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Statement to House Labor Committee
In Support Of
19-H 5340, H-5341, H-5342, H-5343, H-5344, H-5345, H-5346, H-5361, and H-5439
February 27, 2019

Good evening. My name is Lynette Labinger and I am a cooperating attorney with the ACLU of RI.

Chair Williams, members of the House Labor Committee. I am here to address nine of the twelve bills that are under consideration this evening. These bills are House bills 5340-5346, 5361, and 5439.

The ACLU of RI supports the changes set forth in all nine bills. There is some overlap, and some cover more ground than others. Together they would achieve considerable improvements in the laws addressing sexual harassment and other discrimination.

The changes to current laws made by these bills are modest but important. By, among other things, extending the current very short statute of limitations for filing formal complaints of workplace discrimination, adding new reporting requirements for state agencies so the extent of any problems can be better assessed, and addressing the deeply troubling practice of mandated non-disclosure

and non-disparagement agreements in employment contracts, these bills recognize the need to provide better avenues of relief to discrimination victims without imposing undue or unfair burdens on employers.

In addition, while the focus of some of the legislation is specifically about sexual harassment, it is worth emphasizing that many of the amendments being proposed by these bills do not focus exclusively on sexual harassment or discrimination and would improve the ability of all persons to obtain relief under our state's Fair Employment Practices Act from discrimination or retaliation in the workplace, including those asserting claims based on race, national origin, age, religion, disability, sexual orientation, gender identity or expression, as well as sex.

I would like to start with a brief overview of some of the concerns that these nine bills are designed to address:

A. Several of the bills are designed to clarify and return the scope of the Rhode Island Fair Employment Practices Act to what it was before the RI Supreme Court in 2017 in *Mancini v. City of Providence* [155 A.3d 159 (RI 2017)], ruled that individual employee supervisors could not be held personally liable for their actions under the RI-FEPA.

B. Several of the bills are designed to make clear or expand the protections of the RI-FEPA to cover elected officials, employees, and non-conventional employees, such as contract workers, volunteers and interns,

including those who work in the legislative branch of the State and corresponding municipal legislative bodies from sexual harassment and other forms of discrimination.

C. Several of the bills are designed to address the gaps in protection under the RI-FEPA and related anti-discrimination laws to make sure that individuals subjected to sexual or other forms of harassment and hostile work environment have a meaningful opportunity to obtain relief, by extending the time that the victim can seek help from the Human Rights Commission and by extending the time that the Human Rights Commission can investigate before the victim is forced to choose between going to court or losing her or his rights.

D. Several of the bills are designed to prevent these conditions from staying in the shadows by requiring more vigorous reporting, by requiring harassment training, and by preventing mandatory silence.

No one bill does everything and all should be given favorable consideration.

1-2. House 5344 and House 5361 contain identical amendments to RI General Laws §28-5-7(6), which would make individual employee-supervisors, and not just the company employing them, subject to personal liability for their own acts of discrimination. These amendments would restore the interpretation commonly in effect and utilized by the Human Rights Commission before the

decision of the RI Supreme Court in *Mancini v. City of Providence*, 155 A.3d 159 (RI 2017), which ruled that only the employer can be held liable.

The potential of individual liability is particularly important in deterring sexual and other forms of harassment. Employers with an established policy prohibiting discrimination may have defenses to shield the company from liability for intentional actions of supervisors that the individual would not be entitled to assert. But the *Mancini* decision means that the individual supervisor can never be held accountable.

3. House 5346 amends the definition of "employee" in RI General Laws §28-5-6(7) to expand the scope of protected persons to reflect today's reality: that an increasing number of today's employer-employee relationships are not captured by the conventional employment relationship, where many individuals performing employment-type duties are increasingly performed by paid or unpaid interns, apprentices, volunteers and "contract employees." Not only should these individuals have the same protections as traditional employees, but they often have far less bargaining power and may be even more vulnerable to inappropriate demands of a supervisor than the traditional employee. The ACLU of RI supports this language. Similar language appears in the Rhode Island Whistleblowers' Protection Act, RI General Laws §28-50-2(2), which provides "One shall employ another if services are performed for wages or under any contract of hire, written

or oral, express or implied." In §28-50-2(1) of the Whistleblowers' Act, the language is even clearer that "employee" includes so-called "independent contractors", a status increasingly used by companies. In contrast, similar language in the Workers Compensation Act, RI General Laws §28-29-2, is followed by an express exclusion of, among others, independent contractors and volunteers. Because of this lack of clarity, the ACLU of RI would support adding the words "independent contractors" to the proposed definition in House 5346.

House 5346 also amends the definition of "employer" in §28-5-6(8)(i) to expand the reach of the RI-FEPA to employers with one (1) or more employees, instead of the current four (4) or more employees. This expansion is likewise in keeping with the goal of providing protections to all persons serving in an employment relationship. The restriction of the RI-FEPA to companies with four or more employees means that those likely to be in the least structured and most vulnerable relationship, from the standpoint of the employee, and in the smallest business, from the standpoint of the employer, are foreclosed from access to the less expensive and confidential investigative and adjudicative processes of the Human Rights Commission and are left with the only recourse of more expensive and immediately public court proceedings, or none at all.

