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TO: Legislative Council Members

FR: Todd Everts and Julianne Burkhardt
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RE: Current Legislative Branch Harassment Policy Questions

This memorandum was originally in response to Rep. Eck, who, after the Council's December meeting, had requested general clarification on the Montana Legislature's current sexual harassment policy. We thought it would be helpful as background material for the Council's harassment policy discussion at its March meeting. Set out below are the questions raised by Rep. Eck and our responses.

1. What are the options available to an offended party who is a legislator as far as pursuing a complaint against another legislator?

There are two options for an offended party who is a legislator in pursuing a complaint against another legislator. The Montana Legislature's harassment policy is set out in Joint Rule 10-85:

10-85. Harassment prohibited -- reporting. (1) Legislators and legislative employees have the right to work free of harassment on account of race, color, sex, culture, social origin or condition, or religious ideas when performing services in furtherance of legislative responsibilities, whether the offender is an employer, employee, legislator, lobbyist, or member of the public.

(2) A violation of this policy must be reported to the party leader in the appropriate house if the offended party is a legislator or to the presiding officer if the offended party is the party leader. The presiding officer may refer the matter to the rules committee of the applicable house, and the offender is subject to discipline or censure, as appropriate.

(3) If the offended party is an employee of the house of representatives or the senate, the violation must be reported to the employee's supervisor or, if the offender is the supervisor for the house of representatives or the senate, the report should be made to the chief clerk of the house of representatives or to the secretary of the senate, as appropriate. If the offended party is a permanent legislative employee, the report should be made to the employee's supervisor or, if the offender is the supervisor, to the appropriate division director. If the offender is a division director, the report should be made to the presiding officer of the appropriate statutory committee.

(4) If the offended party is a supervisor for the house of representatives or the senate, the violation must be reported to the chief clerk of the house of representatives or to the secretary of the senate, as appropriate. If the offended party is a supervisor of permanent legislative employees, the violation must be reported to the appropriate division director. If the offender is a division director, the report should be made to the presiding officer of the appropriate statutory committee.

(5) The chief clerk or the secretary shall report the violation to the presiding officer. The presiding officer may refer the matter to the rules committee. If the offender is an employee or supervisor, the employee or supervisor is subject to discipline or discharge.

The first option for an offended party who is a legislator is to report the violation to the party leader of the alleged offending legislator in the appropriate house. The legislative rules lack substantive detail with respect to how a complaint should be handled once it has been reported. Joint Rule 10-85(2) only provides that once violation has been reported to the appropriate party leader, the presiding officer "may refer the matter to the rules committee of the applicable house, and the offender is subject to discipline or censure, as appropriate."

If the violation was reported during a legislative session, the presiding officer of the appropriate house has the discretion as to whether to refer the matter to the rules committee or not. This discretion presumes that party leadership may resolve the reported violation themselves rather than refer the matter to the rules committee. Regardless of whether the reported violation is referred to the rules committee or is resolved by party leadership, the legislative rules do not provide for a detailed process on how to investigate, adjudicate, and provide for adequate due process with respect to a reported violation. If a violation is reported outside a legislative session, there is currently not an option for the presiding officer to refer the matter to the rules committee. A rules committee is classified as a standing committee and is statutorily prohibited from meeting during the interim (5-2-205, MCA).

Absent direction in the legislative rules on a process to follow in the event of a reported violation, we would recommend that party leadership follow (with adaptations dictated in the legislative rules) the nondiscrimination and harassment policy process set out in the Legislative Branch Administrative Manual (see **Appendix A**). The Legislative Branch Administrative Manual technically only governs the conduct of permanent legislative branch employees. The conduct of legislators is governed by the legislative rules. However, the process outlined in the Legislative Branch Administrative Manual is instructive and could be utilized by the rules committee or appropriate legislative leadership.

The Legislative Branch Administrative Manual defines harassment:

Under this policy, harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of race, creed, color, culture, social origin, religion, sex, sexual orientation, age, pregnancy, disability,

genetic information, gender identity or expression, marital status, military service or veteran status, citizenship, or any other characteristic protected by law or that of the individual's relatives, friends, or associates and that has the purpose or effect of creating an intimidating, hostile, or offensive work environment, has the purpose or effect of unreasonably interfering with an individual's work performance, or otherwise adversely affects an individual's employment opportunities.

