Montgomery County Council

Committee: HHS
Committee Review: Completed
Staff: Christine Wellons, Legislative Attorney
Purpose: Final action – vote expected
Keywords: #StopSexualHarassment

AGENDA ITEM #8A
October 6, 2020
Action

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

Director James Stowe, Office of Human Rights

COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION

- Final Action – Roll call vote required
- Health and Human Services Commission recommends (3-0) enactment of Bill 14-20.

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

- The HHS Committee voted (3-0) to recommend enactment of Bill 14-20 as introduced.

This report contains:

Agenda Item 8A
October 6, 2020
Action

M E M O R A N D U M

October 1, 2020

TO: County Council

FROM: Christine Wellons, Legislative Attorney

SUBJECT: Bill 14-20, Human Rights and Civil Liberties – Discriminatory Employment Practices – Workplace Harassment[1]

PURPOSE: Action – Roll call vote required

Committee Recommendation: The Health and Human Services Committee voted (3-0) to recommend enactment of Bill 14-20 as introduced.

Expected Attendees
James Stowe, Director, Office of Human Rights

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, Albornoz, Council Vice President Hucker, Council President Katz and Councilmembers Riemer and Rice, was introduced on March 24, 2020. A public hearing was held on June 16, and the Council received written testimony on the bill. A Health and Human Services (HHS) Committee was held on September 24, at which the Committee voted (3-0) to recommend enactment of the bill as introduced.

Bill 14-20 would explicitly define and prohibit discriminatory "harassment" and "sexual harassment" by employers[2] 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."

[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.

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 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).

SUMMARY OF WRITTEN TESTIMONY

Director Stowe of the Office of Human Rights (OHR), on behalf of the County Executive, testified in favor of Bill 14-20. Director Stowe stated:

> [W]ith an everchanging workforce where more and more female employees and other diverse groups are part of the workplace greater support of workers' rights are needed. **According to the Office of Human Rights one of the ongoing concerns raised by female employees specifically, is their difficulty in proving a complaint of a hostile work harassment workplace.** Either supervisors and managers do not believe the employee's story even when the situation is reported repeatedly to them or the employee is told to ignore the behavior and not be so sensitive. This law will provide these same employees a more fair and equitable process to bring these important issues and concerns to employers and if not resolved access to a legal solution. The protections for employers against meritless complaints is considered by the law as well by requiring employees still to prove their work environment's discriminatory conduct aimed to humiliate, ridicule, or intimidate was pervasive. (Emphasis added).

SUMMARY OF THE HHS COMMITTEE'S WORKSESSION

On September 24, the HHS Committee discussed numerous aspects of Bill 14-20, including the following issues and potential amendments. Director James Stowe of the Office of Human Rights (OHR) participated in the worksession.

1. Departure from the "Severe or Pervasive" Standard; Potential Fiscal and Economic Impacts

As described more fully in the enclosed memorandum of the Office of the County Attorney (OCA), Bill 14-20 would represent a departure from the decades' long standard that workplace harassment is actionable only if it is found to be "severe or pervasive." As explained by OCA:

> For 34 years, the courts have held that a successful employment discrimination claim based upon hostile work environment must include proof that the conduct complained of was sufficiently "severe or pervasive" to alter the working conditions of a reasonable person in the plaintiff's shoes. Bill 14-20 expressly replaces this element with a requirement that a reasonable person in the plaintiff's shoes "would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance." Section 27-19(b)(2)(C). The changes proposed by Bill 14-20 are significant.
>
> **The County has the legal authority to make this change. However, it will significantly lower the proof required to bring a viable claim for hostile work environment harassment and impose liability against any employer in the County (including the County itself) for crude workplace conduct that the courts previously found was *not* sufficiently severe or pervasive to state a claim for employment discrimination.** As Federal courts have observed in the context of Title VII cases, to adopt the change proposed by Bill 14-20 potentially will convert the County's Human Rights law into a "general civility code."
>
> Although the amount of compensatory damages due a successful plaintiff under the new standard proposed by Bill 14-20 may, in many cases, be small, the attorney fees to which the successful plaintiff would be entitled under the County's fee shifting law will impose more significant liability exposure on employers in the County. (Emphasis added).

While the County has the legal authority to adopt a standard that is more stringent than the "severe or pervasive standard," the Council should be aware that the new standard would be untested by the courts and may result in liability exposure and legal costs for employers in the County, including the County government. Employers also would need to update their anti-discrimination training modules to account for the new standard.

Notably, however, OLO's Economic Impact Statement concludes 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**." (Emphasis added).

