lipnic, V. (2016).

[43] The EEOC Task Force report acknowledged "[a]s with workplace civility training, more research is needed to determine the effectiveness of bystander intervention training as a workplace harassment prevention measure." Feldblum, C., & Lipnic, V. (2016). One intervening study confirmed that management and bystander intervention trainings were promising alternatives to existing sexual harassment trainings. Dobbin, F., & Kalev A. (2020 May-June). Why sexual harassment programs backfire. *Harvard Business Review*. https://hbr.org/2020/05/why-sexual-harassment-programs-backfire

[44] Dobbin, F., & Kalev, A. (2020, May-June); Lawrence, A. (2020, May-June). Empower managers to stop harassment. *Harvard Business Review.* https://hbr.org/2020/05/empower-managers-to-stop-harassment; Santos, A. (2020, May-June). "If something feels off, you need to speak up." *Harvard Business Review*. https://hbr.org/2020/05/if-something-feels-off-you-need-to-speak-up

[45] Feldblum, C., & Lipnic, V. (2016).

b. REQUIRE EMPLOYERS TO POST NOTICE OF SEXUAL HARASSMENT RIGHTS: Forty-six percent of the other 46 states with applicable laws (n = 21) require notices. As a tool for employers, Utah should direct the UALD to prepare a model poster.

c. REQUIRE EMPLOYERS TO HAVE AND PERIODICALLY DISTRIBUTE WRITTEN SEXUAL HARASSMENT POLICIES: Utah should require employers to have a written sexual harassment policy that is distributed to new hires and periodically thereafter, perhaps along with the recurrent trainings. While fewer of the other 46 states with applicable laws require such policies (n = 12), this is a trending step in the #MeToo era and it would be efficient for Utah to advance sexual harassment awareness in one holistic step. Utah should incorporate recommendations from the 2016 EEOC report (e.g., comprehensive anti-harassment policy, multi-faceted reporting procedures) and task the UALD to prepare a model policy.[46]

d. CONDUCT COMPREHENSIVE, STATE-WIDE STUDY ON SEXUAL HARASSMENT INCIDENTS, REQUIRE EMPLOYERS TO REPORT SEXUAL HARASSMENT DATA TO UALD, AND ENACT ADDITIONAL PREVENTION MEASURES BASED ON DATA: Beyond the above three prevention measures, Utah would be prudent to increase the government's collective awareness regarding why workplace sexual harassment continues despite being prohibited for decades so that it can implement other prevention measures. To do so, Utah could conduct a comprehensive study on workplace sexual harassment occurring in Utah. It could also require employers to report sexual harassment data to the UALD. (Illinois requires employers to annually disclose their total number of adverse sexual harassment agency rulings.[47] Maryland requires certain employers to report sexual harassment settlement data, with the state agency then submitting a summary to government leaders). [48] Once collected, Utah could implement additional prevention measures based on the data.

2. TAKE STEPS TO REDUCE RETALIATION.

Utah should next focus on the troubling corollary to the problem's root. Not only does workplace sexual harassment continue, but the vast majority of women experiencing it do not report it or bring legal claims because of retaliation. "Sixty-eight percent of sexual harassment allegations [filed with the EEOC and companion state government agencies] include a charge of employer retaliation in the face of a discrimination complaint. Almost two-thirds of those filing sexual harassment charges (64%) report losing their jobs because of their complaint. … The very low proportion of employees who file sexual harassment complaints is very likely to be related to employers' typically punitive responses."[49] These sobering percentages exist even though the federal government, Utah, and 44 of the other 46 states with applicable laws prohibit retaliation. Utah should take the following steps to reduce retaliation.

a. MANDATE THAT REQUIRED SEXUAL HARASSMENT TRAINING ALSO COVER RETALIATION: Returning to the premise that awareness is the first step to change, Utah should require the various types of workplace sexual harassment training to also cover retaliation. When crafting training requirements, Utah should review appropriate research to determine how to best raise awareness about preventing workplace retaliation.

