

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1342 (Delegate Kelly, *et al.*)
Rules and Executive Nominations

Legislative Branch of State Government - Sexual Harassment

This bill establishes several requirements and procedures relating to sexual harassment in the Legislative Branch. The bill authorizes any entity to file a complaint with the State Ethics Commission (SEC) that (1) a regulated lobbyist has sexually harassed a member of the Maryland General Assembly (MGA) or an employee of MGA or the Department of Legislative Services (DLS) or (2) a member of MGA has sexually harassed a regulated lobbyist. In addition, the Joint Committee on Legislative Ethics (JCLE) of MGA must develop a code of conduct relating to sexual harassment and retaliation and actions that will be taken against individuals who violate the code of conduct. The bill also requires (1) JCLE to refer complaints to an outside independent investigator for violations of the code of conduct; (2) DLS to maintain sexual harassment training records for members and employees, as specified; and (3) the Maryland Commission on Civil Rights (MCCR) to conduct a biennial survey on discrimination and harassment in the Legislative Branch and report its findings.

Fiscal Summary

State Effect: Potential significant increase in general fund expenditures beginning in FY 2019 to handle complaints and comply with the bill's investigatory and survey requirements. State revenues are not affected.

Local Effect: None.

Small Business Effect: Minimal, as discussed below.

Analysis

Bill Summary:

Code of Conduct

JCLE must develop a code of conduct for the General Assembly that includes:

- a clear definition of sexual harassment;
- a clear definition of retaliation; and
- a list of actions that will be taken against an individual who violates the code of conduct.

Referral of Complaints to Outside Independent Investigator

JCLE must refer a complaint alleging that a member of MGA has violated the committee's code of conduct to an outside and independent investigator who must submit findings and recommendations to the committee for further proceedings, as specified.

Workplace Harassment Training Records; Office of the Executive Director

The Office of the Executive Director in DLS must maintain electronic records documenting the completion of workplace harassment training by MGA members and employees and employees of DLS for at least five years after the training is completed. The records must include:

- the name of each employee and member of MGA and each employee of DLS who takes workplace harassment training;
- the date the workplace harassment training was completed; and
- the name of the person who conducted the training.

Survey of Discrimination and Harassment in the Legislative Branch

MCCR must conduct, by June 1, 2019, and biennially thereafter, a survey of members and employees of MGA to determine:

- the scope of discrimination and harassment in the Legislative Branch of State government;

- whether discrimination and harassment prevention and reform efforts are reducing the prevalence of discrimination and harassment in the Legislative Branch of State government; and
- whether the complaint and reporting process regarding instances of discrimination and harassment in the Legislative Branch of State government is sufficient.

The survey may not request any information or be conducted by any method that would make the respondent or the respondent's office identifiable. MCCR must submit a report that summarizes the results of the survey to the President of the Senate, the Speaker of the House of Delegates, and JCLE.

Current Law/Background:

Antidiscrimination in State Government, Generally

Sexual harassment is a form of sex-based discrimination, and each branch of State government is governed by the laws, personnel policies and procedures applicable in that branch unless otherwise provided by law. Thus, an employee or official in the Judicial, Legislative, or Executive Branch of State government is governed by separate, although substantially similar, prohibitions on sexual harassment.

State law generally prohibits an employer with at least 15 employees from discharging, failing or refusing to hire, or otherwise discriminating against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, genetic information, or disability. For the purposes of this prohibition, the State and local governments are considered employers.

Antidiscrimination in the Legislative Branch

The Legislative Policy Committee (LPC) must adopt guidelines that are not inconsistent with law and that, for employees of DLS, govern hiring, promotion, discrimination, anti-retaliation, and a grievance procedure, among other things. LPC has adopted such guidelines. DLS must manage the personnel activities of MGA as well its own employees, and carry out the rules and guidelines adopted by LPC.

It is the policy of *both* MGA and DLS that "harassment based on an individual's race, color, religion, gender, gender identity, sexual orientation, national origin, age, disability, marital status, citizenship, sex, or any other characteristic protected by law, is prohibited."

MGA and DLS Sexual Harassment Policy and Procedure

MGA and DLS have separate, written, workplace harassment policies. However, they are substantially similar; most of the differences between the policies pertain to additional discipline options for legislators and differences in the personnel to whom sexual harassment may be reported. Both policies define “sexual harassment” as unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical contact of a sexual nature, including where:

- submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment;
- submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting the individual; or
- the conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment, which is perceived by the victim to be abusive or hostile.

