



Committee: HHS

Committee Review: At a future date

Staff: Christine Wellons, Legislative Attorney

Purpose: To receive testimony – no vote expected

Keywords: #StopSexualHarassment

AGENDA ITEM #6

June 16, 2020

Public Hearing

SUBJECT

Bill 14-20, Human Rights and Civil Liberties - Discriminatory Employment Practices - Workplace Harassment

Lead Sponsor: Councilmember Jawando

Co-Sponsors: Councilmember Navarro, Glass, Albornoz, Council Vice President Hucker, Council President Katz, Councilmember Riemer and Rice

EXPECTED ATTENDEES

Public speakers

COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION

- N/A; Public Hearing on Bill

DESCRIPTION/ISSUE

Bill 14-20, Human Rights and Civil Liberties - Discriminatory Employment Practices - Workplace Harassment would define and prohibit certain discriminatory harassment in the workplace; and define and prohibit certain sexual harassment in the workplace.

SUMMARY OF KEY DISCUSSION POINTS

- N/A; receive public testimony

This report contains:

Staff Report

Bill 14-20

Legislative Request Report

Sponsor's Memorandum

Fiscal and Economic Impact Statements

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M E M O R A N D U M

June 11, 2020

TO: County Council

FROM: Christine Wellons, Legislative Attorney

SUBJECT: Bill 14-20, Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment¹

PURPOSE: Public Hearing – no Council votes required

Bill 14-20 Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment, sponsored by Lead Sponsor Councilmember Jawando and Co-Sponsors Councilmembers Navarro, Glass, Alborno, Council Vice President Hucker, Council President Katz and Councilmembers Riemer and Rice, was introduced on March 24, 2020. A Health and Human Services Committee worksession will be scheduled at a later date.

Bill 14-20 would define and prohibit discriminatory harassment and sexual harassment by employers² in the County. Significantly, the bill would alter the level of harassing conduct that constitutes an employment discrimination claim under County law. Harassment would not need to raise to the level of being “severe or pervasive” to be actionable; the harassment would be actionable as long as it was “more than a petty slight, trivial inconvenience, or minor annoyance.”

BACKGROUND

Maryland’s highest court has held that a chartered county, such as Montgomery County, “has the authority to prohibit discrimination occurring in the county, to define the elements of a claim by one injured by such discrimination, to provide for an adjudicatory administrative proceeding by which the injured party may obtain relief, and to provide for a traditional judicial review action in the circuit court for a party aggrieved by the final administrative decision.” *Edward Systems Technology v. Corbin*, 379 Md. 278, 298 (2002). Put another way, the County may, among other things, “decide what will constitute actionable discrimination” within the County. *Id.* See also State Gov’t § 20-1202.

In accordance with this authority, Montgomery County has defined and prohibited discrimination in employment, among other types of discrimination, under Chapter 27 of the County Code. Chapter 27 also provides for an administrative adjudicatory process, through the Office of Human Rights (OHR), and for civil actions under Maryland law.

Currently, Chapter 27 does not define “discriminatory harassment” or “sexual harassment” *per se*, although these practices generally fall within the County’s prohibition against employment discrimination under Section 27-19. Bill 14-20 would specifically define and prohibit these types

¹ #StopSexualHarassment

² “Employer” under County anti-discrimination laws “means any person who employs one or more individuals in the County, either for compensation or as a volunteer. Employer includes a person who recruits an individual in the County to apply for employment in the County or elsewhere. Employer includes Montgomery County and its instrumentalities and agencies.” County Code Section 27-6.

of harassment. Furthermore, the bill would specify that, in the County, such harassment is actionable when it rises above the level of being “more than a petty slight, trivial inconvenience, or minor annoyance.” These standards of prohibited harassment would be similar to those used under a recently enacted law of the State of New York (New York Senate Bill 6577, which was signed into law by Governor Cuomo on August 12, 2019).