Examples of harassing conduct include but are not limited to:

epithets, slurs, or negative stereotyping; threatening, intimidating, or hostile acts; denigrating jokes; and written or graphic material that denigrates or shows hostility or aversion toward an individual or group and that is placed on walls or elsewhere on the employer's premises or circulated in the workplace.

Sexual harassment is defined under the Legislative Branch Administrative Manual as:

unwelcome advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

According to the Manual, sexual harassment may include a range of subtle and not-so-subtle behaviors and may involve individuals of the same or different gender. Depending on the circumstances, these behaviors may include but are not limited to:

unwanted sexual advances or requests for sexual favors; sexual jokes and innuendo; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess, or sexual deficiencies; leering, whistling, or touching; insulting or obscene comments or gestures; display in the workplace of sexually suggestive objects or pictures; and other physical, verbal, or visual conduct of a sexual nature.

The Legislative Branch Administrative Manual provides the following sexual harassment reporting and inquiry procedures:

C. Reporting and inquiry procedure

An employee who believes that the employee has been the subject of harassment shall report the conduct to the employee's supervisor or the human resource manager, either verbally or in writing, within 10 calendar days of the conduct. If the supervisor is the alleged offender, the employee should report the conduct to the employee's director or the human resource manager unless the director is the employee's supervisor; then the employee should report the conduct to the presiding officer of the committee overseeing the division or the human resource manager. Harassment allegations against legislators or House and Senate

employees must be reported as provided in Joint Rule 10-85.

The person receiving the report of alleged harassment shall conduct an inquiry with assistance from the human resource manager within 20 calendar days of receiving the report. The person to whom the report is made may seek the assistance of other division members or employees or persons outside the division as needed. The results of the inquiry must be disclosed to the offended employee and the alleged offender before the 20-day period expires. The person making the complaint and the person receiving the complaint shall treat the information in strict confidence.

The procedure for inquiry into a harassment report may include:

1. securing a statement from the person reporting the harassment;
2. holding individual interviews or group meetings;
3. weighing the facts;
4. applying pertinent laws, rules, policies, or practices to the facts surrounding the report of harassment.

If the result of the inquiry is a finding that the charge of harassment is not substantiated, a copy of the finding must be placed in the confidential employment file of the complaining employee only. If the employee is dissatisfied with the result of the inquiry, the employee may pursue the matter under the formal grievance procedure.

If the result of the inquiry is a finding that the charge of harassment is substantiated and the offender is a division employee, the person conducting the inquiry shall ensure that appropriate disciplinary action is initiated in conformity with Chapter 16 of this manual.

Nothing in this procedure precludes an employee from requesting the employee's supervisor to first confer informally with the alleged offender to apprise the offender of the complaint and to gain assurance that the offensive conduct will be discontinued.

Following the process outlined in the Montana Legislative Branch Administrative Manual, the offended legislator would report the violation to the appropriate party leader who would then, at the request of the offended legislator, either confer informally with the alleged offender to apprise the alleged offender of the complaint and to gain assurance that the offensive conduct will be discontinued and/or initiate an inquiry with the support of the Legislative Branch human

resource officer and legal staff or contract with an independent investigator to conduct the inquiry. The inquiry may include any of the items numbered one through four above or others appropriate to the situation. If the harassment is substantiated, the offender would be subject to discipline as provided in Joint Rule 10-85(2). Any due process concerns could be met by following the process outlined in the Legislative Branch Administrative Manual and specifically by following the procedure outlined above for an inquiry. If the harassment is unsubstantiated and the offended party is not satisfied with the inquiry, the offended party could look to the Legislative Branch employee grievance policy for guidance, but as a practical matter they could consider consulting with an outside attorney.

The second option for an offended legislator in pursuing a complaint against another legislator would be to consult with a private attorney the offended legislator's own expense (many attorneys offer free consultations in these types of cases) and explore a potential claim under the Montana Human Rights Act or other potential claims. A critical matter to note if the complainant is considering a claim under the Montana Human Rights Act is that the statute of limitations is 180 days from the date "the alleged unlawful discriminatory practice occurred or was discovered." (59-2-501(4)(a), MCA).

2. What are the options available to a legislator making a complaint against a different party who is not a legislator?

See our response to question #4 and **Appendix B**.

3. What makes a complaint "formal" vs. "informal"?

The Legislative Branch Administrative Manual states that:

Nothing in this procedure precludes an employee from requesting the employee's supervisor to first confer informally with the alleged offender to apprise the offender of the complaint and to gain assurance that the offensive conduct will be discontinued.

