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MEMORANDUM

To: Governor Steve Sisolak

From: Attorney General Aaron Ford

Date: June 1, 2019

Subject: Task Force on Sexual Harassment and Discrimination Law and Policy:
Report and Recommendations

I. Creation of the Task Force

In his first official act, Governor Steve Sisolak issued Executive Order 2019-1, which created the Task Force on Sexual Harassment and Discrimination Law and Policy (Task Force)¹. Governor Sisolak subsequently issued Executive Order 2019-2, further expanding the duties of the Task Force².

Attorney General Aaron Ford serves as the Chair of the Task Force. The Task Force is comprised of representatives of the Nevada executive branch, law enforcement, victims' rights advocates, and others with an interest or involvement in protecting, advocating for, or representing victims of sex and gender-based harassment and discrimination. These diverse perspectives provide a comprehensive view of the issue of harassment and discrimination.

Accordingly, Governor Sisolak appointed the following members:

Vice-Chair Amanda Cuevas, LSW, MSW, Crisis Response and Intervention Supervisor, Safe Embrace

Geoconda Argüello-Kline, Secretary-Treasurer, Culinary Union Local 226

¹ Executive Order 2019-1 is attached to this report as Attachment A.

² Executive Order 2019-2 is attached to this report as Attachment B.

Deonne Contine, Director, Nevada Department of Administration

Kara Jenkins, Administrator, Nevada Equal Rights Commission

Patricia Lee, Partner, Hutchison & Steffen and Executive Board Member,
Women's Chamber of Commerce of Nevada

Ann McGinley, Professor and Co-Director, William S. Boyd Professor of Law
Program at William S. Boyd School of Law

Erin McMullen, Director of Governmental Affairs, Boyd Gaming Corporation

Jan Morrison, Economic Development Officer, Northeastern NV Regional
Development Authority

Pam Ojeda, Chief of Police, North Las Vegas Police Department

Dr. Melissa Piasecki, M.D., Executive Associate Dean and Professor, UNR
School of Medicine, Dept. of Psychiatry and Behavioral Sciences

The Task Force held four meetings after its creation. Each meeting was open to the public and conducted in accordance with the open meeting laws³. The Task Force received several presentations to better understand the current state of the law, as well as State policies and procedures.

II. Key Findings

Recent social movements have shed light on the insidious problem of sex- and gender-based harassment and discrimination. Members of the Task Force recounted their own experiences with harassment and discrimination, both recently and in the past. This victimization, even if it occurred decades prior, has lasting emotional and even financial repercussions. One member of the Task Force could identify how harassment and discrimination prevented her from advancing in her career. As she faces retirement, that lack of advancement has real consequences for her financial stability.

Simply bringing this issue to light brings progress. Not only do survivors find solace and community instead of isolation and shame, talking about harassment and discrimination encourages conversation and education about what constitutes appropriate workplace behavior. Perhaps more importantly, research shows that when organizational leadership creates a culture against harassment and discrimination, people are more likely to report illegal behavior. This phenomenon occurred in our state—the Division of Human Resource Management (DHRM) representatives stated that reports of sex- and gender-based harassment by State employees doubled after the announcement of the Governor's Task Force. DHRM representatives attribute this to strong, vocal proclamations by the Governor and

³ Meeting minutes are attached to this report as Attachments C1–C4.

Attorney General that harassment and discrimination will not be tolerated in executive agencies.

To its credit, the State has implemented laws, regulations, and policies that address both harassment and discrimination. The State enacted several statutes forbidding discrimination based on, among other things, an employee or prospective employee's sex, sexual orientation, gender identity or expression.⁴ While harassment is considered to be a form of discrimination, no statute explicitly references harassment. Additionally, there are areas where these laws, regulations, and policies should be updated to reflect current case law and social norms.

For example, some of the language used in the Nevada Administrative Code and State policies is outdated. The term "sexual harassment" is under-inclusive, and should be changed to "sex- and gender-based harassment" to capture all forms of illegal behavior.

⁴ NRS 233.010(3):

It is hereby declared to be the public policy of the State of Nevada to protect the welfare, prosperity, health and peace of all the people of the State, and to foster the right of all persons reasonably to seek, obtain and hold employment without discrimination, distinction or restriction because of race, religious creed, color, age, sex, disability, sexual orientation, gender identity or expression, national origin or ancestry.

