

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1611 (Delegate Morales, *et al.*)
Judiciary and Economic Matters

**Courts - Concealment of Public Hazard and Sexual Harassment (Sunshine in
Litigation Act)**

This bill prohibits a court from entering an order or a judgment that conceals a public hazard, information concerning a public hazard, or information that may be useful to members of the public in protecting themselves from injury that may result from a public hazard. The bill also establishes that a person substantially affected by a public hazard has standing to contest an order or judgment that violates the bill's provisions, as specified. In addition, the bill prohibits a court from entering an order or judgment that conceals sexual harassment unless specified conditions are met.

Fiscal Summary

State Effect: The bill is not anticipated to materially affect the Judiciary, as discussed below.

Local Effect: The bill is not anticipated to materially affect the circuit courts, as discussed below.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Public Hazard

“Public hazard” means any device, instrument, person, procedure, or product or a condition of a device, an instrument, a person, a procedure, or a product that has caused or has the potential to cause injury.

Any provision of an agreement or a contract that conceals a public hazard, information concerning a public hazard, or information that may be useful to members of the public in protecting themselves from injury that may result from a public hazard is contrary to public policy and unenforceable.

A person that is substantially affected by a public hazard, including a representative of the news media, (1) has standing to contest an order, a judgment, an agreement, or a contract that violates the bill’s provisions and (2) may contest an order, a judgment, an agreement, or a contract that violates the bill’s provisions in the court that entered the order or judgment or bring an action for declaratory judgment under § 3-401 of the Courts and Judicial Proceedings Article.

On motion by a person seeking to protect disputed information in an action under the bill, the court must review the disputed action *in camera* (in chambers). If, after review, the court determines that the contested information or parts of the contested information concern a public hazard or may be useful to members of the public in protecting themselves from injury that may result from a public hazard, the court must authorize disclosure only of that information directly related to the public hazard.

A trade secret that is not a public hazard must be protected as specified under § 11-1205 of the Commercial Law Article. The bill incorporates the definition of “trade secret” under § 11-1201 of the Commercial Law Article.

Sexual Harassment

“Sexual harassment” is any unwelcome sexual advance or request for sexual favors or other unwelcome verbal or physical conduct of a sexual nature if:

- submission to or rejection of the conduct by an individual is, either explicitly or implicitly, (1) made a term or condition of the individual’s employment, the evaluation of the individual’s academic work, or the individual’s participation in any aspect of a program or an activity or (2) used as the basis for decisions affecting

the individual regarding employment, academics, or program or activity participation; or

- the conduct is sufficiently severe or pervasive that it creates an intimidating, hostile, humiliating, demeaning, or sexually offensive working, academic, residential, or social environment and has the purpose or effect of unreasonably interfering with the work or academic performance of an individual.

Any provision of an agreement or a contract that conceals sexual harassment or information concerning sexual harassment is contrary to public policy and unenforceable. However, on motion of the party alleging sexual harassment, a court may enter an order or judgment that conceals sexual harassment on a finding that the motion was not made as the result of deception by, threat by, or undue influence of the opposing party.

Current Law: “Standing” typically refers to an individual’s capacity to participate in a lawsuit. In order to demonstrate standing, an individual usually has to demonstrate that he/she experienced an adverse effect from the law or action in question, which will continue unless the court grants relief.

Section 11-1201 of the Commercial Law Article defines a “trade secret” as information, including a formula, pattern, compilation, program, device, method, technique, or process that (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In an action under the Maryland Uniform Trade Secrets Act, a court must preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding *in-camera* hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

Sexual Harassment

Discrimination in employment based on an individual’s race, color, religion, national origin, sex, age, marital status, sexual orientation, gender identity, genetic information, or disability is prohibited. Sexual harassment is a form of employment discrimination.

Enforcing Employment Discrimination

An individual alleging employment discrimination may file a complaint with the Maryland Commission on Civil Rights (MCCR). If a complaint is filed with MCCR and an

agreement to remedy and eliminate the discrimination cannot be reached, the matter may be heard before an administrative law judge. Remedies available on a finding that the respondent is engaging or has engaged in an unlawful employment practice include (1) enjoining the respondent from engaging in the discriminatory act; (2) ordering appropriate affirmative relief; (3) awarding compensatory damages for pecuniary and nonpecuniary losses; and (4) ordering any other equitable relief that the administrative law judge considers appropriate.