In the context of the legislative rules, there is nothing that precludes an offended legislator from requesting the appropriate party leader to first confer informally with the alleged offender to apprise the offender of the complaint and to gain assurance that the offensive conduct will be discontinued. This would constitute an "informal" complaint process. A complaint becomes "formal" when the offended party and the appropriate party leader put the alleged offender on notice and initiate a process to investigate and adjudicate the reported violation.

Obviously, if the offended party initiates a complaint pursuant to the Montana Human Rights Act, that would constitute a "formal" complaint.

4. **The rules state that a violation should be brought to the "party leader". Which party leader? If both parties are legislators, to the party leader of the offended or the offending? What if one party is not a legislator, but the other is? Which party leader would the offended go to then? Presumably - can you please map out the various scenarios for me in the instance where the offender is a legislator and the offended is a staffer (long-term legislative staff, short-term legislative staff, executive branch staff) or a member of the public or a member of the press or a lobbyist? In all of the above cases, who determines if the offending action is a violation of the policy?**

Joint Rule 10-85 prohibiting harassment and providing a process for the reporting of harassment is not a model of clarity with respect to answering a number of the above questions. Joint Rule 10-85(1) prohibits harassment of legislators and legislative employees in articulating that:

(1) Legislators and legislative employees have the right to work free of harassment on account of race, color, sex, culture, social origin or condition, or religious ideas when performing services in furtherance of legislative responsibilities, whether the offender is an employer, employee, legislator, lobbyist, or member of the public.
(emphasis added)

Joint Rule 10-85(2) through (5) lay out in some detail the reporting requirements for harassment depending on whether the offended party is a legislator, party leader, employee of the House or Senate, permanent legislative employee, supervisor of permanent legislative employees, or supervisor of the House or Senate:

(2) A violation of this policy must be reported to the party leader in the appropriate house if the offended party is a legislator or to the presiding officer if the offended party is the party leader. The presiding officer may refer the matter to the rules committee of the applicable house, and the offender is subject to discipline or censure, as appropriate.

(3) If the offended party is an employee of the house of representatives or the senate, the violation must be reported to the employee's supervisor or, if the offender is the supervisor for the house of representatives or the senate, the report should be made to the chief clerk of the house of representatives or to the secretary of the senate, as appropriate. If the offended party is a permanent legislative employee, the report should be made to the employee's supervisor or, if the offender is the supervisor, to the appropriate division director. If the offender is a division director, the report should be made to the presiding officer of the appropriate statutory committee.

(4) If the offended party is a supervisor for the house of representatives or the senate, the violation must be reported to the chief clerk of the house of representatives or to the secretary of the senate, as appropriate. If the offended party is a supervisor of permanent legislative employees, the violation must be reported to the appropriate

division director. If the offender is a division director, the report should be made to the presiding officer of the appropriate statutory committee.

(5) The chief clerk or the secretary shall report the violation to the presiding officer. The presiding officer may refer the matter to the rules committee. If the offender is an employee or supervisor, the employee or supervisor is subject to discipline or discharge.

You have requested that we map out in detail under the legislative rules the individual/entity who is responsible for receiving/processing the reported violation from the offended party and identify the individual/entity that is responsible for investigating, adjudicating, and dispensing punishment if the offended party is an employee of the House or Senate, a permanent legislative employee, a supervisor of permanent legislative employees, a supervisor of the House or Senate, a lobbyist, an executive branch employee, or a member of the public. Please refer to the table in **Appendix B**, which maps out all of the possible scenarios with respect to the offended parties noted above.

Specifically addressing the scenario of an offended party who is a legislator, Joint Rule 10-85(2) requires that a violation of the harassment policy must be reported to the party leader in the appropriate house or to the presiding officer if the offended party is the party leader. Joint Rule 10-85(2) does not define what constitutes a "party leader in the appropriate house." Reading Joint Rule 10-85(2) through in its entirety, it can be reasonably inferred that the violation should be reported to the party leader of the alleged offending legislator's house. Each house of the Legislature has the constitutional authority to expel and punish a member for good cause (Article V, section 10(1), Montana Constitution). The house of the alleged offending legislator is the appropriate house in which to investigate and adjudicate the reported violation. This would not preclude an offended legislator from pursuing a separate complaint under the Montana Human Rights Act.