Both policies prohibit retaliation for reporting sexual harassment or other unlawful discrimination, and include examples of prohibited conduct, such as a range of subtle or overt behaviors that include: unwanted sexual advances or requests for sexual favors; sexual jokes and innuendo; verbal abuse of a sexual nature; unwelcome commentary about an individual’s body; commentary about an individual’s sexual prowess or sexual deficiencies; leering, whistling, or touching; insulting or obscene comments or gestures; displaying, communicating, or distributing sexually suggestive objects, pictures, or messages in the workplace; and other physical, verbal, nonverbal, or visual conduct of a sexual nature.

The policies cover the interaction of all MGA and DLS employees (including those who are part-time, temporary, and contractual) as well as members, interns, and pages assigned to MGA. The policies also cover interactions outside of the legislative complex, such as at legislative-sponsored events, professional meetings or seminars, and other activities that involve legislative business.

Several important updates were made to the policies in 2016 and 2017. In 2016, updates to both policies (1) added a definition for “workplace harassment;” (2) added the terms “gender” and “gender identity” to the antidiscrimination statement; and (3) altered the reporting procedures to encourage individuals who *witness* possible incidents of harassment to report it. In 2017, LPC required all reported incidents of sexual harassment in MGA to also be reported to the Human Resources Manager of DLS. The Human Resources Manager must report to LPC annually on the number of incidents made by type and resolution. In addition, MGA policy was modified to clarify that disciplinary action for a legislator who violates the policy includes referral to JCLE and expulsion, pursuant

to the State Constitution. **Exhibit 1** shows in general, how reports of sexual harassment are handled in both MGA and DLS.

Exhibit 1
Handling Sexual Harassment Reports in DLS and MGA

	<u>MGA</u>	<u>DLS</u>
A Report of Sexual Harassment may be made to:	<ul style="list-style-type: none"> • the administrative assistant to either Presiding Officer • the Chief of Staff or Deputy Chief of Staff for the President of the Senate • the Chief of Staff for the Speaker of the House • Human Resources Manager of DLS 	<ul style="list-style-type: none"> • a supervisor • an office director • the Human Resources Manager of DLS • the Executive Director
Who Investigates	The Human Resources Manager of DLS	The Human Resources Manager of DLS
Remedial/ Disciplinary Actions for a Violation by a Nonlegislator	Actions include, but are not limited to, a warning, reprimand, withholding of a promotion or pay increase, reassignment, temporary suspension without pay, or termination	Actions include, but are not limited to, a warning, reprimand, withholding of a promotion or pay increase, reassignment, temporary suspension without pay, or termination
Remedial/ Disciplinary Actions for a Violation by a Legislator	Actions include, but are not limited to, training, referral to counseling, a warning, reprimand, reassignment, referral to JCLE, or expulsion	

DLS: Department of Legislative Services
JCLE: Joint Committee on Legislative Ethics

Source: Department of Legislative Services

Referrals of Sexual Harassment Violations to JCLE

If a member is the subject of a report of sexual harassment, and the matter is referred to JCLE, the committee uses the same process for matters related to allegations of the Maryland Public Ethics Law. Committee staff conducts an investigation and presents the complaint to the committee along with information gathered during the investigation. The committee or the chairs may request additional resources; in the past, this has included additional assistance from DLS staff, assistance from the Attorney General's Office, and assistance from outside sources.

If JCLE determines that further proceedings are necessary, the committee may hold a hearing, issue subpoenas, and receive testimony from sworn witnesses. If JCLE determines that improper conduct has occurred, even if it deems that further proceedings are unnecessary, JCLE has options for remedial action. It may (1) educate or counsel the member; (2) refer the matter to the appropriate Presiding Officer for appropriate action or discipline, including removal of leadership positions, additional counseling, and request for a public apology; or (3) make a recommendation to the appropriate chamber for action, which may include reprimand, censure, or expulsion. After a determination is made, the committee forwards a letter to the complainant stating the committee's actions.

Workplace Harassment Commission

In January 2018, the Workplace Harassment Commission was created by the President of the Senate and the Speaker of the House to review State workplace harassment policies, including sexual harassment, in all three branches of State government. In addition, the commission intends to hold public hearings and seek comment from business leaders and policy experts.

Sexual Harassment Policy in State Legislatures, Generally

Recent events have highlighted the prevalence of sexual harassment in the workplace and heightened awareness of the issue has prompted many private and public organizations to reexamine existing policy. In the context of the legislature, addressing the issue is even more challenging given that, in the unique environment of the legislative workplace, employment and professional relationships are more complex than in the traditional workplace. Members, employees, and staff in state legislatures routinely engage with officials, lobbyists, advocates, and citizens on a regular basis, and much of the official duties and work interaction of members and legislative staff is conducted outside of the office, in more casual settings, such as legislative unit receptions and other functions.