A complainant or a respondent may elect to have the claims asserted in a complaint alleging an unlawful employment practice determined in a civil action brought by MCCR on the complainant's behalf if (1) MCCR has found probable cause to believe the respondent has engaged or is engaging in an unlawful employment practice and (2) there is a failure to reach an agreement to remedy and eliminate the practice. MCCR may also elect to have the claims asserted within the complaint determined in a civil action brought on its own behalf under the same conditions. If an election for a civil action is made, MCCR must file, within 60 days after the election, a civil action in the circuit court for the county where the alleged discrimination occurred. On a finding that discrimination occurred, the court may provide the remedies specified above.

A complainant may file a private civil action against the respondent if (1) the complainant initially filed a timely administrative charge or a complaint under federal, State, or local law alleging discrimination; (2) at least 180 days have elapsed since the filing of this complaint or charge; and (3) the civil action is filed within two years after the alleged discrimination occurred. In addition to the remedies specified above, the court may award punitive damages if (1) the respondent is not a governmental unit or political subdivision and (2) the court finds that the respondent has engaged or is engaging in discrimination with actual malice. The filing of a private cause of action automatically terminates any proceeding before MCCR based on the underlying administrative complaint and any amendment to the complaint. Any party may demand a jury trial if a complainant seeks compensatory or punitive damages. Pursuant to § 20-1015 of the State Government Article, a court may award the prevailing party in a civil action reasonable attorney's fees, expert witness fees, and costs.

Background: Sunshine in Litigation legislation became popular in the 1990s amidst increased concern over the use of protective orders or confidentiality agreements to limit access to information and documents produced during discovery in products liability actions. In response to confidential settlements reached by General Motors concerning faulty ignition switches, Sunshine in Litigation legislation was introduced in the U.S. Congress in April and May 2014. Similar bills have been introduced in recent years, though none have passed.

The heightened focus on sexual harassment in recent months has brought increased attention to the use of nondisclosure clauses in settlement agreements pertaining to sexual harassment. Such agreements may prevent individuals who have suffered harassment from speaking about the experience and hide the true extent of sexual harassment at a workplace. However, some individuals who have experienced harassment may want to ensure confidentiality as to these matters.

Multiple states, including Florida, have Sunshine in Litigation laws regarding public hazards. The statute in Florida has primarily been applied in cases of products liability and sexual abuse of minors.

State/Local Fiscal Effect: The Judiciary advises that the expanded standing granted under the bill is likely to have a fiscal and/or operational impact on the Judiciary. Any increase in filings impact general court operations and could result in an increase in court time. Additionally, motions to review the challenges *in camera* could impact the amount of chamber time required of individual judges. However, the Judiciary is unable to project a precise impact at this time due to a potentially unlimited class of individuals with standing to bring challenges under the bill. However, the Department of Legislative Services assumes that even though the bill does not define “substantially affected” for purposes of expanding standing, individuals who do not have a significant personal or professional interest in a particular matter are unlikely to take the time or go through the expense of filing motions in court, thus mitigating a material impact on circuit court caseloads.

Given the types of actions to which the bill is likely to apply, it is also unlikely that the bill affects District Court caseloads. In general, civil cases in which the amount claimed does not exceed \$30,000 – excluding interest, costs, and attorney’s fees – belong in District Court, and cases involving more than \$30,000 belong in circuit court. Plaintiffs may elect to file cases involving between \$5,000 and \$30,000 in a circuit court. Cases involving up to \$5,000 *must* be filed in the District Court, and cases involving more than \$30,000 *must* be filed in circuit court. However, if the amount in controversy exceeds \$15,000, any party to the case has the right to demand a jury trial, in which case the matter is filed in or transferred to circuit court.

The bill is also unlikely to materially affect filing fee revenues.

Small Business Effect: A small business may be significantly affected to the extent it is involved in litigation concerning liability regarding a “public hazard” or “sexual harassment.” The expanded standing granted pursuant to the bill *may* result in litigation a small business otherwise would not have had. The prohibition against the concealment of information regarding sexual harassment (unless otherwise allowed) or a public hazard may also impact potential settlement agreements.

Additional Information

Prior Introductions: HB 222 of 2017, a similar bill, received an unfavorable report from the House Judiciary Committee. Its cross file, SB 528, received a hearing in the Senate Judicial Proceedings Committee but was subsequently withdrawn. HB 1460 of 2016, a similar bill, received an unfavorable report from the House Judiciary Committee. Its cross file, SB 709, received a hearing in the Senate Judicial Proceedings Committee but was subsequently withdrawn.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); National Women's Law Center; congress.gov; Department of Legislative Services

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