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Henry, Marshall, Poore

HOUSE OF REPRESENTATIVES
149th GENERAL ASSEMBLY

HOUSE SUBSTITUTE NO. 1
FOR
HOUSE BILL NO. 360

AN ACT TO AMEND TITLE 19 OF THE DELAWARE CODE RELATING TO EMPLOYMENT PRACTICES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend Chapter 7, Title 19 of the Delaware Code by making deletions as shown by strike through and
2 insertions as shown by underline as follows:

3 § 711A Unlawful employment practices; sexual harassment.

4 (a) Purpose.

5 The State of Delaware is committed to ensuring that all Delawareans experience a safe and respectful workplace
6 free of sexual harassment. Complaints of sexual harassment will be taken seriously and employers will be held accountable
7 for sexual harassment in the workplace. It is the expectation of the Delaware General Assembly that all employers in the
8 State of Delaware will work to create a workplace where employees are safe and treated with dignity and respect.

9 (b) Definitions.

10 As used in this section:

11 (1) “Applicant” means as defined in § 709B of this Title.

12 (2) “Apprentice” means any individual who is engaged in the learning of any of the licensed practices in Title
13 24 from a practitioner licensed in the profession the apprentice is studying.

14 (3) “Department” means Department of Labor.

15 (4) “Employee” means an individual employed by an employer and includes state employees, unpaid interns,
16 applicants, joint employees and apprentices.

17 (5) “Employer” means any person employing 4 or more employees within the State at the time of the alleged
18 violation and includes the State, the General Assembly, State agencies and labor organizations.

19 (6) “General Assembly” means as defined in § 5831 of Title 29.

20 (7) “Joint employee” means an employee who has an employment relationship with two employers and:

- a. The employee is under the simultaneous control of both employers; and
- b. The employee performs services simultaneously for both employers; and
- c. The services performed by the employee for each employer are the same or closely related.

(8) “Labor Organization” means as defined in § 710 of Title 19.

(9) “Negative employment action” means an action taken by a supervisor that negatively impacts the employment status of an employee and includes termination, failure to promote or hire and loss of wages or benefits.

(10) “State agency” means as defined in § 5831 of Title 29.

(11) “State employee” means as defined in § 5831 of Title 29.

(12) “Supervisor” means an individual that is empowered by the employer to take an action to change the employment status of an employee.

(c) Sexual harassment of an employee is an unlawful employment practice when the employee is subjected to conduct that includes unwelcome sexual advances, requests for sexual favors, verbal or physical conduct of a sexual nature, or retribution on the basis of rejection of such advances and requests and:

(1) Such conduct unreasonably interferes with an individual’s work performance or the endurance of such conduct becomes a condition of continued employment; or

(2) Such conduct creates an intimidating, hostile, or offensive work environment.

(d) An employer is responsible for sexual harassment of an employee when:

(1) A supervisor’s sexual harassment results in a negative employment action of an employee;

(2) The employer knew or should have known of the non-supervisory employee’s sexual harassment of an employee and failed to take appropriate corrective measures; or

(3) A negative employment action is taken against an employee in retaliation for the employee filing a discrimination charge, participating in an investigation of sexual harassment, or testifying in any proceeding or lawsuit about the sexual harassment of an employee.

(e) In determining whether an individual is an employee or an independent contractor under this section, all of the following factors must be considered:

(1) The degree of the employer’s right to control the manner in which the individual’s work is to be performed;

(2) The individual’s opportunity for profit or loss depending upon the individual’s managerial skill;

(3) The individual’s investment in equipment or materials required for the individual’s task or employment of helpers;

- 51 (4) Whether the services rendered by the individual requires a special skill;
52 (5) The degree of permanence of the working relationship between the individual and the employer;
53 (6) Whether the service rendered by the individual is an integral part of the employer's business.

54 (f) In any action against an employer under subsection (c)(2), it is an affirmative defense if the employer proves
55 that:

- 56 (1) The employer exercised reasonable care to prevent and correct any harassment promptly; and
57 (2) The employee unreasonably failed to take advantage of any preventative or corrective opportunities
58 provided by the employer.

