House Rules and Executive Nominations Committee – Floor Report (2018 Session)

House Bill 1342
Legislative Branch of State Government – Sexual Harassment

Sponsor: Delegate Kelly, et al.

Recommendation: Favorable with Amendments

Amendment No. 1: is technical.

Amendment No. 2: requires the Ethics Committee to share certain information with the Manager of Human Resources for the General Assembly regarding complaints alleging violations of the General Assembly’s Antiharassment Policy and Procedures.

Amendment No. 3: authorizes the Ethics Committee to refer a complaint alleging a violation of the Antiharassment Policy and retaliation to an outside and independent investigator; requires the Ethics Committee to refer a complaint to an outside investigator under specified circumstances; requires the Ethics Committee to provide information to the complainant regarding the investigation and disposition; provides that the Ethics Committee may only remove an investigator for good cause; and authorizes the Ethics Committee to delay an investigation, at the request of a prosecutor, if the complaint involves criminal conduct.

Amendment No. 4: requires the Legislative Policy Committee to review and update the General Assembly’s Antiharassment Policy and Procedures at least every 2 years; directs the General Assembly’s Human Resources Manager to conduct a periodic climate survey related to discrimination and harassment issues; strikes language requiring the Ethics Committee to develop a code of conduct; and requires the Ethics Committee to review complaints alleging that a legislator has violated the legislature’s Antiharassment Policies and Procedures.

Amendment No. 5: requires the Office of the Executive Director of Legislative Services to publish records regarding workplace harassment training of members on the Department’s website.

Amendment No. 6: strikes language requiring the Commission on Civil Rights to conduct a climate survey; requires the State Ethics Commission to address sexual harassment in lobbyist training; prohibits a lobbyist from sexually harassing certain individuals while lobbying; authorizes a lobbyist to report certain violations of the General Assembly’s Antiharassment Policy and Procedures to the Ethics Commission and requires the Ethics Commission to refer the report to the Legislative Ethics Committee.
Amendment No. 7: Requires the Ethics Commission to convene a workgroup to make recommendations related to lobbyists and sexual harassment; requires the Legislative Policy Committee to update the Antiharassment Policy and Procedures by December 15, 2018; delays the effective date of the lobbying provisions for 1 year; and makes the effective date of the bill July 1, 2018.

Move the adoption of the committee amendments.

HRU Committee Vote: 21 to 0 (3 excused)

Bill Summary: House Bill 1342 alters the process the legislature uses to address harassment issues, including sexual harassment. In addition, the bill prohibits lobbyists from sexually harassin certain individuals while lobbying.

Additional Bill Information

State Ethics Commission v. Joint Committee on Legislative Ethics

The Joint Committee on Legislative Ethics (Ethics Committee) has jurisdiction over legislators. The Ethics Committee administers and implements the conflict of interest provisions of the Ethics Law, as well as other standards of legislative ethics. The Ethics Committee is comprised of 6 senators and 6 delegates.

The State Ethics Commission (Ethics Commission) is an independent agency in the Executive Branch. The Ethics Commission administers and implements the provisions of the Ethics Law that apply to Executive Branch officials, employees of all branches of government, and lobbyists. The Ethics Commission only has jurisdiction over legislators for financial disclosure purposes. The Ethics Commission has 5 members serving staggered terms. One member is the nominee of the President of the Senate and one member is the nominee of the Speaker of the House. One of the 3 remaining members must be of the opposite political party of the Governor.

Independent Investigator

The bill establishes procedures related to the Joint Ethics Committee referring complaints to an outside and independent investigator. Specifically, the Joint Ethics Committee MAY refer any complaint to an outside investigator if the complaint alleges that a member of the General Assembly has violated the legislature’s Antiharassment Policy and Procedures or has retaliated against an individual for reporting or participating in an investigation of a violation. The Joint Ethics Committee MUST refer a complaint to an outside investigator if: the complainant requests an outside investigator; the complaint is a second or subsequent complaint against the same legislator; or the complaint alleges a sexual crime and the complainant consents to the referral. The Joint Ethics Committee must advise the complainant of the findings of the independent investigator and of the committee’s action. The Joint Ethics Committee may only remove an outside investigator for cause but may ask an investigator to delay an investigation if the committee has reason to believe a crime occurred and a prosecuting authority requests a delay.
Legislative Policy Committee

The bill requires the Legislative Policy Committee to review and update the legislature’s Antiharassment Policy and Procedures at least every 2 years. In addition, the Committee must direct the legislature’s Manager of Human Resources to conduct a climate survey on discrimination and harassment issues at least every 4 years. The Manager of Human Resources must issue a report on the survey to the Presiding Officers and the Joint Ethics Committee. Finally, LPC must update the Antiharassment Policies and Procedures governing legislators and employees by December 15, 2018. When making these updates, LPC must consider including recommendations the Women Legislators of Maryland made in February 2018.

Joint Ethics Committee

The bill requires the Joint Ethics Committee to review complaints alleging violations of the Antiharassment Policy and Procedures by legislators. HB1342 requires the Joint Ethics Committee to provide the Manager of Human Resources of the General Assembly with information regarding complaints alleging a violation of the General Assembly’s Antiharassment Policy and Procedures. With respect to this information, the Manager will be bound by the confidentiality rules of the Joint Ethics Committee.

Training Records

The Office of the Executive Director of the Department of Legislative Services must maintain records regarding workplace harassment training of legislators, General Assembly employees, and DLS employees. Records regarding legislators must be posted on the Department’s website.

Lobbyists

The bill establishes rules regarding lobbyists and sexual harassment, which take effect July 1, 2019. The bill prohibits a lobbyist from sexually harassing: a legislator; a General Assembly employee, intern, or page; a DLS employee; an Executive Branch employee or official; or a lobbyist. The Ethics Commission must address sexual harassment in lobbyist training. The Ethics Commission must convene a workgroup to make recommendations to the Workplace Harassment Commission related to the implementation of these provisions by October 1, 2018.

Current Law/Background:

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.

Referrals of Sexual Harassment Violations to the Ethics Committee

If a member is the subject of a report of sexual harassment, and the matter is referred to the Ethics Committee, 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 the Ethics Committee determines that further proceedings are necessary, the committee may hold a hearing, issue subpoenas, and receive testimony from sworn witnesses. If the Ethics Committee determines that improper conduct has occurred, even if it deems that further proceedings are unnecessary, the Ethics Committee 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.

**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 (Does not reflect amendments, including amendment requiring DLS to conduct climate survey):**

**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 the Ethics Committee 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 the Ethics Committee 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 to $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 of the bill.

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