SPECIFICS OF THE BILL

Bill 14-20 would define prohibited “harassment” to include “verbal, written, or physical conduct, whether or not the conduct would be considered sufficiently severe or pervasive under precedent applied to harassment claims, when:

- (A) the conduct is based upon an individual’s race, color, religious creed, ancestry, national origin, age, sex, marital status, sexual orientation, gender identity, family responsibilities, genetic status, or disability;
- (B)
 - (i) submission to the conduct is made either explicitly or implicitly a term or condition of an individual’s employment;
 - (ii) submission to or rejection of the conduct is used as a basis for employment decisions affecting the individual; or
 - (iii) the conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating a working environment that is perceived by the victim to be abusive or hostile; and
- (C) a reasonable victim of discrimination would consider the conduct to be “more than a petty slight, trivial inconvenience, or minor annoyance.”

Prohibited “sexual harassment” would have a similar definition, except that the definition would focus specifically on sexual conduct, including “unwelcome sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature.”

For all types of discriminatory harassment in employment – including sexual harassment – a complainant would not need to show that conduct was “severe or pervasive,” which is the standard currently used by courts when interpreting harassment claims under the County’s employment discrimination law. *See, e.g., Magee v. Dansources Tech. Servs.*, 137 Md. App. 527, 549 (explaining that, in order for conduct to violate County, state, and federal employment discrimination laws, the conduct must be “sufficiently severe or pervasive to alter the plaintiff’s conditions of employment and to create an abusive work environment”). Instead, the prohibited harassment would be actionable when considered to be “more than a petty slight, trivial inconvenience, or minor annoyance.”

The bill would not alter damages or penalties for employment discrimination. Under Section 27-8 of the County Code, employment discrimination may result in the employer paying damages, in addition to civil fines in the amount of \$5,000 per violation. After exhausting administrative remedies, an individual may bring a civil action under Maryland law. (Section 27-9).

This packet contains:

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Bill No. 14-20
Concerning: Human Rights and Civil
Liberties – Discriminatory
Employment Practices – Workplace
Harassment
Revised: 03/06/2020 Draft No. 3
Introduced: March 24, 2020
Expires: September 24, 2021
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Jawando
Co-Sponsors: Councilmember Navarro, Glass, Alborno, Council Vice President Hucker, Council
President Katz and Councilmember Riemer and Rice

AN ACT to:

- (1) define and prohibit certain discriminatory harassment in the workplace;
- (2) define and prohibit certain sexual harassment in the workplace; and
- (3) generally amend the law regarding discriminatory employment practices.

By amending

Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Sections 27-19

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 27-19 is amended as follows:

27-19. Discriminatory employment practices.

(a) A person must not because of the race, color, religious creed, ancestry, national origin, age, sex, marital status, sexual orientation, gender identity, family responsibilities, or genetic status of any individual or disability of a qualified individual, or because of any reason that would not have been asserted but for the race, color, religious creed, ancestry, national origin, age, sex, marital status, disability, sexual orientation, gender identity, family responsibilities, or genetic status:

(1) For an employer:

(A) fail or refuse to hire, fail to accept the services of, discharge any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment; [or]

(B) limit, segregate, or classify employees in any way that would deprive or tend to affect adversely any individual's employment opportunities or status as an employee; or

(C) subject an individual to harassment, including sexual harassment;

* * *

(b) Definitions.

(1) The term "discriminate" in subsection (a) includes excluding, or otherwise denying, equal job opportunity or benefits to, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.

(2) The term “harassment” in subsection (a) includes verbal, written, or physical conduct, whether or not the conduct would be considered sufficiently severe or pervasive under precedent applied to harassment claims, when:

(A) the conduct is based upon an individual’s race, color, religious creed, ancestry, national origin, age, sex, marital status, sexual orientation, gender identity, family responsibilities, genetic status, or disability;

(B) (i) submission to the conduct is made either explicitly or implicitly a term or condition of an individual’s employment;

(ii) submission to or rejection of the conduct is used as a basis for employment decisions affecting the individual; or

(iii) the conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating a working environment that is perceived by the victim to be abusive or hostile; and

(C) a reasonable victim of discrimination would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance.