[46] Feldblum, C., & Lipnic, V. (2016).
[47] 775 ILCS 5/2-108(B), (C).
[48] Md. S.B. 1010 (2018).
[49] McCann, C., Tomaskovic-Devey, D., & Badgett, M. (n.d.).

b. MANDATE THAT REQUIRED SEXUAL HARASSMENT NOTICE ALSO INCLUDE RETALAITION RIGHTS: Utah should direct the UALD to include retaliation information in the model poster.

c. MANDATE THAT REQUIRED SEXUAL HARASSMENT POLICIES ALSO PROHIBIT RETALIATION: Rolling the awareness premise forward, Utah should require workplace sexual harassment policies to prohibit retaliation. Policies should include the multi-faceted reporting procedures recommended in the 2016 EEOC report. Such procedures can reduce retaliation because claimants can raise concerns to organizational leaders other than the alleged harasser or those allied therewith, whom are often those most inclined to retaliate.

d. INCLUDE QUESTIONS ON RETALIATION INCIDENTS IN COMPREHENSIVE STATE-WIDE STUDY: If the comprehensive study suggested above is undertaken, Utah could include questions on workplace retaliation. This could be followed up with the implementation of additional steps to reduce retaliation based on the data collected.

e. ADOPT LEGAL PROVISIONS TO DETER RETALIATION: Utah could adopt legal provisions to deter retaliation. For example, liability could be extended to *individuals* that engage in retaliation (in addition to organizations).[50] Available damages could also be increased for sexual harassment claims that include retaliation claims. Damages could follow Utah's law for compensation discrimination, which allows additional damages equal to back pay.[51]

f. CHANGE UALD PROCEDURES: For example, Utah could implement methods and allocate appropriate resources to decrease the time the UALD takes to bring charges to closure. This would shorten the window of time during which retaliation could occur. Going further, UALD investigators could be required to check in during the investigation process to see if retaliation is happening. If so, appropriate penalties could be established. Finally, consideration could be given to the UALD fast-tracking retaliation charges in furtherance of government commitment to root out retaliation.

3. REMOVE BARRIERS TO LEGAL REDRESS.

Utah should remove barriers to legal redress that exist in the two current options claimants have for redress, as well as in Utah's Antidiscrimination Act. Doing so will reduce workplace sexual harassment by: (1) helping to timely resolve, and thus end, sexual harassment prompting claimants to seek legal redress; (2) deterring sexual harassment; and (3) providing legal recourse to address, and thus end, sexual harassment in situations currently lacking such recourse.

a. BAN NONDISCLOSURE AND NO-REHIRE PROVISIONS IN PARTICULAR AGREEMENTS: The first option claimants have to seek legal redress for workplace sexual harassment in Utah is to settle with the employer. Utah could facilitate timelier settlements by prohibiting nondisclosure provisions ("NDAs") in such settlement agreements. These provisions restrict claimants from sharing information surrounding the concerns being settled.[52] NDAs might also be in employment agreements, restricting employees from sharing information surrounding future sexual harassment concerns. Because "NDAs can silence individuals who have experienced harassment and empower employers to hide ongoing

[50] See recommendation 3.d. below.
[51] Utah Code Ann. § 34A-5-107(9). Pennsylvania allows compensatory and attorney fees/costs only in connection with retaliation claims and South Dakota allows punitive damages only in connection with retaliation claims.
[52] Limited allowances to disclose are required per federal law, such as allowing a claimant to file an EEOC claim.

harassment, rather than undertake the changes needed to end it[,]"[53] Utah should prohibit NDAs as conditions of both employment and settlement. Fourteen states have enacted similar laws. To balance employee and employer interests, Utah's prohibition could bar NDAs that prevent employees from disclosing factual information but allow restrictions on disclosing settlement amounts.[54]

Utah could also prohibit no-rehire provisions in workplace sexual harassment settlement agreements. These provisions state the claimant will not seek future employment with the employer or its related entities. While only three states have enacted such laws, these provisions add insult to injury. Not only have claimants been sexually harassed, but now they can no longer work for an organization where they have put in time and effort. Additionally, such provisions "disincentivize others from coming forward when they experience harassment."[55]

Removing these two barriers could restore some balance to the parties' negotiating positions and thus help to move the negotiations to closure in a timelier manner and end the sexual harassment at issue. Such prohibitions may also further help to reduce workplace sexual harassment by deterring such conduct because the accused will want to avoid situations where they desire to settle a claim but cannot limit disclosure or future employment.

b. AUDIT UALD PROCESS AND IMPLEMENT LEGISLATIVE RESPONSES: The second option claimants have to seek legal redress for sexual harassment in Utah is to file a charge of harassment with the UALD (or the EEOC). A January 2017 audit by the Utah Legislative Auditor General revealed barriers to the UALD process, including the investigation process was insufficient, mediations needed better processes, and the low rate of cause findings was concerning.[56] In response, the UALD indicated they would implement improvements, with most targeted to be completed by the end of 2017.[57] Given the audit's findings and the passage of years, the time is ripe for Utah to re-audit the UALD process to ascertain if barriers have been removed and, if not, implement appropriate legislative responses to do so. Removing barriers to this option would help ensure that workplace sexual harassment is timely resolved and ended.