If the alleged offender is a legislator and the offended party is a legislative employee, as cited under Joint Rule 10-85(3) through (5), the reported violation would track with requirements spelled out in Joint Rule 10-85(3) through (5) (see **Appendix B**). However, the legislative rules are unclear with respect to who would ultimately determine if the alleged offending legislator violated the harassment policy. Presumably it would be the party leadership/rules committee of the house of the alleged offending legislator that would investigate and make recommendations regarding discipline, if any. Ultimately it is the body of the appropriate house that would adjudicate the reported violation of an offending legislator. This would not preclude the legislative employee from pursuing a separate complaint under the Montana Human Rights Act.

5. The rules state that the leader may refer the matter to the Rules Committee of the "applicable House". Which House is the applicable House? And what if the incident happens in the interim, when the Rules Committee cannot be convened?

See our response to question #1 and see **Appendix B**.

6. What provisions do we have in place to address retaliation against those who choose to come forward and report sexual harassment (whether they are the victim or a third-party observer, etc).

In the event of retaliation, section 49-2-301, MCA, of the Montana Human Rights Act prohibits retaliation and could be included as one of the bases for a human rights complaint. The complainant legislator may also have a complaint under a new statute passed during the 2017 legislative session and codified at 2-2-145, MCA.

2-2-145. Retaliation unlawful — civil liability — remedies — statute of limitations — definitions. (1) It is unlawful for a state agency, state officer, public officer, or public employee to retaliate against, or to condone or threaten retaliation against, an individual who, in good faith, alleges waste, fraud, or abuse.

(2) A person who violates a provision of this section is liable in a civil action in a court of competent jurisdiction. The provisions of 2-9-305 apply if the person is being sued in a civil action for actions taken within the course and scope of the person's employment and the person is a state officer, public officer, or public employee.

(3) For purposes of this section:

(a) "person" has the meaning provided in 2-5-103;

(b) "retaliate" means to take any of the following actions against an individual because the individual, in good faith, alleged waste, fraud, or abuse:

(i) terminate employment;

(ii) demote;

(iii) deny overtime, benefits, or promotion;

(iv) discipline;

(v) decline to hire or rehire;

(vi) threaten or intimidate;

(vii) reassign to a position that hurts future career prospects;

(viii) reduce pay, work hours, or benefits; or

(ix) take another adverse personnel action; and

(c) "state agency" has the meaning provided in 1-2-116.

(4) Remedies available to an aggrieved individual for a violation may include:

(a) reinstatement to a lost position;

(b) compensation for lost benefits, including service credit;

(c) compensation for lost wages;

(d) payment of reasonable attorney fees;

(e) payment of court costs;

(f) injunctive relief; and

(g) compensatory damages.

(5) A lawsuit alleging a violation of this section must be brought within 2 years of the alleged violation.

(6) If a state agency maintains written internal procedures under which an individual may appeal an action described in subsection (3)(b) within the agency's organizational structure, the individual shall first exhaust those procedures before filing an action under this section. The individual's failure to initiate or exhaust available internal procedures is a defense to an action brought under this section.

(7) For purposes of this subsection, if the state agency's internal procedures are not completed within 90 days from the date the individual may file an action under this section, the agency's internal procedures are considered exhausted. The limitation period in subsection (5) is tolled until the procedures are exhausted. The provisions of the agency's internal procedures may not in any case extend the limitation period in subsection (5) more than 240 days.

(8) If the state agency maintains written internal procedures described in subsection (6), the agency shall, within 7 days of receiving written notice from the complaining individual of the action described in subsection (3)(b), notify the individual of the existence of the written procedures and supply the individual with a copy. If the agency fails to comply with this subsection, the individual is relieved from compliance with subsection (6).

(9) The commissioner of political practices is not required or authorized to enforce this section.

The effective date of section 2-2-145, MCA, was October 1, 2017. There are no court cases interpreting this statute. However, if retaliation is against a legislator who has alleged sexual harassment that is determined to be "abuse" as set out in section 2-2-145(1), MCA this statute could provide a remedy.

7. If someone who is a legislator brings a complaint forward, can we protect that person's confidentiality as well as the confidentiality of the accused until a determination has been made?

Consideration of privacy and confidentiality require analysis of the interplay between the right to privacy established in Article II, section 10, of the Montana Constitution and the right to know established in Article II, section 9, of the Montana Constitution.