NRS 284.150(3):

A person must not be discriminated against on account of the person's religious opinions or affiliations, race, sex, sexual orientation, gender identity or expression, age or disability.

NRS 613.330(1):

Except as otherwise provided in NRS 613.350, it is an unlawful employment practice for an employer:

- (a) To fail or refuse to hire or to discharge any person, or otherwise to discriminate against any person with respect to the person's compensation, terms, conditions or privileges of employment, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin;
- (b) To limit, segregate or classify an employee in a way which would deprive or tend to deprive the employee of employment opportunities or otherwise adversely affect his or her status as an employee, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin;

...

Perhaps most surprisingly, there is no statutory requirement that the Department of Administration has a policy against sex- and gender-based harassment. The Department created such a policy, but it is not required to do so by statute. As part of its duties, the Task Force collected and reviewed policies from all of the State executive agencies.⁵ Agencies use the State of Nevada Executive Branch Sexual Harassment and Discrimination Policy as their internal policy, with some variation. For example, some agencies have implemented systems to ensure compliance with training requirements. Others rely on supervisors or human resources staff to ensure their employees have attended training.

Additionally, there is no statutory requirement that private sector companies that enter into contracts with the State to provide goods or services have policies against sex- and gender-based harassment. Executive Order 2019-02 required that the Department of Taxation and the Gaming Control Board collect policies from state license holders.

The Gaming Control Board also asked license holders to publicly share policies to serve as a model for others. These license holders had the benefit of extensive research and legal review to develop their policies. Fortunately, licensees obliged, and an example policy is attached to this report for use as a resource by other private sector companies.⁶ While every entity needs to develop their own policy that works best for that organization, those seeking guidance may look to this policy as examples for what others have done to prevent sex- and gender-based harassment and discrimination.

One of the chief duties of the Task Force outlined in Executive Order 2019-01 is the “development of particularized and actionable recommendations for improving current sexual harassment and discrimination prevention plans and training procedures, allegation reporting and investigation protocol, and privacy protection safeguards.” These findings provide the basis for the following recommendations from the Task Force.

II. Statutory Recommendations From the Task Force

A. Adopt a Statutory Policy Against Sex- and Gender-Based Harassment

State law forbids discrimination based on sex and gender for all employees, not just those who work for the State. But state law is silent as to sex- and gender-based harassment.

Chapter 284 of the Nevada Revised Statutes governs State employees. This chapter contains other policy statements, including the policy against State employees using

⁵ Agency policies are attached to this report as Attachment D1–D4.

⁶ The example policy is attached to this report as Attachment D5.

drugs or alcohol at their place of work.⁷ The Task Force recommends that the Governor support a statute that would include a statement that sex- and gender-based harassment by State employees violates State policy.

Proposed language:

NRS 284.[] Policy concerning sex- or gender-based harassment.

Sex- or gender-based harassment violates the policy of this state and is a form of unlawful discrimination based on sex under state and federal law. Employees shall not engage in sex- and gender-based harassment against an employee, an applicant for employment, or any other person in the workplace, and managerial and supervisory employees shall work to prevent and correct sex- or gender-based harassment that may occur under their control.

B. Adopt Statutory Requirements Regarding Sex- and Gender-Based Harassment Policies for the Department of Administration

As previously noted, the Division of Human Resource Management has created a State Executive Branch Policy for use by State agencies. Current law does not require the creation of this policy. When discussing the adoption of a policy in statute, members indicated several goals: explicitly recognize a State policy against sexual harassment; grant authority to require State employees to adhere to a policy and related requirements; retain flexibility to update the policy, training requirements, and reporting procedures as case law and social norms evolve; and, allow individual agencies to address agency-specific concerns regarding the nature of their specific work. Any statutory recommendations would need to balance these goals.

In addition to adopting a broad policy statement in statute, the Task Force recommends requiring the Division of Human Resource Management to create and maintain a specific State Executive Branch Policy that 1) defines illegal behavior; 2) enumerates training requirements both for employees and managers; and 3) clearly outlines procedures for reporting suspected harassment and discriminatory

⁷ NRS 284.406:

It is the policy of this state to ensure that its employees do not:

1. Report for work in an impaired condition resulting from the use of alcohol or drugs;
2. Consume alcohol while on duty; or
3. Unlawfully possess or consume any drugs while on duty, at a work site or on state property.

behavior. Given how case law and social norms can change, the Task Force also recommends statutorily requiring the Division of Human Resource Management to review and, if necessary, update the State policy on an annual basis.