c. EXTEND STATUTE OF LIMITATION: Utah's current SOL is 180 days. This is the shortest SOL for civil claims in Utah, and it applies to only one other type of claim against tax collectors.[58] Of the 30 states (including Utah) that require an agency charge, 47% (N=14) have SOL's longer than 180 days, with 300 days being the most common (N=8). Of the remaining 17 states that also allow a lawsuit, 94% (N=16) have SOLs for lawsuits of longer than 180 days, with one and two years tying for the most common (N=4 each). Nearly 30% (N=5) have SOLs of three years or longer. At a minimum, Utah should amend the Act to lengthen the SOL to at least 300 days, if not one or two years. However, because Utah follows the federal sexual harassment definition, a longer SOL is recommended. Many claimants must show the alleged harassment is pervasive, which requires a pattern over

[53] Johnson, A., Menefee, K., & Sekaran, R. (2019).
[54] For an example, see Cal. Civ. Proc. Code § 1001; Cal. Gov't Code § 12964.5.
[55] Johnson, A., Menefee, K., & Sekaran, R. (2019).
[56] Office of the Legislative Auditor General, State of Utah. (2017 Utah). A performance audit of the Utah Antidiscrimination and Labor Division's Employment Discrimination Unit. https://le.utah.gov/interim/2017/pdf/00002314.pdf. For the federal fiscal year 2015, the UALD found cause in only 0.4% of the cases it closed. Comparatively, the EEOC had a 3.5% cause rate, and state government agencies nationwide has an average 1.5% cause rate.
[57] Maughan, J. (2017, January 11). https://le.utah.gov/interim/2017/pdf/00002314.pdf
[58] Utah Code Ann. § 78B-2-301.

time.[59] Short SOLs do not allow the required pattern to materialize. Utah could apply its existing three-year SOL, which applies to liability created by state statutes.[60] The Act would be among such statutes if it did not otherwise specify a shorter SOL. If a longer SOL is adopted, Utah should analyze how it would interact with the EEOC's 300-day SOL and determine if tolling or other coordination measures would be advisable.

d. ADD STATE COURT OPTION FOR LEGAL REDRESS: Utah could allow claimants to immediately file a lawsuit in Utah's civil courts.[61] Thirty-seven percent of the other 46 states with applicable laws (n = 17) allow this. Doing so would be particularly vital to timely resolve and end sexual harassment if the recommended re-audit of the UALD process continues to show barriers. Even if the UALD process has no barriers, a private right of action will sometimes still be the timeliest way to resolve and end sexual harassment (e.g., for lawsuits involving multiple statutes – some of which are outside the UALD's jurisdiction). Absent a private right of action, the claimant would have to pursue both an agency charge and a court action. This wastes the time (and money) of all involved—the claimant, the employer, and the government.

e. ALLOW COMPENSATORY AND PUNITIVE DAMAGES AND ADD INDIVIDUAL LIABILITY: Utah could also address two barriers that soften the deterrent impact of Utah's Antidiscrimination Act. First, Utah's Act could be amended to explicitly allow claimants to recover compensatory and punitive damages. The federal government allows both. Thirty states allow compensatory damages and 24 allow punitive damages. If Utah places caps on these damages, it could consider indexing them to rise over time.[62] Second, in addition to organizations, Utah could hold individuals, such as managers and supervisors, liable for damages. Four states allow this and only four rule this out. The laws of three of the other 46 states with applicable laws are silent. The federal law, Utah's law, and 35 of the other 46 states' laws are not clear. Utah's Act could be clarified to add individual liability for damages.[63]

f. EXPAND SCOPE OF UTAH'S ANTIDISCRIMINATION ACT: Barriers in Utah's Antidiscrimination Act preclude the current UALD process and any new lawsuit option from providing legal recourse in three situations. To overcome these barriers, Utah's Act could be amended to expand its scope. Specifically, Utah could expand the definition of employer to include those with less than 15 employees.[64] Nearly one in five Utah employees work for such employers[65] and effectively have no legal recourse for sexual harassment unless it

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[59] EEOC. (n.d.). Harassment. https://www.eeoc.gov/harassment. "Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. … A 'hostile environment' claim generally requires a showing of a pattern of offensive conduct. … When the alleged harassment consists of verbal conduct, the investigation should ascertain the nature, frequency, context, and intended target of the remarks." EEOC. (1990 March 19). Policy guidance on current issues of sexual harassment. https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment

[60] Utah Code Ann. § 78B-2-305(4).

[61] Claimants can opt out of the UALD process by requesting a right to sue letter from the EEOC, which allows them to bring a lawsuit in federal – not state – court.