Any expectation of privacy of a legislator who is alleged to have committed an act of sexual harassment is most likely unreasonable. In *Citizens to recall Whitlock v. Whitlock*, 255 Mont. 517, 524, 844 P.2d 74, 78 (1992), the Montana Supreme Court determined that the expectation of privacy of the offending party who was the mayor of Hamilton was unreasonable. As a result, the investigative report prepared by the outside investigator finding evidence of harassment was publicly released. The primary basis for the determination was that the allegations against Whitlock applied directly to his ability to carry out his duties. The Court held: "[i]nformation related to the ability to perform public duties should not be withheld from public scrutiny." *Whitlock*, 255 Mont. at 522, 844 P.2d at 77. The court further reasoned that the harassment allegations applied to Whitlock's ability to perform his job. The same analysis could be used

regarding a legislator who harasses another legislator. The complainant in *Whitlock* was the Hamilton City Judge. She waived confidentiality and, as a result, the case is not instructive with respect to complainant confidentiality.

The question then becomes does a legislator who is a complainant in a sexual harassment case have a reasonable expectation of privacy? Montana law is undecided on this issue. However, there are potential arguments that could be made on behalf of a legislator who has suffered sexual harassment and wishes to protect confidentiality.

When a privacy interest is implicated a court will utilize a two-part test to determine whether a privacy interest is protected: (1) whether the person involved had a subjective or actual expectation of privacy; and (2) whether society is willing to recognize that expectation as reasonable. *Whitlock*, 255 Mont. at 522, 844 P.2d at 77.

A legislator who is a complainant has an argument that the legislator has an actual expectation of privacy because simply being a victim of sexual harassment does not affect the legislator's ability to perform public duties. Further, the confidentiality of public employees who are complainants or witnesses is generally protected because society is willing to accept their expectation of privacy as reasonable. *Moe v. Butte Silver-Bow County*, 2016 MT 103, ¶21. Granted, a legislator is not an ordinary public employee but as a complainant, the legislator has more in common with a public employee who is a complaining witness than with a legislator who is alleged to have committed sexual harassment. Additionally, because the investigation is focused on the conduct of the offending legislator, the complainant who chose to come forward may have an expectation of privacy that society is willing to accept as reasonable. *See also Bozeman Daily Chronicle v. Police Dept.* 260 Mont. 218, 228, 859 P.2d 435, 441 (1993). Finally, it could be argued that the legislature as a whole has an interest in encouraging candor and a willingness to come forward with legitimate complaints of harassment.

Next comes the question of balancing the expectation of privacy of a legislator who is a victim of sexual harassment against the merits of public disclosure. With respect to public employees, the Court has held that the privacy interests regarding the complaint process and reporting exceed the merits of public disclosure even if the information may provide "interesting or sensational news copy". *Moe*, ¶24. In balancing the public's right to know with the privacy rights of a complainant, each case "requires a fact specific, case-by-case analysis of the interests at issue." *Billings Gazette v. City of Billings*, 2013 MT 334, ¶ 15, 372 Mont. 409, 413-14, 313 P.2d 129, 133. In addition, "mere status does not control the determination." *Missoulian v. Board of Regents*, 207 Mont. 513, 526, 675 P.2d 962, 969 (1984) (in determining that the demands of individual privacy of university presidents in confidential job performance evaluations clearly exceed the merits of public disclosure).

In this case, the confidentiality of a legislator who comes forward with a sexual harassment complaint is similar to the confidentiality of the university presidents in *Missoulian* because both are considered public figures. *See generally Missoulian*. The goal of encouraging candor in the

evaluation of university presidents is analogous to encouraging candor of legislators in policing themselves. A legislator making such a report has not violated public trust but rather has strengthened it by coming forward. In our opinion, these are the types of arguments that could justify the redaction of the complainant's name and identifying information if a public information request was received. Only a court could make a final determination of course, but we are comfortable in redacting this type of information.

8. How do we ensure due process?

See our response in question #1.

9. Does it matter if the offensive behavior takes place within the Capitol vs. outside of the Capitol?

No. If the offended legislator or legislative employee was performing services in furtherance of legislative responsibilities, it does not matter where the harassing behavior took place and the harassment policy under the legislative rules would apply.

10. Is there a provision for a third party investigator to be brought in?

There is no prohibition in the current legislative rules governing harassment or the Legislative Branch Administrative Manual with respect to bringing in an independent third party to investigate a complaint. The Wyoming Legislature has recently proposed creating a process for an outside independent investigation of a complaint in the event that their Legislative Services Office executive director or leaders of the Legislature have a conflict of interest when looking into a report of harassment.

