

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 834

(Senator Smith)

Judicial Proceedings

Economic Matters

**Harassment and Sexual Harassment – Definitions – Employment Discrimination
and Sexual Harassment Prevention Training**

This bill alters the statutory definition of “harassment” relating to employment discrimination. The bill explicitly includes sexual harassment within the definition of harassment, and expands the definition of harassment to include conduct under certain circumstances, as specified, which need not be severe or pervasive. The bill also alters the definition of “sexual harassment” in statutory provisions relating to the requirement that each State employee, as specified, complete mandatory sexual harassment prevention training.

Fiscal Summary

State Effect: Potential general and special fund expenditures associated with increased liability for the State, as discussed below. No material effect on revenues is anticipated.

Local Effect: Potential local government expenditures, as discussed below. Revenues are not affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Employment Discrimination

The bill alters the State Government Article's definition of harassment relating to employment discrimination. Under the bill, "harassment" includes unwelcome and offensive conduct, which need not be severe or pervasive, when (1) the conduct is based on race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, or disability and (2) submission to the conduct is made either explicitly or implicitly a term or condition of employment of an individual; submission to or rejection of the conduct is used as a basis for employment decisions affecting the individual; or, based on the totality of the circumstances, the conduct unreasonably creates a working environment that a reasonable person would perceive to be abusive or hostile.

The bill also specifies that the definition of harassment in the context of employment discrimination includes sexual harassment. Under the bill, "sexual harassment" includes conduct, which need not be severe or pervasive, that consists of unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when (1) submission to the conduct is made either explicitly or implicitly a term or condition of employment of an individual; (2) submission to or rejection of the conduct is used as a basis for employment decisions affecting the individual; or (3) based on the totality of the circumstances, the conduct unreasonably creates a working environment that a reasonable person would perceive to be abusive or hostile.

Sexual Harassment Prevention Training

The bill makes conforming changes to statutory provisions addressing mandatory sexual harassment prevention training for State employees by establishing that "sexual harassment" has the same meaning as it does in the context of employment discrimination, as described above.

Current Law:

Employment Discrimination

An employer may not engage in harassment of an employee. Under § 20-601 of the State Government Article, "harassment" includes harassment based on race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, or disability, and retains its judicially determined meaning, except to the extent it is expressly

or impliedly changed in the applicable statutory provisions. Section 20-601 contains no separate definition for “sexual harassment.”

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. 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 under specified circumstances. In addition to the remedies specified above, the court may award punitive damages in specified circumstances. 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.

Employer Liability

In an action alleging harassment, 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 another employee or an applicant, including hiring, firing, promoting, demoting, and reassigning another employee or an applicant or (2) directs, supervises, or evaluates the work activities of another employee. An employer is also liable if the employer’s negligence led to the harassment or continuation of harassment.

Sexual Harassment Prevention Training

All State employees in the Executive, Judicial, and Legislative branches generally must complete at least two hours of in-person or virtual interactive training on sexual harassment prevention within six months after the employee's initial appointment and every two-year period thereafter. Among other requirements, the training must include information on the laws concerning the prohibition of sexual harassment, best practices in prevention and correction of sexual harassment, and remedies and procedures available to victims of sexual harassment in employment.

Each covered unit of State government must designate a representative to coordinate with MCCR to implement the required training. MCCR must train each representative in the prevention of sexual harassment, discrimination, and retaliation, and best practices in sexual harassment prevention. Representatives are encouraged to use U.S. Equal Employment Opportunity Commission materials to prevent sexual harassment in the workplace.

With respect to this required training, "sexual harassment" is defined as including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical contact of a sexual nature when (1) submission to the conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of the conduct by an individual is used as a basis for employment decisions affecting the individual; or (3) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating or offensive working environment that is perceived by the victim to be abusive or hostile.

State Fiscal Effect:

Maryland Commission on Civil Rights

MCCR advises that although the bill expands the definitions of harassment/sexual harassment beyond existing precedent, thereby potentially increasing the number of claims filed, MCCR anticipates being able to absorb any potential increase in the number of harassment complaints it receives and investigates with existing resources.

Increased Caseloads Generally

Any increase in complaints to MCCR may subsequently lead to an increase in administrative appeals and civil actions filed in the circuit courts. Nonetheless, any increase in caseloads is not anticipated to materially affect the finances or operations of the Judiciary or the Office of Administrative Hearings.

Sexual Harassment Prevention Training

To the extent that the bill's expanded definitions of harassment/sexual harassment affect State employee training programs, expenditures potentially increase in connection with updating or revising relevant aspects of a governmental unit's curriculum or training materials. Specific costs that might be associated with such curriculum or program updates are not readily available. It is assumed, however, that any potential expenditures associated with updating employee training programs and procedures do not materially affect State finances.

State as Employer

State expenditures (general/special funds) may increase to the extent that the State, as an employer, is subject to additional employment discrimination complaints under the bill, thereby potentially increasing liability risks and other costs associated with the litigation and resolution of such claims. According to the State Treasurer's Office (STO), if an employment discrimination claim against the State is filed in circuit court, once STO receives the suit, it is subject to review by the Office of the Attorney General to determine if there are torts involved and whether the claim remains under Maryland Tort Claims Act (MTCA)/STO or with the State agency involved in the claim. If the claim falls under MTCA, special funds from the State Insurance Trust Fund may be used to pay for subsequent litigation costs and judgment awards. If claims do not involve a tort, any resulting costs are generally paid by the impacted agency or as otherwise directed by the Board of Public Works.

Local Fiscal Effect: Local governments may be subject to additional employment discrimination complaints under the bill, potentially increasing liability risks and other expenditures associated with such claims.

Small Business Effect: Small business owners may be subject to an increased risk of liability based on the bill's expanded definition of harassment.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Maryland Commission on Civil Rights; Judiciary (Administrative Office of the Courts); Department of Budget and Management; Department of Legislative Services

Fiscal Note History:
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