impact on work productivity. Furthermore, various instances of inappropriate conduct may, in the aggregate, become "severe or pervasive." While every workplace should strive for model behavior at all times, the Work Group's task was to address harassing behavior: inappropriate and unwelcome conduct that is based on a person's status as a member of a protected class.

Work Group participants declined to recommend that the policy define harassment by explaining what harassment "does not include." For example, many policies expressly exclude "petty slights" or "annoyances" from their coverage. These exclusions are counterproductive. Potential reporters of workplace harassment often read harassment policies in detail; such exclusions can cause them to refrain from reporting, if they think the exclusions could apply to them. Moreover, as a legal matter it can be difficult to distinguish workplace bullying (which is a lawful but regrettable behavior) from unlawful harassment based on a protected class. And conduct that appears benign in isolation, may nonetheless constitute workplace harassment when it is motivated by implicit bias or is part of a pervasive pattern. For these and other reasons, the workplace harassment policy should strive to prohibit all conduct that could reasonably be included as a component of workplace harassment.

2. Reporting Harassment

Consensus Recommendation: The workplace harassment policy should include:

- A confidential disclosure process. The confidential disclosure process allows an individual who wishes to remain anonymous to report conduct that violates the policy. It also can include confidential "process advice" for individuals who believe they may have been subjected to conduct that violates the workplace harassment policy and to individuals who are, or believe they may be, the subject of a complaint.
- A nonconfidential reporting process. Individuals who believe they may have been subjected to conduct that violates the workplace harassment policy, or who believe they may have witnessed or otherwise become aware of such conduct, may make a nonconfidential report to a supervisor or other legally responsible person, to Human Resources, or to the Equity Office.
- A nonconfidential, formal complaint process. The formal complaint process is designed to trigger an investigation that may lead to discipline of respondents who have engaged in harassment.

The Equity Office should ultimately receive all reports of harassment and be empowered to investigate as appropriate.

Commentary: This structure seeks to balance several competing interests. As a matter of principle, the Work Group believes that individuals subject to the policy should have access to accurate information about the reporting options and adjudicatory consequences under the policy. The Work Group believes that more people will seek out this information, and that more people will report harassment, if there is a confidential option. Concerns surrounding due process and fundamental fairness, however, prevent taking formal disciplinary action based on these confidential communications. Thus, while the Work Group strongly recommends the creation of a confidential disclosure option, the consequences of a confidential disclosure must necessarily be limited.

In addition to this confidential option, the Work Group also recommends two nonconfidential reporting options. The nonconfidential reporting process is available as a standard workplace reporting option that may lead to an investigation and the imposition of discipline. The nonconfidential reporting option is, however, limited in other respects. As it does not require a formal complainant, it may not result in the meaningful discipline of a legislator. The nonconfidential, formal complaint process is available when a complainant wishes to trigger an investigation and pursue concrete remedies. Because this process may result in the discipline of a legislator, it is a public process that is likely to generate significant public interest.

This structure is intended to provide reporters as much certainty as possible – in advance – about how reports, disclosures, and complaints will be made and used. While the Assembly may not be able to provide as much confidentiality as the Work Group would have liked,[5] the Work Group recommends that every effort be made to provide as much confidentiality as possible. In addition, reporters should be fully informed of any limits on that confidentiality.

3. Confidential Disclosures

Consensus Recommendation: The non-investigatory half of the Equity Office should be empowered to receive confidential disclosures from anyone who has experienced or witnessed harassment.

The identity of the person making a confidential disclosure should remain confidential, subject to two exceptions: (a) when necessary to prevent imminent physical harm to any individual and (b) when disclosure is required by law.

Because a respondent has a due process right to know about the basis for any potential discipline, confidential disclosures may not be used as the basis for any disciplinary action. Nevertheless, the office may use other, nondisciplinary and nonpunitive methods to respond to confidential disclosures, when it is possible to do so without revealing the identity of the reporter directly or indirectly. For example, the Equity Office could provide a respondent or a particular group of employees formal or informal training or advice regarding expected standards of behavior. It could also reach out to complainants who make confidential disclosures to encourage them to come forward voluntarily in a nonconfidential way.

Both Equity Office staff may access and use aggregate, deidentified data based on confidential disclosures. This data will allow the institution to observe patterns of behavior, take non-investigatory steps to remedy training, culture, or climate, encourage reporters to come forward in a nonconfidential way, and take other necessary actions.

The Legislative Assembly should adopt a statute, modeled on ORS 40.264, that creates a privilege for communications made to the non-investigatory half of the Equity Office. The privilege would protect communications from intrusion by state legal processes. Because federal courts are not required to follow state privilege laws, the recommended privilege statute would not necessarily protect communications from disclosure in response to federal legal processes. Members of the Capitol community should be fully informed of any limitations on the privilege, however theoretical.

[5] As will be described in more detail below, there may be limits to what confidentiality is possible.

Commentary: Testimony received by the Work Group was consistent with the experience of the participants with complaints in the State Capitol and elsewhere: Given the power differential in the State Capitol, and the fears of those with little power, many complaints go unreported. One significant way to increase reporting is to provide a confidential avenue.