We would also note that the permanent nonpartisan legislative staff (i.e. human resource officer, executive directors, and legislative attorneys) would likely be asked to assist legislative leadership in investigating and adjudicating a reported violation. If the offended legislator and the alleged offending legislator were of opposite political parties, it could potentially put nonpartisan legislative staff in an awkward position. Having said that, it is part and parcel of our job duties as nonpartisan legislative staff to support the institution of the Legislature and provide legislative leadership with information, legal advice, and options. Ultimately it is up the legislative leadership and the Legislature (House and Senate) to take or leave nonpartisan staff's advice and make their own decisions regarding the investigation and adjudication process and punishment, if any.

We would be remiss if we did not note that bringing in an outside independent investigator would necessitate additional costs incurred on the part of the Legislative Branch.

Appendix A. Legislative Branch Administrative Manual Policy on Harassment

III. Nondiscrimination and harassment

A. Policy and objective

It is the policy of the Legislative Branch that employees have the right to be free from illegal discrimination and harassment when performing services in furtherance of division responsibilities, whether the offender is an employer, employee, legislator, lobbyist, state officer or employee, or member of the public. Federal law, [Title 49, chapter 2, MCA](#) (commonly referred to as the Montana Human Rights Act), and its implementing regulations prohibit discrimination on the basis of race, creed, color, culture, social origin, religion, sex, sexual orientation, age, pregnancy, disability, genetic information, gender identity or expression, marital status, military service or veteran status, citizenship, or any other characteristic protected by law.

It is the policy of the Legislative Branch to encourage an employee to promptly report, as provided in section C, if the employee is being subjected to illegal discrimination or harassment by anyone while performing services in furtherance of division responsibilities. It is the policy of the Legislative Branch to investigate those reports. The Legislative Branch prohibits retaliation against any individual who reports discrimination or harassment or participates in an investigation of those reports.

It is the policy of the Legislative Branch to ensure equal employment opportunity without discrimination or harassment on the basis of race, creed, color, culture, social origin, religion, sex, sexual orientation, age, pregnancy, disability, genetic information, gender identity or expression, marital status, military service or veteran status, citizenship, or any other characteristic protected by law. The Legislative Branch prohibits any such discrimination or harassment.

It is the policy of the Legislative Branch to discipline an employee for substantiated charges of illegal discrimination or harassment of any person in connection with the employee's performance of services in furtherance of division responsibilities.

B. What constitutes harassment?

Harassment on the basis of any protected characteristic is strictly prohibited. Under this policy, harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of race, creed, color, culture, social origin, religion, sex, sexual orientation, age, pregnancy, disability, genetic information, gender identity or expression, marital status, military service or veteran status, citizenship, or any other characteristic protected by law or that of the individual's relatives, friends, or associates and that has the purpose or effect of creating an intimidating, hostile, or offensive work environment, has the purpose or effect of unreasonably interfering with an individual's work performance, or otherwise adversely affects an individual's employment opportunities.

Harassing conduct includes but is not limited to epithets, slurs, or negative stereotyping; threatening, intimidating, or hostile acts; denigrating jokes; and written or graphic material that denigrates or shows hostility or aversion toward an individual or group and that is placed on walls or elsewhere on the employer's premises or circulated in the workplace.

Sexual harassment constitutes discrimination and is illegal under federal and state laws. For the purposes of this policy, sexual harassment is defined as unwelcome advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when, for example:

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

Sexual harassment may include a range of subtle and not-so-subtle behaviors and may involve individuals of the same or different gender. Depending on the circumstances, these behaviors may include but are not limited to unwanted sexual advances or requests for sexual favors; sexual jokes and innuendo; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess, or sexual deficiencies; leering, whistling, or touching; insulting or obscene comments or gestures; display in the workplace of sexually suggestive objects or pictures; and other physical, verbal, or visual conduct of a sexual nature.

C. Reporting and inquiry procedure

An employee who believes that the employee has been the subject of harassment shall report the conduct to the employee's supervisor or the human resource manager, either verbally or in writing, within 10 calendar days of the conduct. If the supervisor is the alleged offender, the employee should report the conduct to the employee's director or the human resource manager unless the director is the employee's supervisor; then the employee should report the conduct to the presiding officer of the committee overseeing the division or the human resource manager. Harassment allegations against legislators or House and Senate employees must be reported as provided in [Joint Rule 10-85](#).