It is also possible that Bill 14-20 would be a net positive for the economy by increasing worker productivity. An abusive workplace is detrimental to employee morale, increase absenteeism, and increase turnover. For example, the consulting firm Deloitte found the following costs of sexual harassment in the Australian economy in 2018:

$2.6 billion in lost productivity, or $1,053 on average per victim; and

$0.9 billion in other costs, or $375 on average per victim.

See Deloitte Access Economics, *The economic costs of sexual harassment in the workplace* (March 2019), available at https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economic-costs-sexual-harassment-workplace-240320.pdf.

2. Standards of Objective Reasonableness vs. Subjective Belief

In its memorandum, the OCA has noted that the current wording of lines 41-45 of the bill – which define "harassment" – would permit a hostile work environment claim to proceed if an individual *subjectively* believes that the conduct is abusive or hostile. The individual still would have to prove, however, that "a reasonable victim of discrimination would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance." Thus, the bill includes a subjective component *and* an objective component to the claim, as does current case law.

The OCA has not put forward a specific amendment to address this issue; however, the Committee considered, but decided against, adopting the following amendment to the definition of "harassment" (lines 41-45):

> ….the conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating a working environment that is reasonably perceived by the victim to be abusive or hostile….

In rejecting the potential amendment, the Committee noted that the amendment might tend to deter, or prematurely terminate, legitimate complaints.

3. Approaches of Other Jurisdictions

Although the vast majority of jurisdictions – including the federal government – continue to follow the "severe or pervasive" standard, a number of jurisdictions, including Colorado and Minnesota, have introduced legislation to move away from the "severe or pervasive standard" and to adopt a standard that is more protective of workers. Two states, California and New York, already have eschewed the "severe or pervasive" requirement in favor of a more protective standard for workers. California's law provides non-binding guidance to courts on applying a more protective standard, and New York mandates the more protective standard.

State legislatures have been motivated to consider more protective standards after cases in which alleged abusive workplace conduct went unchecked by the courts and was not permitted to go to a jury. For example, in *Swyear v. Fare Foods Corp.*, 911 F.3d 874 (7th Cir. 2018), a U.S. Court of Appeals upheld summary judgment for the employer, and found that there was no "severe or pervasive" harassment as a matter of law, when, during an overnight business trip, a sales representative followed his female colleague into her hotel room, got into her bed, said he wanted a "cuddle buddy", and asked her to go skinny dipping. The female colleague reported the harassment to her employer.

In *Swyear*, the employer did not reprimand the sales representative and, instead, fired the female employee a month after she complained of the abuse. Nonetheless, the court found that actionable harassment did not occur because of the "severe or pervasive" standard. The court concluded that the sales representative's actions towards his colleague "were not severe as compared with acts this Court has found sufficient to create a hostile or abusive work environment." *Id.* at 882.

The laws of California and New York, which eschewed the "severe or pervasive" standard, took effect recently and, therefore, it is too early to evaluate how they have affected workplaces or employment law jurisprudence.

NEXT STEPS: Roll call vote on whether to enact Bill 14-20, as recommended (3-0) by the HHS Committee.

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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, Albornoz, 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	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets**]**	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets**]]**	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

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 compliant 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	
FY21 - MINIMUM SALARY + 25%		GRADE 20 MINIMUM		GRADE 23 MINIMUM		GRADE 25 MINIMUM	
		FULL YEAR	W/ 3 MTH LAPSE	FULL YEAR	W/ 3 MTH LAPSE	FULL YEAR	W/ 3 MTH LAPSE
FY20 GENERAL SALARY & MLS SALARY SCHEDULES		$52,459.00	$39,344.25	$60,285.00	$45,213.75	$66,164.00	$49,623.00
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

4-13-20

Richard S. Madaleno, Director
Office of Management and Budget

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.

BACKGROUNDD

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).

OFFICE OF THE COUNTY ATTORNEY

Marc Elrich
County Executive

Marc P. Hansen
County Attorney

M E M O R A N D U M

TO: James Stowe
Director, Office of Human Rights

VIA: Edward B. Lattner, Chief
Division of Government Operations

FROM: Kathryn Lloyd
Associate County Attorney

DATE: June 15, 2020

RE: **OCA Review of Bill 14-20, Human Rights and Civil Liberties - Discriminatory Employment Practices - Workplace Harassment**

For 34 years, the courts have held that a successful employment discrimination claim based upon hostile work environment must include proof that the conduct complained of was sufficiently "severe or pervasive" to alter the working conditions of a reasonable person in the plaintiff's shoes. Bill 14-20 expressly replaces this element with a requirement that a reasonable person in the plaintiff's shoes "would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance." Section 27-19(b)(2)(C). The changes proposed by Bill 14-20 are significant.

