TESTIMONY OF THE MAINE EMPLOYMENT DEFENSE CONSORTIUM IN OPPOSITION TO LD 2184 – "RESOLVE, REGARDING LEGISLATIVE REVIEW OF CHAPTER 9: RULES GOVERNING ADMINISTRATIVE CIVIL MONEY PENALTIES FOR LABOR LAW VIOLATIONS, A MAJOR SUBSTANTIVE RULE OF THE DEPARTMENT OF LABOR, BUREAU OF LABOR STANDARDS"

Senator Tipping, Representative Roeder and the distinguished members of the Committee on Labor and Housing, we are writing to voice our opposition to LD 2184 and ask that the Committee send the proposed Chapter 9 revisions back to the Department of Labor for further rulemaking.

We, the Maine Employment Defense Consortium ("MEDC"), are the largest group of management-side labor and employment lawyers in Maine. Collectively, we represent a vast majority of the employers in this state ranging from small employers up to employers with thousands of employees. Our motto – "Keeping Maine Employed" – drives the MEDC's mission, which is to keep Maine's employers operating and to attract new employers to the state.

However, the proposed language of Chapter 9 charts a dangerous new course for Maine that will make the state less attractive to employers, which is why we ask that you oppose LD 2184.

First and foremost, the proposed major substantive rule is unconstitutional and will almost certainly lead to litigation against the state. Chapter 9, Section II(A)(4) shifts the burden onto employers to demonstrate "good faith" to reduce a potential civil penalty. But to demonstrate "good faith," this proposed rule mandates that employers provide a written apology. This is a glaringly unconstitutional regulation of private speech. The United States Supreme Court "has long held that the government may not compel the speech of private actors" and that the Free Speech Clause of the Constitution "restricts government regulation of private speech." *See e.g.*, *United States v. United Foods, Inc.,* 533 U.S. 405, 413-15 (2001); *Wooley v. Maynard,* 430 U.S. 705, 714-15, (1977); *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943). In fact, "the First Amendment guarantees private actors the right not to be associated with speech with which they disagree." *National A-1 Advertising v. Network Solutions,* 121 F. Supp. 2d 156, 165 (D.N.H. 2000). This is a bedrock principle of the First Amendment. As the U.S. District Court for the District of Maine explained,

> Since the beginning of the Republic compelled speech has been contrary to the freedoms guaranteed by the First Amendment. Thomas Jefferson powerfully observed that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950). The Supreme Court has prevented state governments from compelling speech in line with this principle."

Hagopian v. Dunlap, 480 F. Supp. 3d 288, 297-98 (D. Me. 2020).

The problem with Section II(A)(4) is that it predicates a finding of "good faith" only if "**all** of the below are applicable" including a written apology. This is the epitome of the government compelling private speech and will not withstand a constitutional challenge. The better route for

the Department to take is to treat an apology as one factor to consider in establishing "good faith" rather than mandating that "good faith" cannot be found without an apology. Indeed, an employer *may* choose to apologize, and the Department can certainly take that apology into account when determining a penalty. However, the Department cannot force an employer to apologize as the current proposed rule does.

Similarly, what if a violation was the result of an error through no fault of the employer such as payroll mistake by a third-party payroll provider? How does mandating a written apology serve any purpose in that situation? Also, there are no protections for the employer against the mandatory apology used against them in subsequent litigation.

Second, Section II(A)(4)(i) states that an employer can only demonstrate good faith if it complies with **all** of the Director's requests for information and records. Yet, it contains no requirement that the Director's requests by reasonable or proportional to the alleged violation. What recourse does an employer have if it believes a request is unreasonable? The answer is none, because both the Director's request and the determination as to whether an employer failed to comply rests on the judgment of the Director, rather than a neutral authority.

Third, the proposed rule, Section V(6) sets out an arbitrary minimum of 40% of "enforcement resources" allocated to proactive enforcement. That turns the Department into a hammer looking for a nail. With a quota to hit, the Department now has to allege violations to hit the 40% threshold regardless of the underlying merits of such violations. This is a dangerous precedent.

Finally, Section V(1) requires the Director to produce a report evaluating the extent of labor law violations to the Committee, which will be made public. But the rule provides no additional details as to what will be contained in the report. It is not clear whether employers will be identified in this report such that it is just a tool to publicly shame employers who may have committed a violation through no fault or ill-intention of their own.

The aforementioned issues are serious deficiencies in the proposed language of Chapter 9. Given that this is a major substantive agency rule, the Legislature must review and approve it. You have the power to send Chapter 9 back to the Department for further rulemaking to cure these defects. Adopting Chapter 9 as proposed will continue sending the message that Maine is not a welcome place for employers to conduct business.

Steven Silver, Esq.
Littler Mendelson, P.C. Workplace Policy Institute
President, Maine Employment Defense Consortium