(3) The term “sexual harassment” in subsection (a) includes unwelcome sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature, whether or not the conduct would be considered sufficiently severe or pervasive under precedent applied to harassment claims, when:

- (A) (i) submission to the conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- (ii) submission to or rejection of the conduct is used as a basis for employment decisions affecting the individual; or
- (iii) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating a working environment that is perceived by the victim to be abusive or hostile; and
- (B) a reasonable victim of discrimination would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance.

* * *

LEGISLATIVE REQUEST REPORT

Bill 14-20

Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment

DESCRIPTION: Bill 14-20 would define and prohibit certain discriminatory harassment in the workplace and define and prohibit certain sexual harassment in the workplace.

PROBLEM: Victims of alleged discriminatory harassment generally must demonstrate that the harassment has been severe or pervasive.

GOALS AND OBJECTIVES: Prohibit discriminatory workplace harassment, including sexual harassment, that a reasonable victim would consider to be more than a petty slight, trivial inconvenience, or minor annoyance.

COORDINATION: Office of Human Rights

FISCAL IMPACT: OMB

ECONOMIC IMPACT: OLO

EVALUATION: To be done.

EXPERIENCE ELSEWHERE: New York State / To be researched.

SOURCE OF INFORMATION: Christine Wellons, Legislative Attorney

APPLICATION WITHIN MUNICIPALITIES: N/A

PENALTIES: Damages, and \$5,000 civil penalty per violation, under County Code Section 27-8

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MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

WILL JAWANDO
COUNCILMEMBER
AT-LARGE

TO: Councilmembers
FROM: Will Jawando, Councilmember
DATE: March 10, 2020
SUBJECT: Bill XX-20, Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment.

On March 17, I will be introducing Bill XX-20, Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment. Over the last several years the “Me Too” movement has brought to light the pervasiveness of workplace sexual harassment. In 2018, NPR reported that a survey conducted by the nonprofit Stop Street Harassment found that “81 percent of women and 43 percent of men have experienced sexual harassment.”

Current case law has created an extremely high standard of “severe or pervasive” to prove harassment cases. In the absence of a codified definition for harassment or sexual harassment, current practice limits the ability to seek a remedy in cases where individuals have been harassed. This legislation creates definitions of harassment and sexual harassment and sets a reasonable standard so victims can seek a remedy.

This legislation requires that:

- 1) The term “harassment” in subsection (a) is defined as “include verbal, written, or physical conduct, regardless of whether the conduct would be considered sufficiently severe or pervasive under precedent applied to harassment claims”;
- 2) The term “sexual harassment” in subsection (a) is defined as “unwelcome sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature, whether or not the conduct would be considered sufficiently severe or pervasive under precedent applied to harassment claims.”

The goal of this bill is to ensure there is clear definitions of harassment and sexual harassment. With the explicit removal of the “severe or pervasive” standard the bill allows allegations that “a reasonable victim of discrimination would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance.”

If you have any questions or if you would like to co-sponsor the draft bill, please contact Fatmata Barrie in my office. Thanks in advance for your consideration.

Fiscal Impact Statement

Bill 14-20, Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment

1. Legislative Summary

Bill 14-20 would amend Chapter 27, Section 27-19 of the Montgomery County Code, which authorizes the County “to prohibit discrimination occurring in the County, to define the elements of a claim by one injured by such discrimination, to provide for an adjudicatory administrative proceeding by which the injured party may obtain relief, and to provide for a traditional judicial review action in the Circuit Court for a party aggrieved by the final administrative decision.” Under the County’s current employment discrimination law, a complainant needs to show that conduct was severe or pervasive.