One participant emphasized the value of having limited exceptions to confidentiality, noting a direct correlation between the number of exceptions to confidentiality included in a policy and reduced reporting. As the participant explained, the more exceptions that are conveyed to a person, the more likely the person will hear "this isn't really confidential."

Another participant raised a different confidentiality concern, describing fact patterns where individuals seek out information, support, and guidance, but may not wish to initiate a formal process. For this participant, it was important to avoid a system where an individual unwittingly initiates a formal process, particularly given the possibility that the process is a public one that generates widespread interest.

The Work Group recommendation reflects the view that the legislature should take every step possible to provide confidentiality when a person who has experienced workplace harassment seeks it. There are, however, two significant challenges to providing confidentiality.

First, as the Work Group discussed at length, an employer who is "on notice" that harassment may exist has a legal duty to respond reasonably to prevent future harassment. Thus, the Legislative Assembly could be exposed to liability under employment discrimination laws if Equity Office employees know about workplace harassment and fail to take remedial measures because they are keeping a complaint confidential.

The Work Group recognizes this risk. But it is usually possible to manage this risk while still honoring a complainant's request for confidentiality. This is because an investigation that discloses a confidential disclosure and results in discipline for a harasser is only one way of responding reasonably to a complaint. For example, training and discussion—and maintenance of a culture that encourages reporting—may be equally effective responses in many circumstances. In extreme cases, such as those in which immediate physical harm might result, an employer might need to breach confidentiality in order to act reasonably. But in other instances, it is reasonable for an employer to honor a complainant's request for confidentiality and turn to other mechanisms to correct and prevent future harassment.[6] This is especially true when the employer has clearly communicated a venue where a complainant may make a nonconfidential complaint that triggers an investigation.[7] When receiving a confidential disclosure, the Equity Office should reinforce this communication by reminding a complainant that nonconfidential reporting exists and explaining the different remedies that confidential disclosures and nonconfidential reports provide. When a complainant knowingly chooses a

[6] *See, e.g.*, *Hardage v. CBS Broad., Inc.*, 427 F.3d 1177, 1188 (9th Cir. 2005), *amended on denial of reh'g*, 433 F.3d 672 and 436 F.3d 1050 (9th Cir. 2006) (employer not liable for failing to act where complainant specifically requested employer not make use of its remedial and preventative procedures); *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997) (employer did not breach duty to remedy racial and sexual harassment by honoring employee's request to keep the matter confidential).

[7] *See*, *e.g.*, *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997) (for employer to be on notice, complaint must come to the attention of someone who has or is reasonably believed to have a duty to act).

confidential, noninvestigatory avenue to report, it may be reasonable in many cases for an employer not to take remedial measures that require disclosure, but to take other reasonable measures to end harassment.

But there is one other problem. Regardless of whether the institution is "on notice" or not, records of confidential Equity Office conversations (and the memory of its participants) are subject to discovery in a future lawsuit. And even if the legislature were to create a state-law privilege that would protect confidential reports in state court lawsuits (as the Work Group recommends), *federal* courts may decline to recognize such a privilege.[8] This could force the Equity Office to provide "confidential" records in federal employment litigation.

Given these limitations, the Work Group was unable to formulate a recommendation that would allow the legislature to protect confidentiality in all circumstances. Nonetheless, the Work Group believes that the legislature should support an individual's ability to remain confidential as much as possible. To support their autonomy to make their own decisions, the Equity Office should fully inform individuals of these limitations and should remain cognizant of the limitations at all times. Further, in light of these limitations, Equity Office staff should be trained in appropriate methods of recordkeeping. For example, the Equity Office may choose not to request the names of individuals who make confidential disclosures.

4. Nonconfidential Reports

Consensus Recommendation: The Equity Office should be empowered to receive nonconfidential reports from anyone who believes they have experienced or witnessed harassment. Additionally, legislative supervisors and other legally responsible persons should be required to make a nonconfidential report to Human Resources or the Equity Office if there is a reasonable possibility that workplace harassment or discrimination may have occurred. This duty is triggered whenever an employee makes a complaint to a supervisor or other legally responsible person. It is also triggered when the supervisor or other legally responsible person receives information through direct observation, rumor, or otherwise, that the policy has been violated. Supervisors should not attempt to determine whether the information relates to harassment or not. If they have reason to believe the information could possibly be related to harassment, they should report it. Non-supervisors should be encouraged to make such reports. This form of reporting is not confidential.

Human Resources should determine whether the report is potentially a report of workplace harassment based on protected class, or whether it involves interpersonal difficulties or other matters. If the report is potentially a report of workplace harassment, Human Resources will forward the report to the Equity Office. If it is not, Human Resources should address the report.

Third parties who contract with the Legislative Assembly should be contractually obligated to report conduct that may constitute harassment to the Equity Office.

Commentary: As described earlier, if a legislative supervisor or other legally responsible person knows or reasonably should know about workplace harassment, the institution as a whole

[8] *See, e.g., Sony Comput. Entm't Am., LLC v. HannStar Display Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.),* 835 F.3d 1155 (9th Cir. 2016) (federal common law generally governs claims of privilege).