Proposed language:

NRS 284.[] The Division of Human Resource Management is required to maintain a policy concerning sex- or gender-based harassment.

The Administrator shall:

1. Maintain a policy concerning sex- or gender-based harassment. The policy shall:

(a) Define behavior that constitutes illegal sex- or gender-based harassment; and

(b) Define training requirements both for employees and managers; and

(c) List procedures for reporting suspected harassment and discriminatory behavior.

2. Review the policy on, at a minimum, an annual basis for compliance with relevant state and federal law.

C. Adopt Statutory Requirement for the Sex- and Gender-Based Harassment and Discrimination Investigation Unit at the Division of Human Resource Management

It is imperative that any policy against sex- and gender-based harassment and discrimination include meaningful enforcement. The Task Force frequently discussed the importance of a mechanism for reporting and investigating complaints of harassment and discrimination that supported victims' rights and confidentiality while also ensuring due process for those alleged to have committed an offense. The Division of Human Resource Management (DHRM) currently houses an investigative team for these specific types of complaints. By maintaining this team at the DHRM, complaints can be investigated by an independent agency, further supporting the goals of victim confidentiality and due process. Additionally, providing an avenue to report complaints outside of a victim's place of work helps relieve fears of reprisal from supervisors who receive such complaints.

Representatives from this team gave a presentation to the Task Force about their role in the reporting process. By statutorily requiring this investigative team, the State both sends a strong message to its employees that its policy will be enforced, and also safeguards any future attempt to dismantle this important unit.

Proposed language:

NRS 284.[] Division of Human Resource Management's Sex- and Gender-Based Harassment and Discrimination Investigation Unit

1. The Division of Human Resource Management's Sex- and Gender-Based Harassment and Discrimination Investigation Unit is hereby created.
2. The Division of Human Resource Management's Sex- and Gender- Based Harassment and Discrimination Investigation Unit shall investigate complaints of employees or other victims of sex- or gender-based harassment or discrimination.
3. After receiving notification of a complaint of sex- or gender-based harassment or discrimination, the appointing authority shall:
 - (a) Promptly notify the agency's assigned personnel, deputy attorney general or staff counsel assigned to represent the agency; and
 - (b) The Division of Human Resource Management's Sex- and Gender-Based Sexual Harassment and Discrimination Investigation Unit.
4. After receiving notification of a complaint of sex- or gender-based harassment or discrimination, the Division of Human Resource Management's Sex- and Gender-Based Sexual Harassment and Discrimination Investigation Unit shall:
 - (a) Begin the investigation as soon as possible;
 - (b) Make every attempt to conduct the investigation as discreetly and with as little disruption to the workplace as possible.
 - (1) All information gathered in an investigation will be kept confidential to the maximum extent possible, and supervisors, next level authorities, coordinators and/or investigators shall explain to the complainant, the accused and each witness the confidential nature of the investigative process and information.
 - (c) Prepare a written report of findings by an investigator, which will be submitted to the appointing authority, the agency's legal counsel, and the agency's chief personnel officer.
5. At the conclusion of the Division of Human Resource Management's Sex- and Gender-Based Harassment and Discrimination Investigation Unit's investigation:

(a) The appointing authority will review the findings and recommendations and determine the appropriate resolution of the case. If warranted, the appointing authority, after consultation with their legal counsel, may take disciplinary action up to and including termination. The appointing authority shall retain a written record of the findings of the investigation and the resolution of the complaint as confidential records.

(b) The Division of Human Resource Management will notify the complainant in writing that the investigation was completed and forwarded to their appointing authority for review.

D. Adopt Statutory Requirements Regarding Sex- and Gender-Based Harassment Policies for State Vendors

Executive Order 2019-02 required the Department of Administration's Purchasing Division collect policies from state vendors and create a report with its findings.⁸ After collecting and reviewing these policies, the Purchasing Division recommended any statute regarding vendor requirements balance a variety of factors that take into account the diverse entity types that enter into state contracts, from large corporations to small, family farms.

The Purchasing Division recommends that Nevada adopt language similar to a law in Oregon, which requires a state vendor to certify that it has a "policy and practice" of prohibiting sex- and gender-based harassment and discrimination. This would apply to competitive contracts for \$100,000 or more. After discussion, the Task Force agreed with its recommendation.

