

Department of Legislative Services
 Maryland General Assembly
 2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 872

(The President)(By Request - Workplace Harassment
 Commission) and Senator Klausmeier

Finance

Workplace Harassment - Prohibitions, Liability, and Enforcement

This bill broadens the definition of “employer” for employment discrimination if an employee has filed a complaint alleging harassment. It also broadens the definition of an “employee” protected from employment discrimination to include (1) an individual working as an independent contractor for an employer and (2) an elected officer’s personal staff. An employer may not engage in harassment of an employee. The bill prohibits specified individuals who are exempt from registering as a lobbyist and are granted special access to the State Legislative Complex from engaging in unlawful harassment or discrimination against an official or employee; an intern, page, or fellow in any branch of State government; another individual regulated lobbyist; or a credentialed member of the press. Finally, the bill establishes provisions relating to actions alleging violations of the workplace harassment provisions.

Fiscal Summary

State Effect: General fund expenditures increase by at least \$54,400 annually beginning in FY 2020. Depending on caseload, expenditures for the Judiciary and the Office of Administrative Hearings (OAH) may also increase. State revenues are not affected.

(in dollars)	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	54,400	66,100	68,300	70,500	72,900
Net Effect	(\$54,400)	(\$66,100)	(\$68,300)	(\$70,500)	(\$72,900)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: Filing fee revenues and expenditures for the circuit courts may increase.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: The Department of General Services must revoke the special access to the State Legislative Complex granted to a person or lobbyist who unlawfully harasses or discriminates against an individual if the revocation is requested by the Speaker of the House, the Senate President, the Executive Director of the Department of Legislative Services, or their designees.

The bill broadens the definition of “employer” for employment discrimination if an employee has filed a complaint alleging harassment so that it includes a person that is engaged in an industry or business and has one or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

In terms of employment discrimination, the term “harassment” includes harassment based on race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, or disability, and generally retains its judicially determined meaning.

In an action alleging harassment of an employee, an employer is liable for the acts or omissions toward an employee or applicant for employment committed by an individual who (1) undertakes or recommends tangible employment actions affecting the employee or an applicant for employment or (2) directs, supervises, or evaluates the work activities of the employee. An employer is also liable if the employer’s negligence led to the harassment or continuation of harassment.

A complaint alleging harassment against an employer must be filed within two years after the date of the alleged harassment. A complaint filed with a federal human relations commission within six months or a local human relations commission within two years of the alleged harassment must be deemed as having complied with this requirement. A complainant may bring a civil action against the respondent alleging unlawful harassment within three years after the alleged harassment occurred.

The bill preempts or prevails over any local ordinance, resolution, law, or rule that requires an employer to have more than one employee for purposes of a complaint alleging employment discrimination based on sexual harassment. The bill must be construed to apply prospectively and may not be applied or interpreted to have any effect on or application to any cause of action arising before October 1, 2019.

Current Law: 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. Unless the individual is subject to the State or local civil service laws, an employee does not include an elected public official, an individual chosen by an elected officer to be on the officer's personal staff, an appointee on the policymaking level, or an immediate adviser with respect to the exercise of the constitutional or legal powers of an elected office.

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered.

Antidiscrimination laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits. EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. If EEOC finds that discrimination has occurred, it tries to settle the charge. If not successful, EEOC has the authority to file a lawsuit to protect the rights of individuals and the interests of the public but does not, however, file lawsuits in all cases in which there was a finding of discrimination.

EEOC states harassment is a form of employment discrimination. Harassment becomes unlawful where (1) enduring the offensive conduct becomes a condition of continued employment or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

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.

Discrimination and Harassment of State Officials and Lobbyists

Chapter 525 of 2018 made several changes related to anti-harassment procedures, policies, and training applicable to State government, including (1) prohibiting Executive Branch officials from unlawfully harassing or discriminating against an official, employee, intern, page, fellow, lobbyist, or member of the press; (2) requiring an update of the anti-harassment policy and procedures governing members and employees of the General Assembly; (3) requiring the Joint Committee on Legislative Ethics to review complaints filed with the committee involving General Assembly members that allege violations of the anti-harassment policy; (4) establishing anti-harassment duties and procedures for the State Ethics Commission relating to regulated lobbyists; and (5) establishing specific prohibitions relating to sexual harassment for lobbyists. Chapter 525 also prohibited lobbyists from harassing or discriminating against an official, employee, intern, page, or fellow of any branch of State government; a lobbyist; or a member of the press.