The proposed legislation would define and prohibit discriminatory harassment and sexual harassment by employers in Montgomery County. Also, this legislation would alter the level of harassing conduct that would constitute an employment discrimination claim under County law; harassment is actionable when it rises above the level of being more than a petty slight, trivial inconvenience, or minor annoyance.

Under the proposed legislation, the term “harassment” includes verbal, written, or physical conduct, whether or not the conduct would be considered sufficiently severe or pervasive under precedent applied to harassment claims; the term sexual harassment includes unwelcome sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature, whether or not the conduct would be considered sufficiently severe or pervasive under precedent applied to harassment claims.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

Changes to County expenditures are difficult to project because the cost of enforcing this legislation is dependent upon the number of complaints received, reviewed, and investigated.

The change in County revenues will be contingent upon the number of cases where harassment have been substantiated and fines assessed. At this time, the legislation is silent on which agency should issue the citations and collect the fine. Under Section 27-8 employment discrimination may result in the employer paying damages in addition to the civil fines in the amount of \$5,000 per violation.

3. Revenue and expenditure estimates covering at least the next six fiscal years.

Changes to County revenues and expenditures are difficult to project because the cost of enforcing this legislation is dependent upon the number of complaints received, reviewed, and investigated.

4. **An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.**

This Bill will not affect retiree pension or group insurance costs.

5. **An estimate of expenditures to County's information technology (IT), including Enterprise Resource Planning (ERP) systems.**

This Bill is not expected to impact expenditures related to the County's IT or ERS systems.

6. **Later actions that may affect future revenue and expenditures if the bill authorizes future spending.**

Not applicable.

7. **An estimate of the staff time needed to implement the bill.**

This Bill redefines and alters the level of harassment conduct that constitutes an employment discrimination claim under County law. This could impact the number of complaints because the standard in which a complaint could be deemed valid is now less stringent which may increase the case load. Should this occur and because of the potential complexity of such cases, an additional senior level full-time investigator would be required.

8. **An explanation of how the addition of new staff responsibilities would affect other duties.**

Expenditures related to harassment complaints that should be investigated by the enforcing agency is difficult to project due to the length of time and nature of the investigation. Workplace and sexual harassment cases are among the most complex and time-consuming and if the agency experiences increases in the number of complaints, the new capacity would exceed the department's ability to meet its goals and deadlines for complaint resolutions. This would cause possible backlogs in other complaint categories where such backlogs do not currently exist.

9. **An estimate of costs when additional appropriation is needed.**

An additional appropriation may be needed to include the salary for one full-time equivalent Grade 25 Investigator III. The following chart illustrates the personnel costs for an Investigator III.

		INVESTIGATOR I		INVESTIGATOR II		INVESTIGATOR III	
		GRADE 20		GRADE 23		GRADE 25	
		MINIMUM		MINIMUM		MINIMUM	
		FULL YEAR	W/ 3 MTH LAPSE	FULL YEAR	W/ 3 MTH LAPSE	FULL YEAR	W/ 3 MTH LAPSE
FY21 - MINIMUM SALARY + 25%							
FY20 GENERAL SALARY & MLS SALARY SCHEDULES							
PLUS 25%		\$13,114.75	\$9,836.06	\$15,071.25	\$11,303.44	\$16,541.00	\$12,405.75
REVISED SALARY		\$65,573.75	\$49,180.31	\$75,356.25	\$56,517.19	\$82,705.00	\$62,028.75
FICA @ 7.65%		\$5,016.39	\$3,762.29	\$5,764.75	\$4,323.56	\$6,326.93	\$4,745.20
Retirement @ 8%		\$5,245.90	\$3,934.43	\$6,028.50	\$4,521.38	\$6,616.40	\$4,962.30
MEDICAL FLAT RATE		\$13,006.00	\$9,754.50	\$13,006.00	\$9,754.50	\$13,006.00	\$9,754.50
TOTAL PERSONNEL COSTS - 1 Position		\$88,842.04	\$66,631.53	\$100,155.50	\$75,116.63	\$108,654.33	\$81,490.75

10. A description of any variable that could affect revenue and cost estimates.

Changes to County expenditures are difficult to project because the cost of enforcing this legislation is dependent upon the number of complaints received, reviewed, and investigated.