Proposed language:

NRS 333.[] Certification of policy and practice against sex- or gender-based harassment required by certain vendors.

The Administrator may not award a contract following a competitive request for proposals issued pursuant to NRS 333.165(1) to a vendor that has failed to certify it has a policy and practice of prohibiting sex- and gender-based harassment and discrimination unless that vendor submitted the only response.

⁸ The report from the Department of Administration's Purchasing Division is included as Attachment E.

E. Support SB177

Currently, there is a question as to whether Title VII of the 1964 Civil Rights Act forbids workplace discrimination based on sexual orientation, gender identity and gender expression, including transgender status. As of now, most federal courts of appeals conclude that sexual orientation and transgender status are not forbidden reasons for discriminating against employees. Nevada law, in contrast, states that it is illegal to discriminate based on sexual orientation, gender identity and expression. But, there is no damage remedy under Nevada civil rights law.

Title VII, in contrast, grants capped compensatory and punitive damages to employees who prove that their employers have illegally discriminated against them. As the law stands currently, Nevada residents who sue under federal law may collect compensatory and punitive damages for discrimination based on sex, disability, age, race, religion, national origin, and color. But they may not be able to bring a suit under Title VII for discrimination based on sexual orientation or transgender status. Their only recourse, then, is to sue under Nevada law, but as the law stands now they have no right to the same damages as under federal law.

This bill would change Nevada law so that employees who are illegally discriminated against at work for any illegal purpose (including harassment based on sexual orientation, gender identity or expression) may sue in state court and may receive the same remedies as are available under Title VII of the 1964 Civil Rights Act for discrimination against other protected individuals.

The Task Force urges the Governor to support this bill because sex- and gender-based harassment of gay, lesbian, bisexual, and transgender employees is frequent and violates the policies of Nevada law. Granting remedies under Nevada law to these and other protected employees will further Nevada policy of condemning sex- and gender-based harassment against all protected individuals.

IV. Administrative Recommendations

A. Update State Executive Branch Policy

The Task Force recommends that the Governor support the adoption of a new proposed Executive Branch Policy.⁹ The new policy changes the term “sexual harassment” to the term “sex- and gender-based harassment,” which is more inclusive and accurately reflects state and federal law. It also includes a new definition of “sex- and gender-based harassment” that accurately reflects state and federal law and makes clarifications to the means to report harassment as well as changes to the time when new employees, new managers and supervisors should receive training.

⁹ The proposed policy is included as Attachment F.

This proposed State Executive Branch Policy, while still subject to final legal review, is an effort by the Task Force to reflect a more modern and clarified approach to the Executive Branch Policy and to serve as an example to others who may use it as a resource to develop their own policy.

B. Update the Nevada Administrative Code

Language regarding “sexual harassment” and the definitions of “sexual harassment” are under-inclusive and not accurate under the law. The Task Force recommends changes to language and definitions in the Nevada Administrative Code that would reflect current law. The changes proposed are the following:

Current Version NAC 284.0995:

NAC 284.0995 “Sexual harassment” defined. (NRS 284.065) “Sexual harassment” means unwelcome sexual advances, requests for sexual favors, or other speech or physical conduct of a sexual nature when:

1. Submission to such speech or conduct is made either explicitly or implicitly a term or condition of a person’s employment;
2. Submission to or the rejection of such speech or conduct by a person is used as the basis for employment decisions affecting that person; or
3. Such speech or conduct has the purpose or effect of unreasonably interfering with a person’s work performance or creating an intimidating, hostile or offensive working environment.

Proposed Version NAC 284.0995 (changes are in bold print):

NAC 284.0995 “Sex- and gender-based harassment” defined. “Sex- and gender-based harassment” means:

- 1. Making submission to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature either explicitly or implicitly a term or condition of a person’s employment; or**
- 2. Making submission to or the rejection of such conduct described in (1) by a person a basis of employment decisions affecting that or any other person; or**
- 3. Engaging in unwelcome harassing verbal or physical behavior that occurs because of sex or gender of an individual(s) and has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating or offensive work environment where:**
 - a. Harassing behavior is of a sexual nature;**