In October 2017, the National Conference of State Legislatures (NCSL) conducted a survey of legislative policies on sexual harassment and concluded that the following best practices were important components to a strong legislative sexual harassment policy:

- a clear definition of “sexual harassment” and examples of what behaviors are considered inappropriate in the workplace;
- specific examples of potential discipline, if warranted;
- a policy that applies to legislators and staff, as well as nonemployees, such as lobbyists and outside vendors;
- a diversity of contacts within the legislature to whom sexual harassment can be reported, allowing the complainant to bypass reporting to his/her direct supervisor;
- a clear statement prohibiting retaliation for the filing of any claim;
- a statement providing for confidentiality, to the extent possible, for all parties involved;
- the possibility of involving parties outside the legislature to assist in the investigation, if it is warranted or requested;
- an appeal procedure; and
- a statement informing the complainant that he/she can also file a complaint to the Equal Employment Opportunity Commission and/or the state’s Human Rights Commission.

The sexual harassment policy for MGA was identified by NCSL, along with four other states (the Alabama House of Representatives, the Colorado General Assembly, the Hawaii Senate, and the Oregon Legislature) as the best examples of implementation of the recommended best practices.

Public Ethics Law, Generally

The State Public Ethics Law sets out requirements, prohibitions, and procedures that affect officials in the Legislative, Executive, and Judicial branches of government for the purpose of maintaining people’s trust in government and protecting against the improper influence and appearance of improper influence of government. However, its provisions are generally intended to foster transparency, impartiality, and independent judgement by State employees and officials, and do not specifically address harassment.

Title VII of the Civil Rights Act of 1964

Federal law prohibits discriminatory employment practices by an employer, including (1) failing or refusing to hire or discharging any individual, or otherwise discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment, because of an individual's race, color, religion, sex, or national origin or (2) practices that limit, segregate, or classify employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his/her status as an employee, because of the individual's race, color, religion, sex, or national origin.

Among other things, the law specifically prohibits retaliation for making charges, testifying, assisting, or participating in enforcement proceedings regarding a complaint of discrimination under the Act.

State Expenditures:

Department of Legislative Services

General fund expenditures increase, potentially significantly, beginning in fiscal 2019, depending on the number of violations of the code of conduct established under the bill that JCLE must refer to an outside independent investigator, as required by the bill. DLS advises that if the complaints are referred to an attorney or other employment law expert, hourly rates could range from \$250 to \$600 per hour, based on the department's historical costs for outside legal counsel over the past 12 years. Actual expenditures cannot be reliably estimated at this time and depend on (1) the number of complaints referred by JCLE each year and (2) the length of time and complexity of each outside investigation. DLS can handle the electronic recordkeeping requirement for member and employee sexual harassment training with existing resources.

State Ethics Commission

General fund expenditures increase, potentially significantly, beginning in fiscal 2019, depending on the number of violations of sexual harassment between lobbyists, legislators, and legislative staff reported to the commission. Although the bill specifies that a complaint involving a lobbyist may be filed with SEC, statutory duties of SEC specify that SEC may initiate a complaint on its own motion and specify the procedures required for SEC to make a finding regarding a complaint that is filed.

SEC advises that it has no in-house expertise on antidiscrimination or sexual harassment law. At a minimum, existing employees need extensive training on the law. SEC anticipates training costs of up \$50,000. To the extent that a substantial number of

complaints are received as a result of the bill, an additional staff attorney specializing in employment law, a paralegal, and additional office space may be needed. Accordingly, annual expenditures could exceed \$150,000. However, the data is not available at this time to estimate the number of complaints requiring investigation that the commission may receive as a result the bill.

Maryland Commission on Civil Rights

General fund expenditures for MCCR may increase significantly in fiscal 2019 and every other year thereafter to develop, distribute, compile, and report the results of the survey on discrimination and harassment in the Legislative Branch. MCCR advises that its existing investigative staff has no background in conducting surveys, although it is authorized in statute to conduct surveys concerning human relations. MCCR also advises that existing staff cannot be redirected to the task of conducting a survey, because this affects the commission's existing federal contractual obligations, which include a work-sharing agreement with the Equal Employment Opportunity Commission to investigate employment discrimination complaints. MCCR also contracts with the federal Department of Housing and Urban Development, in circumstances where federal and State housing law overlap, to investigate housing discrimination complaints. MCCR likely needs to engage contractual services to meet the bill's requirements; however, the commission does not have any information on the potential costs that may be incurred for such services, as a specific needs assessment must be conducted to be able to provide an estimate.

Small Business Effect: Lobbying organizations are affected to the extent that they file a sexual harassment complaint, as specified, or are the subject of a sexual harassment complaint, as specified. Assuming compliance, any such impact is anticipated to be minimal.

Additional Information

Prior Introductions: None.

Cross File: Although designated as a cross file, SB 1138 (Senator Conway, *et al.* – Rules) is not identical.

Information Source(s): Maryland Commission on Civil Rights; State Ethics Commission; National Conference of State Legislatures; Department of Legislative Services

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