The person receiving the report of alleged harassment shall conduct an inquiry with assistance from the human resource manager within 20 calendar days of receiving the report. The person to whom the report is made may seek the assistance of other division members or employees or persons outside the division as needed. The results of the inquiry must be disclosed to the offended employee and the alleged offender before the 20-day period expires. The person making the complaint and the person receiving the complaint shall treat the information in strict confidence.

The procedure for inquiry into a harassment report may include:

1. securing a statement from the person reporting the harassment;
2. holding individual interviews or group meetings;
3. weighing the facts;
4. applying pertinent laws, rules, policies, or practices to the facts surrounding the report of harassment.

If the result of the inquiry is a finding that the charge of harassment is not substantiated, a copy of the finding must be placed in the confidential employment file of the complaining employee only. If the employee is dissatisfied with the result of the inquiry, the employee may pursue the matter under the formal grievance procedure.

If the result of the inquiry is a finding that the charge of harassment is substantiated and the offender is a division employee, the person conducting the inquiry shall ensure that appropriate disciplinary action is initiated in conformity with Chapter 16 of this manual.

Nothing in this procedure precludes an employee from requesting the employee's supervisor to first confer informally with the alleged offender to apprise the offender of the complaint and to gain assurance that the offensive conduct will be discontinued.

APPENDIX B. Harassment Reporting, Investigation, and Adjudicating Scenarios Under the Current Legislative Rules, Legislative Branch Administrative Manual, and the Montana Human Rights Act

Offended Party	Alleged Offending Party	Individual to Whom the Violation is Reported	Entity/Individual Responsible for Investigating and Adjudicating Compliant
Legislator	Legislator.	Not completely clear under the legislative rules. Likely the party leader of the alleged offending legislator's house.	Not completely clear under the legislative rules. Likely the party leader of the alleged offending legislator's house or the appropriate rules committee if a referral is made by the presiding officer.
Legislator (Party Leader)	Legislator.	Presiding officer of the alleged offending party leader's house.	Presiding officer of the alleged offending party leader's house or the appropriate rules committee if a referral is made by the presiding officer.
Legislator	Individuals not legislators (lobbyist, executive branch employees, members of the public).	Unclear under the legislative rules. Likely the presiding officer of the offended legislator's house.	Unclear under the legislative rules. Likely the presiding officer of the offended legislator's house or the appropriate rules committee if a referral is made by the presiding officer. However, there is limited authority for the legislature to punish a violator. Referral of reported violation to the human rights commission may be an option.

Offended Party	Alleged Offending Party	Individual to Whom the Violation is Reported	Entity/Individual Responsible for Investigating and Adjudicating Compliant
Legislator	Employees of the House or Senate.	Unclear under the legislative rules. Likely report to the party leader of the offended legislator and/or to the presiding officer of the house that the alleged offender employee is employed.	Unclear under the legislative rules. Likely the presiding officer of the house that the alleged offender employee is employed. The presiding officer may refer the matter to the rules committee. Pursuant to legislative rule alleged offender employee of the House or Senate may be subject to discipline or discharge.
Legislator	Permanent legislative employee.	Unclear under the legislative rules. Likely report to the party leader of the offended legislator and/or the presiding officer of the offended legislator's house. The offended legislator's party leader and/or the presiding officer would likely report the violation to permanent legislative employee's division director.	Unclear under the legislative rules. Likely both the division director and the party leader of the offended legislator and/or the presiding officer of the offended legislator's house.

Offended Party	Alleged Offending Party	Individual to Whom the Violation is Reported	Entity/Individual Responsible for Investigating and Adjudicating Compliant
Employee of House or Senate	Another employee of the House or Senate.	Employee's supervisor.	Chief clerk of the House or secretary of the Senate shall report violation to the presiding officer in the appropriate house. The presiding officer may refer the matter to the rules committee. Pursuant to legislative rule alleged offender employee of the House or Senate may be subject to discipline or discharge.
Employee of House or Senate	Permanent legislative employee.	Employee's supervisor.	Unclear under the legislative rules. Chief clerk of the House or secretary of the Senate shall report violation to the presiding officer in the appropriate house. The presiding officer may refer the matter to the rules committee.