- b. **Harassing behavior is not sexual in nature, but is related to sex or gender of the victim or others;**
- c. **Harassing behavior is sex- and gender-neutral in content but occurs because of an individual's sex or gender; or**
- d. **Any combination of types of behaviors described in 3a through c.**

Current Version NAC 284.771:

NAC 284.771 Sexual harassment. (NRS [284.065](#), [284.155](#))

1. Sexual harassment violates the policy of this State and is a form of unlawful discrimination based on sex under state and federal law. An employee shall not engage in sexual harassment against another employee, an applicant for employment, or any other person in the workplace.
2. Sexual harassment is a very serious disciplinary infraction. An appointing authority may impose harsh disciplinary sanctions on, or dismiss, persons who commit sexual harassment, including, without limitation, first-time offenders.

Proposed Version NAC 284.771 (changes are in bold print):

NAC 284.771 Sex- and gender-based harassment. (NRS [284.065](#), [284.155](#))

1. **Sex- and gender-based harassment** violates the policy of this State and is a form of unlawful discrimination based on sex **and gender** under state and federal law. An employee shall not engage in sex- or gender-based harassment against another employee, an applicant for employment, or any other person in the workplace.
2. **Sex- and gender-based harassment** is a very serious disciplinary infraction. An appointing authority may impose harsh disciplinary sanctions on, or dismiss, persons who commit **sex- and gender-based harassment**, including, without limitation, on first-time offenders, **and sanctions shall be proportionate to the violation.**

Current Version NAC 284.496:

NAC 284.496 Classes and training concerning prevention of sexual harassment. (NRS [284.065](#), [284.155](#), [284.343](#))

1. Within 6 months after an employee is initially appointed to state service, the employee shall attend a certified class concerning the prevention of sexual harassment.

Proposed Version NAC 284.496 (changes are in bold print):

NAC 284.496 Classes and training concerning prevention of sex- and gender-based harassment. (NRS [284.065](#), [284.155](#), [284.343](#))

1. Within **30 days** after an employee is initially appointed to state service, the employee shall attend a certified class concerning the prevention of sex- and gender-based harassment. *[NB. The only changes here are the title and the time change from six months to 30 days]*

Current Version NAC 284.498:

NAC 284.498 Training of supervisory and managerial employees. (NRS [84.065](#), [284.155](#), [284.343](#))

1. Except as otherwise provided in this section:

(a) Within 6 months after an agency initially appoints an employee to a supervisory position or managerial position, the employee shall attend a training class concerning work performance standards and the evaluation of the performance of employees.

(b) Within 12 months after an agency appoints an employee to a supervisory position or managerial position, the employee shall attend at least one training class which has been approved by the Division of Human Resource Management in each of the following areas:

- (1) Equal employment opportunity;
- (2) Interviewing and hiring;
- (3) Alcohol and drug testing;
- (4) Progressive disciplinary procedures; and
- (5) Handling grievances.

Proposed Version NAC 284.498 (changes are in bold print):

NAC 284.498 Training of supervisory and managerial employees. (NRS 284.065, 284.155, 284.343)

1. Except as otherwise provided in this section:

(a) Within 30 days month after an agency initially appoints an employee to a supervisory position or managerial position, the employee shall attend a training class concerning sex- and gender-based harassment. [NEW SECTION]

(b) Within 6 months after an agency initially appoints an employee to a supervisory position or managerial position, the employee shall attend a training class concerning work performance standards and the evaluation of the performance of employees.

(c) Within 12 months after an agency appoints an employee to a supervisory position or managerial position, the employee shall attend at least one training class which has been approved by the Division of Human Resource Management in each of the following areas:

- (1) Equal employment opportunity;
- (2) Interviewing and hiring;
- (3) Alcohol and drug testing;
- (4) Progressive disciplinary procedures; and
- (5) Handling grievances.

C. Review State Training Programs

Unfortunately, most research demonstrates that training employees alone does not prevent sex- or gender-based harassment. But there are some best practices that have been recommended by the Nevada Equal Rights Commission, the Equal Employment Opportunity Commission Task Force and federal courts. The Task Force is concerned that the training across Nevada state agencies may not be as effective in prevention as possible.

The Task Force recommends that the State engage in a close review of the training it does and if necessary, adopt new training methods, including bystander intervention training, that accord with the Nevada Equal Rights Commission, the Equal Employment Opportunity Commission Task Force and federal courts' recommendations.