The expansion of jurisdiction of the Human Rights Commission to all Rhode Island employers, instead of those with four or more employees, is also consistent

with the expansion of the Workers' Compensation Act, RI General Laws §§28-29-5 and 28-29-6, which was extended to reach all employers with at least one employee, instead of four or more, in 1998, more than twenty years ago. This is long overdue.

4. House 5439 combines aspects of the three bills I just mentioned, as well as other terms. H5439 uses language identical to House 5344 and House 5361 to amend RI General Laws §28-5-7(6), on unlawful employment practices, to legislatively overrule *Mancini v. City of Providence*.

In addition, H5439 also would amend the definitions of "employee" and "employer" in §28-5-6 of the RI-FEPA. These amendments, while not identical to H5346, are consistent with the intent of H5346.

House 5439, like H5346, amends the definition of "employee" to specifically include apprentices, volunteers and unpaid interns and pages. It does not address the issue of "independent contractors." The primary focus of H5439 is to make express and explicit that the individuals working or serving within legislative bodies such as the General Assembly are entitled to the protections of the Fair Employment Practices Act against sexual harassment and against all forms of employment discrimination. To accomplish this, H5439 also amends the definition of "employee" to make clear that the RI-FEPA protects individuals elected to public office of the state or political subdivisions and amends the

definition of "employer" to make clear that the RI-FEPA, and the jurisdiction of the Human Rights Commission, includes all state and municipal legislative branches. At the same time, the proposed definition of "employer" makes clear that the express inclusion of legislative bodies, such as the General Assembly, shall not interfere with the protections accorded to legislators by the "speech in debate" clause of Article VI, Section 5 of the Rhode Island Constitution.

H5439 also makes a technical amendment to §28-5-6(3) to correct the name of the Commission to the Rhode Island Commission for Human Rights.

5-6. House 5340 and House 5341 each address an aspect of the statutes of limitation, or time for taking action under the RI-FEPA or other civil rights claims where a claim before the Human Rights Commission is being administratively pursued. This is particularly important in claims of harassment and hostile work environment, which typically build up over time and require substantial personal commitment and resolve to pursue. Often individuals who finally reach the point when they can no longer stay silent find that they waited too long. Other times, individuals who wish to have their matters investigated confidentially by the Human Rights Commission find that, in order to preserve their related claims under other state laws and common law, they have to file a court case even though the Commission has not completed its review. These are strong practical deterrents to moving forward.

House 5341 would amend §28-5-17 of the RI-FEPA to increase the time for an individual to file a charge of discrimination before the Human Rights Commission from one year to two years. House 5340 would add a §28-5-18.1 to the RI-FEPA to provide that once a charge is filed, the time for filing a law suit or other notice or claim concerning the same claim under other Rhode Island laws would be suspended for up to one year. This would give the Commission and the individual more time to have the Commission investigate before facing the choice either to go to court or to drop the claim.

7. House 5345 would amend the RI-FEPA to prohibit an employer from requiring as a condition of employment that the individual enter a non-disclosure or non-disparagement agreement. The ACLU of RI strongly supports this prohibition, as it represents an important step in addressing attempts by employers to stifle the rights of victims of discrimination to speak out about misconduct in the workplace.

8. House 5342 would amend the RI-FEPA by adding a new §28-5-44 requiring the Commission to provide an annual report each September 1 to the Governor, Speaker, and Senate President of each violation established by the Commission. Section 2 of House 5342 would amend §28-5.1-3 concerning affirmative action mandates and the role of the state equal opportunity office. Subsection (h) would be amended to remove the exclusion of the legislative branch

of state government, which we support. However, the exclusion of the legislative branch remains intact in subsection (b) and (f), and apparently preserves the exclusion of the legislative branch from the obligation to develop or follow an affirmative action plan, making the achievement of the intended goal problematic. We submit that those two references should also be deleted to make clear that the legislative branch, like the other branches of State government, is required to develop an affirmative action plan and report on its progress.

House 5342 would also add a new §28-5.1-18 to the chapter on affirmative action to require each state department or agency to report annually on violations of the RI-FEPA and their affirmative action obligations. In order to achieve that new obligation in full, the exclusion of the legislative branch from the obligation to adopt and implement an affirmative action plan should be removed.

9. House 5343 would amend chapter 28-51, effective January 1, 2021, to make the policies designed to prevent sexual harassment at large employers, defined as companies with 50 or more employees, more robust and meaningful. H5343 would amend §28-51-2 to require, rather than simply "encourage," large employers to conduct education and training programs for new employees, and would mandate that the education and training be conducted within three months of the start of employment or promotion—rather than within one year, with refresher training for all supervisory and managerial employees every two years.

H5343 would also add a new §28-51-4 encouraging employers to conduct an annual climate survey for employees which may unearth issues related to sexual harassment, unequal opportunity and discrimination. The ACLU of RI supports this provision, but believes that it should be required, not simply "encouraged": in our view, an effective date almost two years in the future is plenty of time for employers with 50 or more employees to ramp up to fulfill these requirements, which we believe are considered minimum best practices for large employers.

I look forward to the Committee's favorable consideration of each of these nine House bills, and I would be pleased to answer any questions that you may have.