The County has the legal authority to make this change. However, it will significantly lower the proof required to bring a viable claim for hostile work environment harassment and impose liability against any employer in the County (including the County itself) for crude workplace conduct that the courts previously found was *not* sufficiently severe or pervasive to state a claim for employment discrimination. As Federal courts have observed in the context of Title VII cases, to adopt the change proposed by Bill 14-20 potentially will convert the County's Human Rights law into a "general civility code."

Although the amount of compensatory damages due a successful plaintiff under the new standard proposed by Bill 14-20 may, in many cases, be small, the attorney fees to which the successful plaintiff would be entitled under the County's fee shifting law will impose more significant liability exposure on employers in the County.

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I. The County has the power to enact Bill 14-20.

Enactment of this bill is within the County's purview because the County has the authority to enact a local law prohibiting discrimination in the County. In *Edward Systems Technology v. Corbin*, 379 Md. 278, 297-98 (2004), the Court of Appeals held that, under the Express Powers Act, a chartered county such as Montgomery County may enact such an ordinance as a local law. Specifically, the Court found that a chartered county generally "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 a traditional judicial review action in the circuit court for a party aggrieved by the final administrative decision." *Id.* at 298.

II. The current test for employment discrimination based upon hostile work environment.

In 1986 the Supreme Court for the first time concluded that employment discrimination under Title VII included claims based upon a hostile work environment, even in the absence of tangible economic loss. In *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Court announced that to establish a claim for hostile work environment based on sexual harassment the plaintiff must prove the following four elements: '(1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff;[1] (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual basis to the employer."[2] Maryland state courts have recognized and employed this same test. *Manikhi v. Mass Transit Administration*, 360 Md. 333, 348 (2000); *Magee v. Dansources Tech. Services*, 137 Md. App. 527, 549-50 (2001).

Bill 14-20 alters the third prong of the test. The "sufficiently severe or pervasive" prong has both an objective and a subjective component. As to the subjective component, the Fourth Circuit recently explained that the victim must show that he or she "did [subjectively] perceive, and a reasonable person would perceive, the environment to be abusive or hostile." *Evans v. International Paper Company*, 936 F.3d 183, 192 (4th Cir. 2019). As to the objective component, the *Magee* Court, citing *Manikhi*, explained that the alleged discriminatory conduct must be so "objectively" severe or pervasive that it has a substantial effect on the terms or on the conditions of employment. *Magee*, 127 Md. App. at 550. The Fourth Circuit has explained that "[t]o make

[1] This same analysis applies to workplace harassment based upon any improper criteria (e.g., race, age, etc.).

[2] An employer is liable for harassment if the perpetrator is a supervisor and the harassment results in a tangible employment action, such as termination, failure to hire or promote, or reassignment. However, if the harassment does not lead to a tangible employment action, the employer can escape liability by showing that it exercised reasonable care in its efforts to prevent and correct the harassment and the employee who was the victim of harassment unreasonably failed to take advantage of the employer's preventive or corrective procedures. This is known as the *Faragher/Ellerth* defense because the standard was adopted by the Supreme Court in the companion cases of *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998) and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). Bill 14-20 does not alter these standards.

that showing, a worker must demonstrate that 'the environment would reasonably be perceived, and is perceived, as hostile or abusive . . .. We determine the 'objective severity of harassment . . . from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.'" *Pryor v. United Air Lines, Inc*., 791 F.3d 488, 496 (4th Cir. 2015) (*citing Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 81 (1998)).

The Fourth Circuit has explicated the need for flexibility in applying the objective component of the "sufficiently severe or pervasive" prong in *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 176 (4th Cir. 2009) (internal citations and quotations omitted):

> This objective inquiry is not, and by its nature cannot be, a mathematically precise test. Rather, when determining whether the harassing conduct was objectively severe or pervasive, we must look at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. No single factor is dispositive as the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Because we have recognized that plaintiffs must clear a high bar in order to satisfy the severe or pervasive test, the [plaintiff] must show that the environment was pervaded with discriminatory conduct aimed to humiliate, ridicule, or intimidate, thereby creating an abusive atmosphere.

The Fourth Circuit has frequently noted that crude and boorish behavior alone is *not* sufficiently severe or pervasive and is therefore not actionable under Title VII. In *Evans v. Int'l Paper Co.*, 936 F.3d 183, 192 (4th Cir. 2019) (internal citations and quotations omitted) the court wrote:

> Incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard. Thus, rude treatment from coworkers, callous behavior by one's superiors, or a routine difference of opinion and personality conflict with one's supervisor are not actionable under Title VII. The Supreme Court has also reinforced the steep requirements of a hostile work environment claim. Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. The mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII.

