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February 13, 2019

To: Chair Taylor, Vice Chair Knopp, Members of the Senate Committee on Workforce
From: Dana L. Sullivan, Buchanan, Angeli, Altschul & Sullivan, LLP
Re: Support for SB 726, The Oregon Workplace Fairness Act

Chair Taylor, Vice Chair Knopp and members of the Senate Workforce Committee:

I am submitting this statement as a supplement to the statement, dated February 11, 2019, that I previously submitted in favor of SB 726. My aim is to address the concerns about the bill raised by individuals who testified at the February 12 hearing on behalf of the Oregon Farm Bureau (OFB) and Oregon Business Industry (OBI). I also wish to provide the answer to the question posed by Senator Monnes Anderson, to which I did not have time to respond during the hearing.

I. Extension of Statute of Limitations.

The extension of the statute of limitations applicable to claims of discrimination and harassment will not unfairly prejudice employers. It is important to note that, presently, under Oregon law there are many claims arising from the employment relationship for which the statutes of limitations are much longer than one year. For example, an employee who contends that her employer breached a contractual obligation or failed to pay her wages she was owed has six years to pursue that claim. Employees who wish to pursue a common law claim for assault or intentional infliction of emotional distress have two years in which to do so. Under federal law (42 U.S.C. §1981), an employee who wishes to pursue a race discrimination claim has four years to file the claim. A city or county employee has three years to pursue a federal claim under 42 U.S.C. §1983 for discrimination or retaliation.

Moreover, in my experience clients who have experienced sexual harassment and have waited a year or more to come forward are most often prompted to do so because they have learned of a more recent complaint of harassment. The understanding that they are not alone and that their harasser poses a continuing threat gives them the fortitude they previously lacked to share their experience. The account of the woman reporting an earlier incident of harassment helps the employer appreciate the severity of its present situation. Under these circumstances, which are common in the #metoo era, it is unfair for the earlier victim to be foreclosed from seeking a remedy for the harm she has suffered.

While we all hope that we can get to a point where every employee feels safe reporting harassment or discrimination, we are unfortunately not there yet. If employers want to be assured that their employees will promptly report harassment or discrimination the onus is on them to create supportive work environments. The sample policies and procedures that BOLI will be required to make available to employers under SB 726 will provide employers with additional tools to ensure their workplace cultures are welcoming to reports of harassment and discrimination.

II. Individual Liability.

SB 726 does not change existing law regarding the exposure of mid- or low-level managers to individual claims of harassment or discrimination. It simply clarifies that company owners, partners and officers are among

those individuals who can be held individually liable for participating in or failing to address harassment or discrimination. This clarification is necessary because of an Oregon federal district court decision holding that a corporate officer cannot be found individually liable for aiding and abetting harassment by the corporation because the officer and the corporation are one and the same. If allowed to stand, this ruling leaves mid-level and low-level managers more likely than those at the top of the corporate ladder to face individual liability for harassment, which makes no sense.

There is also no basis to fear that SB 726 would render an absent partner individually liable for the harassing conduct of the partner charged with managing the business, as posited by the witness who testified on behalf of OFB. Paragraph (4) of Section 3 of the bill makes clear that individual liability is limited to those who personally engage in prohibited conduct.

III. Applicability to Harassment by Clients, Customers or Other Third Parties.

At the hearing, Senate Monnes Anderson asked whether SB 726 applies to harassment by customers, clients or other third-parties. As the law currently stands, an employer's obligation to keep its employees safe requires the employer to address unlawful harassment and discrimination by anyone with whom its employees come into contact during the course of their work, including vendors, clients, patients, customers, contractors, etc. The additional protections that SB 726 provides apply to any workplace harassment, including harassment by third parties.