59 (g) Information sheet.

60 (1) The Department of Labor shall create an information sheet on sexual harassment that the Department shall
61 make available to employers. The information sheet shall be available at each office of the Department, and shall be
62 mailed if the request includes a self-addressed envelope with postage affixed. The Department shall make the
63 information sheet available on its website.

64 (2) The information sheet shall provide notice to employees of the right to be free from sexual harassment in
65 the workplace. The information sheet must contain all of the following:

- 66 a. The illegality of sexual harassment;
67 b. The definition of sexual harassment under state law using examples;
68 c. The legal remedies and complaint process available through the Department;
69 d. Directions on how to contact the Department.
70 e. The legal prohibition against retaliation.

71 (3) Every employer shall distribute the information sheet to its employees as follows:

- 72 a. To new employees at the commencement of employment;
73 b. To existing employees within 6 months of the effective date of this Act.

74 (4) A claim that the information sheet required to be distributed under subsection (g) shall not in and of itself
75 result in liability of any employer to any present or former employee in any action alleging sexual harassment. An
76 employer's compliance with subsection (g) does not insulate the employer from liability for sexual harassment of any
77 current or former employee or applicant.

78 (h) Training requirements for an employer having 50 or more employees in Delaware.

79 (1) For purposes of this subsection only, applicants shall not be counted to meet the employee numerosity
80 requirement.

81 (2) An employer shall provide at least 90 minutes of effective interactive training and education to employees
82 regarding the prevention of sexual harassment.

83 (3) Such training shall be provided to employees as follows:

84 a. To new employees within 1 year of the commencement of employment and thereafter every 2 years;

85 b. To existing employees within 1 year of the effective date of this Act and thereafter every 2 years.

86 (4) The training shall include all of the following:

87 a. The illegality of sexual harassment;

88 b. The definition of sexual harassment using examples;

89 c. The legal remedies and complaint process available to the employee.

90 d. Directions on how to contact the Department.

91 e. The legal prohibition against retaliation.

92 (5) Supervisor training.

93 a. An employer shall provide additional interactive training to all supervisors as follows:

94 1. To new supervisors within 1 year of the commencement of employment as a supervisor, and
95 thereafter every 2 years;

96 2. To existing supervisors within 1 year of the effective date of this Act, and thereafter every 2 years.

97 b. Such training shall include all of the following:

98 1. The specific responsibilities of a supervisor regarding the prevention and correction of sexual
99 harassment;

100 2. The legal prohibition against retaliation.

101 (6) Training provided prior to January 1, 2019.

102 a. If an employer provided training to employees or supervisors prior to January 1, 2019 that would
103 satisfy the requirements under subsection (h), no additional training is required under subsection (h) until January
104 1, 2020.

105 (i) The Department of Labor shall post the requirements of this section on their website and shall perform outreach
106 as necessary to educate employers of the requirements of this section.

107 Section 2. Amend Chapter 7, Title 19 of the Delaware Code by making deletions as shown by strike through and
108 insertions as shown by underline as follows:

109 § 712 Enforcement provisions; powers of the Department; administrative process.

110 (a) The Department of Labor is empowered, as hereinafter provided, to prevent any person from engaging in any
111 unlawful employment practice as set forth in §§ 711, 711A, 719A, 723 and 724 of this title. In connection with the
112 performance of its duties, the Department may:

113 (1) Investigate employment practices by permitting the Department to enter any place of employment at
114 reasonable times; inspect and copy records or documents in the possession of the employer, the employment agency or
115 labor organization; administer oaths, certify to official acts, take and cause to be taken depositions of witnesses; issue
116 subpoenas compelling the attendance and testimony of witnesses and the production of papers, books, accounts,
117 payrolls, documents, and records;

118 (2) Make, revise or rescind such rules or regulations necessary or appropriate to administer or enforce this
119 chapter in accordance with the provisions of § 10161(b) of Title 29;

120 (3) Commence civil actions in Superior Court for violations of this chapter, any published regulations or for
121 civil penalties provided herein.