Finally, the Fourth Circuit has also noted the oft-repeated admonition against turning the country's primary anti-discrimination law into a general code of workplace civility. *EEOC v. Fairbrook Med. Clinic, P.A.*, 609 F.3d 320, 328 (4th Cir. 2010) (internal citations and quotations omitted).

> Title VII, after all, is not a general civility code. While no one condones boorishness, there is a line between what can justifiably be called sexual harassment and what is merely crude behavior. Activities like simple teasing, offhand comments, and off-color jokes, while often regrettable, do not cross the line into actionable misconduct. If they did, courts would be embroiled in never-ending litigation and impossible attempts to eradicate the ineradicable, and employers would be encouraged to adopt authoritarian traits to purge their workplaces of poor taste.

See also Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 2283-84, 141 L.Ed.2d 662, 677 (1998) (internal citations and quotations omitted) ("These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code. Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.")

While viable hostile work environment claims often involved repeated conduct, the "severe or pervasive" prong of the test provides flexibility to make actionable isolated or even single incidents when the incidents are particularly severe. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280-81 (4th Cir. 2015) (single use of a racial epithet)

III. Bill 14-20 replaces the requirement that workplace conduct be sufficiently "severe or pervasive" to alter the working conditions of a reasonable person in the plaintiff's shoes with a requirement that a reasonable person in the plaintiff's shoes "would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance."

Bill 14-20 expressly rejects the "severe or pervasive" prong of the current test. Instead, under the bill, 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" if the claimant meets the following three-part test:

First, if "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." Section 27-19(b)(2)(A).

Second, the victim must prove *one* of following three elements:

- That "submission to the conduct is made either explicitly or implicitly a term or condition of an individual's employment."
- *Or* "submission to or rejection of the conduct 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 a working environment that is perceived by the victim to be abusive or hostile*." Sections 27-19(b)(2)(B)(i)-(iii) and (b)(3)(A)(i)-(iii) (emphasis added).

Because of the use of the disjunctive "or," this second element is met if the plaintiff *subjectively* perceives the conduct to be abusive or hostile to successfully maintain an action against an employer.

Third, and most crucially, the victim must prove that "a *reasonable* victim of discrimination would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance." Sections 27-19(b)(2)(C) and (b)(3)(B). Bill 14-20 replaces the requirement that workplace conduct be sufficiently "severe or pervasive" to alter the working conditions of a reasonable person in the plaintiff's shoes with a requirement that a reasonable person in the plaintiff's shoes "would consider the conduct to be more than a petty slight, trivial inconvenience, or minor annoyance." Thus, while Bill 14-20 does contain an element of objective reasonableness, the plaintiff need only provide that the conduct was objectively or reasonably more than a petty slight, trivial inconvenience, or minor annoyance (not sufficiently severe or pervasive as to alter working conditions of a reasonable person in the plaintiff's shoes), which is a much lower standard than that currently used under the County's anti-discrimination law.

IV. Bill 14-20 would make actionable even boorish and crude workplace behavior.

Boorish and crude workplace behavior that the courts previously found was *not* sufficiently severe or pervasive to alter the working conditions of a reasonable person in the plaintiff's shoes (and therefore did not create an abusive work environment) could be found actionable under Bill 14-20. For example, the following workplace conduct, which the Fourth Circuit found did not make out a prima facie case of hostile work environment in *Ziskie v. Mineta*, 547 F.3d 220, 228 (4th Cir. 2008), would become actionable under Bill 14-20. The plaintiff, who worked as an air traffic controller, described a workplace where profanity and other crude language and behavior, such as belching, were commonplace. Male controllers often referred to pilots as "dick head pilots." Ziskie heard one co-worker call a supervisor a "stupidvisor;" another told a female supervisor to "fuck off." Male controllers found it amusing to intentionally pass gas in the presence of other employees, including Ziskie. Because of evidentiary errors, the court reversed the trial court's grant of summary judgment to the employer. In remanding the case to the trial court, the Fourth Circuit cautioned:

> What Ziskie does describe is a workplace in which employee interactions could sometimes assume a coarse or boorish tone. But while no one condones boorishness, there is a line between what can justifiably be called sexual harassment and what is merely crude behavior. Profanity, while regrettable, is something of a fact of daily life. Flatulence, while offensive, is not often actionable, for Title VII is not a general civility code. The occasional off-color joke or comment is a missive few of us escape. Were such things the stuff of lawsuits, we would be litigating past

sundown in ever so many circumstances.