Background: The Workplace Harassment Commission created by the Presiding Officers of the General Assembly in January 2018 issued its final [report](#) in November 2018. The

commission focused on aligning existing anti-harassment policies and requirements with national best practices. The bill implements several of the commission’s recommendations.

In its [2018 annual report](#), MCCR reported that employment discrimination complaints accounted for 81% of the total complaints received by MCCR for fiscal 2018. Of the 707 employment complaints that MCCR received in fiscal 2018, 1,223 different protected bases/acts were selected across those complaints, of which 43 complaints were for sexual harassment.

State Revenues: MCCR has a work-sharing agreement with the U.S. EEOC to investigate employment discrimination complaints and with the U.S. Department of Housing and Urban Development for investigating housing discrimination complaints where the State and federal law overlap. To the extent that MCCR investigative staff are used to implement the bill, any reduction in MCCR’s case production numbers for these two areas could result in a reduction in federal fund revenues. However, the Department of Legislative Services (DLS) assumes additional staff is hired instead of redirecting the investigative staff to implement the bill; thus, State revenues are not affected.

State Expenditures: MCCR advises that the bill has a significant impact on its operations and finances. It expects a significant number of additional employment discrimination cases stemming from independent contractors, who are considered an employer for employment discrimination under the bill. While current law already prohibits harassment for employers with at least 15 employees, the bill prohibits harassment for employers with fewer than 15 employees and increases the time to file a claim of harassment. MCCR advises that existing staff are unable to handle the additional cases stemming from the bill, and DLS concurs. Currently, civil rights officers handle an average of 85 cases each on an annual basis. Assuming the bill increases MCCR’s workload by 85 cases, one civil rights officer is needed.

Thus, general fund expenditures increase by \$54,439 in fiscal 2020, which accounts for the bill’s October 1, 2019 effective date. This estimate reflects the cost of hiring one civil rights officer to investigate additional employment discrimination cases, mostly stemming from independent contractors. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

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Salary and Fringe Benefits	\$47,205
Operating Expenses	<u>7,234</u>
Total FY 2020 State Expenditures	\$54,439

Future year expenditures reflect a full salary with annual increases and employee turnover and ongoing operating expenses. To the extent that more than 85 new complaints are filed, MCCR may need additional resources.

Additionally, the bill may increase the workload of the Judiciary or OAH, depending on the number of new cases for each that stem from the bill. MCCR delegates a small number of employment discrimination claims to OAH to conduct contested case hearings and issue decisions under the Administrative Procedure Act. To the extent that MCCR delegates more employment discrimination cases to OAH, expenditures for OAH may increase. Additionally, the bill may increase the number of lawsuits filed in the circuit courts. Any increase in circuit court filings impacts general court operations and could result in an increase in court time; thus, general fund expenditures for the Judiciary may increase.

Revoking access granted to a person to the State Legislative Complex can be handled with existing Maryland Capital Police personnel.

Local Fiscal Effect: To the extent that more cases are filed in the circuit courts, filing fee revenues collected by the circuit courts increase. Local government expenditures for the circuit courts may also increase. Otherwise, the bill is not anticipated to materially affect local government operations or finances because local jurisdictions generally already prohibit employment discrimination and harassment. However, under the bill, employees have more time to file a complaint alleging harassment.

Small Business Effect: Small businesses with at least 1 employee but fewer than 15 employees may be adversely affected by the bill because they are liable for harassment under the bill. In terms of employment discrimination, independent contractors are prohibited from discriminating against individuals under the bill. Small businesses may also be adversely affected because employees have more time to file a harassment claim.

Additional Information

Prior Introductions: None.

Cross File: HB 679 (The Speaker)(By Request - Workplace Harassment Commission) and Delegate Jones - Appropriations and Rules and Executive Nominations.

Information Source(s): Kent, Montgomery, and Worcester counties; City of Westminster; Town of Leonardtown; Maryland Municipal League; Maryland Commission on Civil Rights; Judiciary (Administrative Office of the Courts); Department of General Services; Department of Labor, Licensing, and Regulation; Office of Administrative Hearing; State Ethics Commission; Department of Legislative Services

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md/mcr

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