11. If a bill is likely to have no fiscal impact, why that is the case.

The fiscal impact of this legislation is difficult to project because the cost of enforcing this legislation is dependent upon the number of complaints received, reviewed, and investigated.

12. Other fiscal impacts or comments.

Not applicable.

13. An explanation of the staff time needed to implement this bill.

See question #8.

14. Ranges of revenue or expenditures that are uncertain or difficult to project.

Changes to County revenues or expenditures are difficult to project because the cost of enforcing this legislation is dependent upon the number of complaints received, reviewed, and investigated.

15. The following contributed to and concurred with this analysis:

James Stowe, Office of Human Rights

Philip Weeda, Office of Management and Budget



Richard S. Madaleno, Director
Office of Management and Budget

4-13-20

Date

Economic Impact Statement

Office of Legislative Oversight

Bill 14-20

Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment

SUMMARY

The Office of Legislative Oversight (OLO) expects Bill 14-20 to have an insignificant impact on the Montgomery County economy.

BACKGROUND

Bill 14-20 is intended to address the problem of discriminatory workplace harassment in Montgomery County. The bill would amend Sections 27-19 of the Montgomery County Code by defining and prohibiting, both, discriminatory harassment and sexual harassment against employees by their employers.¹ The bill would also alter the standard on “the level of harassing conduct that constitutes an employment discrimination claim under County law.”² Under the current standard followed in County law, the harassing conduct must be “sufficiently severe or pervasive to alter the plaintiff’s conditions of employment and to create an abusive work environment.”³ Under the proposed standard, the conduct need only arise to the level of “more than a petty slight, trivial inconvenience, or minor annoyance.”⁴ In brief, Bill 14-20 would expand the scope of workplace harassment that is prohibited under County law.

INFORMATION, ASSUMPTIONS and METHODOLOGIES

No methodologies were used in this statement. The assumptions underlying the claims made in the subsequent sections are based on the judgment of OLO staff.

VARIABLES

The variables that could affect economic impacts in the County are the following:

- Number of workplace harassment claims filed against employers
- Amount of harassment claims paid to employees
- Percentage of workforce subject to harassing conduct

¹ County Council for Montgomery County, Maryland. Bill 14-20 Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment. March 17, 2020. 1-4; and County Council for Montgomery County, Maryland. Memorandum. Christine Wellons. March 12, 2020. 1.

² County Council. Memorandum. 1.

³ *Magee v. Dansources Tech. Serv.*, 137 Md. App. 527, 549 quoted in County Council. Memorandum.

⁴ County Council. Bill 14-20. 3-4.

Economic Impact Statement

Office of Legislative Oversight

IMPACTS

Businesses, Non-Profits, Other Private Organizations

Workforce, operating costs, property values, capital investment, taxation policy, economic development, competitiveness, etc.

OLO believes that Bill 14-20 would have little to no impact on private organizations in the County in terms of the Council's priority indicators, namely workforce, operating costs, capital investments, property values, taxation policy, economic development and competitiveness.

Residents

Employment, property values, taxes paid, etc.

OLO believes that Bill 14-20 would have little to no impact on County residents in terms of the Council's priority indicators, namely employment, property values, and taxes paid.

WORKS CITED

County Council for Montgomery County, Maryland. Bill 14-20 Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment. March 17, 2020.

County Council for Montgomery County, Maryland. Memorandum. Christine Wellons. March 12, 2020.

CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. Second, the analysis performed here is intended to *inform* the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

This economic impact statement was drafted by Stephen Roblin (OLO).