Id. at 228 (internal citations and quotations omitted). Under Bill 14-20 the conduct complained of by Ziskie may well be found actionable. "*See also Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 753-54 (4th Cir. 1996) (internal quotation omitted) ("While [the plaintiff's supervisor's] conduct was undoubtedly tasteless and inappropriately forward, we cannot conclude that it was of the type that would interfere with a reasonable person's work performance to the extent required by Title VII.")

V. Conclusion.

Under Section 27-6 of the County Code, an employer is defined as "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." Bill 14-20 will expand liability for hostile work environment claims for these employers. It is anticipated that if this bill is passed, it will generate significant additional litigation and increase potential liability exposure, which may include significant attorney fees being awarded.

cc: Dale Tibbitts, Special Assistant to the County Executive
Marc P. Hansen, County Attorney
Christine Wellons, Legislative Attorney

20-002303

TESTIMONY ON BEHALF OF COUNTY EXECUTIVE MARC ELRICH ON BILL 14-20 HUMAN RIGHTS AND CIVIL LIBERTIES- DISCRIMINATORY EMPLOYMENT PRACTICES- WORKPLACE HARASSMENT

June 16, 2020

President Katz, Vice-President Hucker and distinguished members of Council, first we wish to thank you for allowing this opportunity to speak about this very important issue. We are here to speak on behalf of the County Executive in support of Council Bill 14-20 Human Rights and Civil Liberties- Discriminatory Employment Practices- Workplace Harassment. The proposed law would define and prohibit certain discriminatory harassment in the workplace and defines and prohibits certain sexual harassment in the workplace. Further the proposed measure would significantly change the level of conduct required to rise to the level of an employment discrimination claim under county law. Harassment would not need to meet the current requirements today of being "severe or pervasive" to cause a charge of employment discrimination; a charge of employment discrimination could go forward as long as the behavior was "more than a petty slight, trivial inconvenience, or minor annoyance.

As you may be aware, county government does have the authority separate an apart from any state probation to enact the proposed law based on long standing legal president. We would however point out that this change would lower the proof standard required to file a viable complaint for hostile work environment harassment and impose increased liability against all county employers (including the County) for crude workplace behavior that courts found heretofore as not sufficiently severe or pervasive to move forward a charge of employment discrimination. I am aware that this fact alone may produce more complaints of discrimination and while the compensatory damages and civil fines available under this law would in most cases be small, attorney fees and other legal costs could subject employers to even more liability.

I believe however with an everchanging workforce where more and more female employees and other diverse groups are part of the workplace greater support of workers' rights are needed. According to the Office of Human Rights one of the ongoing concerns raised by female employees specifically, is their difficulty in proving a complaint of a hostile work harassment workplace. Either supervisors and managers do not believe the employee's story even when the situation is reported repeatedly to them or the employee is told to ignore the behavior and not be so sensitive. This law will provide these same employees a more fair and equitable process to bring these important issues and concerns to employers and if not resolved access to a legal solution. The protections for employers against meritless complaints is considered by the law as well by requiring employees still to prove their work environment's discriminatory conduct aimed to humiliate, ridicule, or intimidate was pervasive.

We are aware of the concerns of businesses and employers that new employment laws may seem like a continuing interference in management of the workplace and may be

viewed by employers as overreaching by government. We believe however in this instance this law will help provide a workplace free of discrimination allowing an environment that is productive for all employees.

If approved, the Office of Human Rights would address complaints as directed by the provisions of the law. The Office of Human Rights would also provide support for technical questions that might arise from employers and employees. However, this additional responsibility and potential increase in number of complaints will put additional strain on the agency's current staffing levels. We must include considerations for additional staff resources to be determined by the Office of Human Rights.

We are in support of the passage of this law. Thank you for the opportunity to share these comments and observations

Ms. Wilson
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June 12, 2020

Council President
100 Maryland Avenue
Rockville, MD 20850.

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

Dear Councilmembers:

Thank you for sponsoring *Bill 14-20* in order to make the necessary changes that will no longer make it more difficult and discouraging for victims to make their case.

I've been a victim of workplace discrimination. I've assisted other victims of workplace discrimination and harassment. Although we have laws in place against such acts, I have found that the administrative adjudicatory process is set in place to dismiss many cases and discourage and discredit victims, rather than be supportive and empathetic.

No legislation or courts should determine how severe workplace discrimination or harassment should be in order for a victim to receive justice and compensation. The workplace should be free from all types of discrimination and harassment regardless of how minor it may be to others. Misconduct in the workplace should never be protected or glossed over.

I pray that we will all continue to make progress here in Montgomery County and in this nation. Voting for Bill 14-20 is a great start! Thank you again.

Sincerely,

Ms. Wilson