122 (b) The Department shall have jurisdiction over all cases arising under this chapter, affording review and
123 oversight of employment practices in Delaware. The Department shall endeavor to eliminate unlawful discrimination in
124 employment through its administrative process set forth below. This subchapter shall afford the sole remedy for claims
125 alleging a violation of this chapter to the exclusion of all other remedies. Upon termination of the administrative process by
126 the Department, the charging party may institute a civil action in Superior Court of the State of Delaware pursuant to §§
127 714 and 715 of this title.

128 (c) The administrative process requires the following:

129 (1) Statute of limitation and filing procedure. — Any person claiming to be aggrieved by a violation of this
130 chapter shall first file a charge of discrimination within 300 days of the alleged unlawful employment practice or its
131 discovery, setting forth a concise statement of facts, in writing, verified and signed by the charging party. The
132 Department shall serve a copy of the verified charge of discrimination upon the named respondent by certified mail.
133 The respondent may file an answer within 20 days of its receipt, certifying that a copy of the answer was mailed to the
134 charging party at the address provided.

135 (2) Preliminary findings and recommendations. — The Department shall review the submissions within 60
136 days from the date of service upon the respondent and issue preliminary findings with recommendations. The
137 preliminary findings may recommend:

- 138 a. Dismissing the charge unless additional information is received which warrants further investigation;
139 b. Referring the case for mediation requiring the parties' appearance; or

140 c. Referring the case for investigation.

141 (3) Final determinations upon completion of investigation. — After investigation, the Department shall issue
142 a determination of either "reasonable cause" or "no reasonable cause" to believe that a violation has occurred or is
143 occurring. All cases resulting in a "reasonable cause" determination will require the parties to appear for compulsory
144 conciliation. All cases resulting in a "no cause" determination will receive a corresponding Delaware Right to Sue
145 Notice.

146 (4) Confidentiality of the Department's process. — The Department shall not make public the charge of
147 discrimination or information obtained during the investigation of a charge. This provision does not apply to
148 disclosures made to the parties, their counsel, or witnesses where disclosure is deemed necessary or appropriate.
149 Nothing said or done during and as a part of the mediation or conciliation efforts may be made public by the
150 Department, its officers or employees or used by any party as evidence in a subsequent proceeding without the written
151 consent of the persons concerned.

152 (5) End of administrative process. — In all cases where the Department has dismissed the charge, issued a no
153 cause determination or upon the parties failed conciliation efforts, the Department shall issue a Delaware Right to Sue
154 Notice, acknowledging the Department's termination of the administrative process. Once the Department has issued its
155 preliminary findings pursuant to paragraph (c)(2) of this section, the Department, in its discretion, may grant a
156 Delaware Right to Sue Notice to a charging party.

157 Section 3. This Act shall take effect on January 1, 2019.

SYNOPSIS

As poll from 2017 revealed that 31% of people in the United States have been sexually harassed in the workplace. The United States Equal Employment Opportunity Commission released a comprehensive study of workplace harassment in the United States which concluded that between 25% and 85% of women reported having experienced sexual harassment in the workplace. However, the Commission estimated that 75% of all workplace harassment incidents go unreported. The purpose of this bill is to combat sexual harassment in the workplace and to ensure the safety and dignity of all employees in Delaware. This bill defines sexual harassment and makes employers responsible for the sexual harassment of an employee by a supervisor or by another employee when the employer knew or should have known about it and failed to take appropriate corrective action. Moreover, this bill prevents an employer from retaliating against an employee for filing a discrimination charge. This bill includes a requirement that the Department of Labor create an information sheet pertaining to sexual harassment that employers must distribute to employees. Employers having more than 50 or more employees in Delaware will be required to provide sexual harassment training to all employees and supervisory employees which must be conducted every 2 years. This bill also empowers the Department of Labor to investigate violations of this Act and gives the Department jurisdiction over all sexual harassment cases which includes an administrative process. This bill requires the Department of Labor to post the requirements in this bill on its website and perform outreach necessary to educate employers of the requirements. This bill takes effect on January 1, 2019.