[62] Title VII's damage caps on compensatory and punitive damages have not increased since 1991, when first enacted. 42 U.S.C. § 1981a(a)(1), (b)(3).

[63] Utah case law should be reviewed to account for any relevant cases in formulating the recommended amendments. In addition, study of the deterrent effect of other states' laws expanding liability to individuals could be prudent in light of individuals' more limited resources to pay damage awards.

[64] H.B. 283 in the 2018 legislative session proposed expanding coverage to employers who employ 5 employees.

[65] Carlisle, N. (2018 March 2). Utah Legislature passes a bill aimed at hostile workplaces, but 271,794 workers can still be sexually harassment and discriminated against with no legal recourse. *Salt Lake Tribune*.

constitutes egregious conduct under another law such as criminal or civil assault. Thirty-nine of the other 46 states with applicable laws cover employers with fewer than 15 employees, with one employee being the most common (n = 21). Next, Utah could expand the definition of sexual harassment. Two states have removed one portion of the federal definition, no longer requiring the conduct be severe or pervasive. Removing this would not result in a free-for-all. Claimants would still have to prove conduct was unwelcome, based on the protected class of sex, and had the purpose/effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Finally, Utah could refine the Act's exceptions. For example, the Act defines covered employers and then excludes religious entities from that definition. Thus, the Act's prohibitions, including its sexual harassment prohibition, do not apply to religious entities. Utah could amend its Act to align with federal Title VII and focus the religious-entity exclusion on the employment of individuals of a *particular religion*, meaning that a religious employer is excluded from the prohibition against religious discrimination and can hire a person of its religion, but not sexually harass that person.[66] Removing these barriers allows those legitimately experiencing workplace sexual harassment to seek legal recourse and put an end to it. Their removal could also deter those newly covered by the Act from engaging in sexual harassment, thereby reducing conduct that—but for the Act's outdated wording—would otherwise constitute prohibited harassment.

Conclusion

Tragically, workplace sexual harassment continues to happen today and is vastly under-reported. This harassment causes extensive harms to the individuals harassed, the vast majority of whom are women. For example, many of these women are harassed into leaving their jobs, despite being well-qualified, dependable workers. Workplace sexual harassment also harms organizations. One lost sexual harassment claim can set an employer back hundreds of thousands of dollars in both damages paid and talent lost. The extensiveness of these harms grows exponentially when juxtaposed with the reality that the majority of Utah's women participate in the workforce. Today's economy—with its low unemployment, need for skilled workers, and tight bottom-lines—can no longer withstand a workplace climate that forces capable women workers to the sidelines.

State legislatures have been called upon to act to reduce workplace sexual harassment. To answer this call, Utah's legislature should require workplace sexual harassment prevention measures, take steps to reduce retaliation that occurs once sexual harassment concerns are raised in the workplace, and remove barriers to legally redress this harassment. These actions will provide helpful compliance tools to Utah employers and modernize Utah's Antidiscrimination Act, which, as time has shown, left much to be done to significantly reduce workplace sexual harassment.

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https://www.sltrib.com/news/politics/2018/03/02/utah-legislature-passes-a-bill-aimed-at-hostile-workplaces-but-271794-workers-can-still-be-sexually-harassed-and-discriminated-against-with-no-legal-recourse/

[66] Title VII defines covered employers and then excludes certain organizations from that definition—but not religious entities. It goes on to state that Title VII does not apply to "religious [entities] with respect to the employment of individuals of a *particular religion,*"[66] but religious entities must otherwise comply with all of Title VII's prohibitions, including that against sexual harassment. 42 U.S.C. § 2000e-1(a). While outside the scope of data collected for this paper, other western states such as Arizona (A.R.S §41-1462) and Nevada (Nev. Rev. Stat. Ann. § 613.320) provide this more focused religious-entity exclusion.

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This white paper was commissioned by Dr. Susan R. Madsen of the Utah Women & Leadership Project (UWLP), which is housed in the Jon M. Huntsman School of Business at Utah State University (USU) and works in partnership with USU Extension. The mission of the UWLP is to strengthen the impact of Utah girls and women. The UWLP serves Utah and its residents by first, producing relevant, trustworthy, and applicable research; second, creating and gathering valuable resources; and third, convening trainings and events that inform, inspire, and ignite growth and change for all Utahns. For questions, email Dr. Susan Madsen at susan.madsen@usu.edu and find other publications and resources at http://utwomen.org/.

Acknowledgements: Special thanks to Dr. Susan R. Madsen for her guidance, coaching, and editing, and to other UWLP staff members, Kylie Downs and Dr. Emily Darowski, for their reviews.