Jeffrey Neil Young, Esq.
Johnson, Webbert & Young LLP
160 Capitol St. Suite 3
Augusta, ME 04330
207-623-5110
jyoung@work.law

TESTIMONY OF JEFFREY NEIL YOUNG NEITHER IN SUPPORT OF NOR IN OPPOSITION TO LD 1250 AN ACT TO PROHIBIT SEXUAL HARASSMENT AS A SUBJECT MATTER OF MANDATORY ARBITRATION IN EMPLOYMENT CONTRACTS

My name is Jeffrey Neil Young. I am a partner in the law firm of Johnson, Webbert & Young, an executive Board member of the National Employment Lawyers Association (NELA), and vice-president of the Maine Employment Lawyers Association (MELA). NELA is the largest organization of civil rights lawyers in the country with about 4,000 national and affiliate attorney members. MELA is the largest organization of civil rights lawyers in Maine with about 75 member attorneys who represent employees in labor and employment matters across the state as at least 50% of their practice. I myself have been practicing labor and employment law for 35 years, the last 30 years here in Maine.

The intent of LD 1250 to ban forced arbitration of sexual harassment claims is salutary. It is precisely because employers so frequently require forced arbitration and the concomitant evil that decisions in such arbitrations must be kept confidential that sexual predators like Harvey Weinstein, Bill O'Reilly, Charlie Rose, Al Franken, and others too numerous to mention have been able to escape detection and victimize multiple women.

For that reason, MELA supports ending forced arbitration of sexual harassment claims. While victims of sexual harassment for many reasons, including personal privacy, may prefer arbitration to litigation in a court, that is a choice that they should be allowed to make voluntarily if and when a cause of action arises, not at the outset of their employment as a condition of hire.

While MELA believes that LD1250 as written is a well-intentioned attempt to preclude forced arbitration of sexual harassment claims, MELA has three concerns with the bill. First, MELA believes that the bill likely is preempted by the Federal Arbitration Act. The Supreme Court and Circuit Courts have found bills like LD 1250 to be preempted by the Federal Arbitration Act.. *Kindred Nursing Centers Ltd. P'ship v. Clark,* 137 S.Ct. 1421 (2017); *AT&T Mobility L.L.C. v. Concepcion,* 563 U.S. 333 (2011); *Mortensen v Bresnan Communications, LLC,* 722 F.3d 1151 (9th Cir. 2013).

Second, even if the bill were not preempted, LD 1250 does not address issues that often flow from sexual harassment complaints. Primary among those

complaints is retaliation. All too often, a woman—and most albeit not all sexual harassment victims are women—who refuses to succumb to a supervisor's or co-worker's advances finds herself the victim of retaliation if she dares to report the illicit behavior. LD 1250 if enacted could result in the impractical situation that a sexual harassment victim might find herself litigating a hostile work environment claim in court but having to arbitrate her retaliation claim.

Third, while MELA certainly appreciates that victims of sexual harassment should be free to litigate their claims if they so desire, MELA believes that other victims of discrimination deserve the same protections from pre-hire agreements and employment contracts that require forced arbitration as a condition of employment. It is not only women who may be subjected to a hostile environment at work. Maine law is replete with cases where African-Americans, people of color, people of different nationalities, people whose sexual orientation is LGBTQ, and people with disabilities have had to endure illegal harassment on the job. Those individuals deserve the same protection as victims of sexual harassment. Similarly, employees who are discriminated against on the basis of any protected characteristic who suffer adverse employment actions, such as disparate treatment including discipline and discharge, deserve protection from forced arbitration.

Fortunately, another bill will soon come before you that shares the good intentions of LD 1250 but is broader in scope, avoids preemption concerns, and allows employees to proceed collectively where they have a greater ability to successfully confront discrimination and harassment. That bill is a bill introduced by the Majority Leader, Sen. Jackson, which is forthcoming from the revisor's office. Sen. Jackson's bill will have a further beneficial side effect that is not present in LD 1250; it will enable employees to act as whistleblowers who, if successful, will recover penalties on behalf of the State that would help fund at no expense to the taxpayers badly needed positions in the Maine Department of Labor. You may recall that several weeks ago Mike Roland from the MDOL testified with respect to LD 857 that the four employees currently working for the Department in enforcement lack the ability to perform audits or inspections and only have time to respond to employee complaints.

In summary, while MELA supports the concept of Rep. Tipping's bill, for both legal and policy reasons MELA is neither for nor against LD 1250. MELA believes that Sen. Jackson's bill will present a better approach that has been used successfully in other states and will avoid the preemption and other issues raised by Rep. Tipping's bill. MELA will strongly support Sen. Jackson's bill and respectfully requests that this Committee consider Rep. Tipping's bill together with Sen. Jackson's bill when Sen. Jackson's bill comes before you.

Thank you for your consideration.