Offended Party	Alleged Offending Party	Individual to Whom the Violation is Reported	Entity/Individual Responsible for Investigating and Adjudicating Compliant
Employee of House or Senate	Individuals not an employee of the House or Senate (lobbyist, executive branch employees, members of the public).	Employee's supervisor.	Unclear under the legislative rules. Chief clerk of the House or secretary of the Senate shall report violation to the presiding officer in the appropriate house. The presiding officer may refer the matter to the rules committee. However, there is limited authority for the legislature to punish a violator. Referral of reported violation to the Human Rights Commission may be an option.
Employee of House or Senate	Employee's supervisor.	Chief clerk of the House or secretary of the Senate as appropriate.	Chief clerk of the House or secretary of the Senate shall report violation to the presiding officer in the appropriate house. The presiding officer may refer the matter to the rules committee. Pursuant to legislative rule alleged offender employee of the House or Senate may be subject to discipline or discharge.

Offended Party	Alleged Offending Party	Individual to Whom the Violation is Reported	Entity/Individual Responsible for Investigating and Adjudicating Compliant
Employee of House or Senate (Supervisor)	Employee of House or Senate, permanent legislative employee, etc.	Chief clerk of the House or secretary of the Senate as appropriate.	Chief clerk of the House or secretary of the Senate shall report violation to the presiding officer in the appropriate house. The presiding officer may refer the matter to the rules committee. Pursuant to legislative rule alleged offender employee of the House or Senate may be subject to discipline or discharge.
Employee of House or Senate	Legislator.	Initially reported to the employee's supervisor. Supervisor would likely then to the clerk of the House or secretary of the Senate as appropriate and then to the presiding officer of the appropriate house.	Unclear under the legislative rules. Chief clerk of the House or secretary of the Senate shall report violation to the presiding officer in the appropriate house. The presiding officer may refer the matter to the rules committee.
Permanent Legislative Employee	Another permanent legislative employee.	Permanent legislative employee's supervisor.	Process set out in the legislative branch administrative manual.
Permanent Legislative Employee	Supervisor of permanent legislative employee.	Appropriate division director.	Process set out in the legislative branch administrative manual.
Permanent Legislative Employee (Supervisor)	Another permanent legislative employee, employee of House and Senate, etc.	Appropriate division director.	Process set out in the legislative branch administrative manual and legislative rules.

Offended Party	Alleged Offending Party	Individual to Whom the Violation is Reported	Entity/Individual Responsible for Investigating and Adjudicating Compliant
Permanent Legislative Employee	Permanent legislative employee division director.	Presiding officer of the appropriate statutory committee.	Process set out in the legislative branch administrative manual
Permanent Legislative Employee	Employee of House or Senate.	Initially report to the permanent legislative employee's supervisor.	Unclear under legislative rules. Likely adherence to the process set out in the legislative branch administrative manual. In addition under the legislative rules, the chief clerk of the House or secretary of the Senate shall report violation to the presiding officer in the appropriate house. The presiding officer may refer the matter to the rules committee. Pursuant to legislative rule alleged offender employee of the House or Senate may be subject to discipline or discharge.
Permanent Legislative Employee	Legislator	Initially reported to the permanent legislative employee's supervisor. Likely then to the employee's division director and then to the presiding officer of the alleged offending legislator of the appropriate house.	Unclear under the legislative rules. Likely both the division director and the party leader of the offended legislator and/or the presiding officer of the offended legislator's house.

Offended Party	Alleged Offending Party	Individual to Whom the Violation is Reported	Entity/Individual Responsible for Investigating and Adjudicating Compliant
Permanent Legislative Employee	Individuals not a permanent legislative employee (lobbyist, executive branch employees, members of the public).	Permanent legislative employee's supervisor.	Process set out in the legislative branch administrative manual. Referral of reported violation to the human rights commission may be an option.

Offended Party	Alleged Offending Party	Individual to Whom the Violation is Reported	Entity/Individual Responsible for Investigating and Adjudicating Compliant
Lobbyist, Executive Branch Employees, Members of the Public	Legislator, employee of House or Senate, or permanent legislative employee.	The legislative rules regarding harassment only apply to offended legislators and legislative employees. The Legislative Branch Administrative Manual only applies to permanent legislative employees. An offended lobbyist and members of the public may report a violation under the Montana Human Rights Act. An executive branch employee may report under the process outlined in the employee's respective executive branch harassment policy and/or report a violation under the Montana Human Rights Act.	The legislative rules regarding harassment only apply to offended legislators and legislative employees. The Legislative Branch Administrative Manual only applies to permanent legislative employees. An offended lobbyist and members of the public may report a violation to the human rights commission and the commission is the entity that would investigate and adjudicate the violation. An executive branch employee may report under the process outlined in the employee's respective executive branch harassment policy which provides for an investigation and adjudication process and/or report a violation under the Montana Human Rights Act.

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