

Department of Legislative Services
 Maryland General Assembly
 2018 Session

FISCAL AND POLICY NOTE
 Enrolled - Revised

House Bill 1342 (Delegate Kelly, *et al.*)

Rules and Executive Nominations

Rules

State Government – Discrimination and Harassment

This emergency bill prohibits specified State officials and regulated lobbyists from engaging in unlawful harassment or discrimination and modifies the process used to address harassment and discrimination in State government. The bill makes several changes to antiharassment and antidiscrimination procedure, policy, and training applicable to the Legislative Branch and registered lobbyists. **Specified provisions related to regulated lobbyists take effect July 1, 2019.**

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 requirements. State revenues are not affected.

Local Effect: None.

Small Business Effect: Minimal, as discussed below.

Analysis

Bill Summary:

Prohibited Conduct for State Officials

The bill establishes a specific prohibition against unlawful harassment or discrimination based on any characteristic protected by law by a State official (other than a State official of the Legislative or Judicial Branch who are covered by other provisions) against:

- an official or employee;
- an intern, a page, or a fellow in any branch of State government;
- an individual regulated lobbyist; or
- a credentialed member of the press.

The bill also prohibits an officer or unit of State government from using any part of an appropriation to settle a claim of unlawful harassment or discrimination, based on any characteristic protected by law, that is filed against an official or employee of State government in the individual's personal capacity.

Antiharassment Policy and Procedures – Maryland General Assembly

By December 15, 2018, the Legislative Policy Committee (LPC) must (1) update the antiharassment policy governing Maryland General Assembly (MGA) members and employees; (2) include provisions prohibiting harassment of credentialed members of the press in the updated policy; and (3) consider including the recommendations of the Women Legislators of Maryland adopted February 7, 2018 in the updated policy. After the required initial update, LPC must review and update the policy and procedures as necessary but at least every two years, to create and maintain an environment in which all members and employees are treated with respect and are free from unlawful discrimination and harassment.

Reporting of Harassment – Maryland General Assembly

The Joint Committee on Legislative Ethics (JCLE) must review complaints filed with the committee alleging that a member of MGA may have violated the antiharassment policy and procedures adopted by LPC. JCLE must provide a copy of the complaint and a notice of the committee's action to the Human Resources Manager of the Department of Legislative Services (DLS), who, for purposes of information provided by JCLE, is bound by the existing confidentiality rules regarding matters before JCLE.

Referral of Complaints to Outside Independent Investigator

Unless the alleged victim objects, JCLE is *required* to refer a complaint for evaluation to an outside independent investigator of its choosing if the complaint alleges that a member of MGA has violated the antiharassment policy and procedures of MGA or has retaliated against an individual for reporting or participating in an antiharassment investigation. The investigator must submit its findings and recommendations regarding an evaluated complaint to JCLE. If the investigator completes the evaluation and recommends dismissal, JCLE may dismiss a complaint before the completion of an investigation. If the

investigator does not recommend dismissal of the complaint after completing the evaluation, the investigator must investigate the complaint.

The investigator must submit its findings and recommendations regarding an investigated complaint to JCLE for further proceedings, as specified. JCLE must (1) advise the complainant of the findings and recommendations of the investigator and (2) provide a notice of the committee's actions to both the accused legislator and to any person who filed the complaint.

If JCLE refers a matter to a prosecuting authority, it may direct an outside independent investigator to delay an investigation at the request of the prosecuting authority. JCLE may remove an outside independent investigator only for good cause.

A current or former member of the Workplace Harassment Commission created by the Presiding Officers of the General Assembly in January 2018, may not serve as an outside and independent investigator selected by JCLE.

Workplace Harassment Training Records – Department of Legislative Services

The Office of the Executive Director in DLS must (1) maintain electronic records documenting the completion of workplace harassment prevention training by MGA members and employees for at least five years after the training is completed and (2) publish the records related to the training of members on the MGA website. The records must include:

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

Antidiscrimination and Antiharassment Provisions – Lobbyists

The bill specifically establishes that while engaged in lobbying, a regulated lobbyist may not unlawfully harass or discriminate, based on any characteristic protected by law:

- an official or employee;
- an intern, a page, or a fellow of any State government branch;
- an individual regulated lobbyist; or
- a credentialed member of the press.

A regulated lobbyist may report to the State Ethics Commission (SEC) that a member of MGA has violated the MGA antiharassment policy and procedures. If such a report is made, SEC must refer the report to JCLE.

The bill requires the training SEC is required to provide for regulated lobbyists and prospective regulated lobbyists on the provisions of the Maryland Public Ethics Law to include provisions related to discrimination and harassment.

Provisions in the bill related to the conduct and training of regulated lobbyists are effective July 1, 2019.

Current Law/Background:

Antidiscrimination in State Government, Generally

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.

Harassment occurs when an employee is subjected to discriminatory behavior or practices based on the protected characteristics specified above. Sexual harassment is a form of sex-based discrimination. Each branch of State government is governed by the laws, personnel policies, and procedures applicable in that branch unless otherwise specified 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 discriminatory conduct and illegal harassment.

Antidiscrimination in the Legislative Branch

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 Antiharassment 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 harassment may be reported. For example, both policies specifically 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 (1) unwanted sexual advances or requests for sexual favors; (2) sexual jokes and innuendo; (3) verbal abuse of a sexual nature; (4) unwelcome commentary about an individual’s body; (5) commentary about an individual’s sexual prowess or sexual deficiencies; (6) leering, whistling, or touching; (7) insulting or obscene comments or gestures; (8) displaying, communicating, or distributing sexually suggestive objects, pictures, or messages in the workplace; and (9) 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 may include referral to JCLE or expulsion, pursuant HB 1342/ Page 5

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

Exhibit 1
Handling Workplace Harassment Reports in DLS and MGA

	<u>MGA</u>	<u>DLS</u>
A Report of Workplace Harassment may be made to:	<ul style="list-style-type: none"> • the administrative assistant to either Presiding Officer • the Chief of Staff for the President of the Senate • the Chief of Staff for the Speaker of the House • the Human Resources Manager for MGA 	<ul style="list-style-type: none"> • a supervisor • an office director • the Human Resources Manager for MGA • the Executive Director
Who Investigates	The Human Resources Manager for MGA	The Human Resources Manager for MGA
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
MGA: Maryland General Assembly
JCLE: Joint Committee on Legislative Ethics

Source: Department of Legislative Services

Referrals of Harassment Violations to JCLE

If a member is the subject of a report of harassment or discrimination in violation of policy adopted by LPC, 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 improper conduct has occurred but that further proceedings are unnecessary, JCLE has options for remedial action. It may (1) educate or counsel the member or (2) refer the matter to the appropriate Presiding Officer for appropriate action or discipline, including removal of leadership positions or additional counseling. After the committee concludes its review, the committee advises the complainant of the committee's actions.

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 a violation occurred, the committee may make a recommendation to the appropriate Presiding Officer or chamber for action, which may include reprimand, censure, or expulsion. In addition, the committee may (1) educate or counsel the member or (2) refer the matter to the appropriate Presiding Officer for action.

Confidentiality of JCLE Proceedings

Unless a matter or record is otherwise available for public access or inspection under the Maryland Public Ethics law, all matters before JCLE, including information relating to any complaint, proceeding, or record, must remain confidential with the exception of (1) a disclosure or disclaimer of a conflict of interest form filed with the committee; (2) any portion of a meeting in which a disclosure or disclaimer form is reviewed; (3) information regarding a complaint, proceeding, or record of JCLE that is authorized to be made publicly available by the member involved, or upon a three-fourths vote of the committee; or (4) a broadly applicable rule or opinion of the committee.

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 stated its intention to hold public hearings and seek comment from business leaders and policy experts.

Sexual Harassment Policy in State Legislatures

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 as including the recommended best practices.

State Ethics Commission – Regulated Lobbyist Training

SEC must administer a training course for regulated lobbyists and prospective regulated lobbyists at least twice annually on the provisions of the Maryland Public Ethics Law relevant to regulated lobbyists. Within six months of initially registering as a regulated lobbyist, an individual must complete the training. The individual regulated lobbyist subsequently must complete a training course every two years.

Maryland Public Ethics Law

The Maryland 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.

Under the Maryland Public Ethics Law, a “State official” means:

- a constitutional officer or officer-elect in an executive unit;
- a member or member-elect of the General Assembly;
- a judge or judge-elect of a court under Article IV § 1 of the Maryland Constitution;
- a judicial appointee, as specified by Maryland Rule 18-200.3;
- a State’s Attorney;
- a clerk of the circuit court;
- a register of wills; or
- a sheriff.

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 harassment or discrimination violations that JCLE must refer to an outside independent investigator pursuant to 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 requirements established by the bill with existing resources.

State Ethics Commission

General fund expenditures increase, potentially significantly, beginning in fiscal 2020, depending on the number of complaints of harassment or discrimination involving regulated lobbyists that are reported to SEC. Statutory duties of SEC specify that SEC may also 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 antiharassment law. At a minimum, existing employees need extensive training on the law. 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 of the bill.

Small Business Effect: Regulated lobbyists and their organizations are affected to the extent that lobbyists are the subject of harassment and discrimination complaints filed with SEC. Assuming compliance with the bill's provisions, 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): State Ethics Commission; National Conference of State Legislatures; Department of Legislative Services

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