SPONSOR: Rep. Keeley & Sen. Hansen
Reps. Bennett, Bolden, Brady, Heffernan, Kowalko, Longhurst, Mulrooney, Paradee, K. Williams; Sens. Henry, Marshall, Poore

HOUSE OF REPRESENTATIVES
149th GENERAL ASSEMBLY

HOUSE SUBSTITUTE NO. 1
TO
HOUSE BILL NO. 360
AS AMENDED BY
HOUSE AMENDMENT NO. 2

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:

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

§ 711A Unlawful employment practices; sexual harassment.

(a) Purpose.

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

(b) Definitions.

As used in this section:

(1) "Applicant" means as defined in § 709B of this Title.

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

(3) "Department" means Department of Labor.

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

(5) "Employee placed by employment agency" means an employee who performs services for an employer as a result of the employer's contractual agreement with an employment agency.

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

(7) “Employment agency” means as defined in § 710 of this Title.

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

(9) “Independent contractor” means as defined in § 3507 of this Title.

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

(11) “Negative employment action” means an action taken by a supervisor that negatively impacts the employment status of an employee.

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

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

(14) “Supervisor” means an individual that is empowered by the employer to take an action to change the employment status of an employee or who directs an employee’s daily work activities.

(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, and other verbal or physical conduct of a sexual nature when:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an employee’s employment;

(2) submission to or rejection of such conduct is used as the basis for employment decisions affecting an employee; or

(3) such conduct has the purpose or effect of unreasonably interfering with an employee’s work performance or creating an intimidating, hostile, or offensive working 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 any action against an employer under subsection (c)(2), it is an affirmative defense if the employer proves that:

(1) The employer exercised reasonable care to prevent and correct any harassment promptly; and

(2) The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.

(f) Information sheet.

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

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

a. The illegality of sexual harassment;

b. The definition of sexual harassment under state law using examples;

c. The legal remedies and complaint process available through the Department;

d. Directions on how to contact the Department.

e. The legal prohibition against retaliation.

(3) Every employer shall distribute, physically or electronically, the information sheet to its employees as follows:

a. To new employees at the commencement of employment;

b. To existing employees within 6 months of the effective date of this Act.

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

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

(1) An employer shall provide interactive training and education to employees regarding the prevention of sexual harassment.

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

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

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

(3) The training shall include all of the following:

a. The illegality of sexual harassment;

b. The definition of sexual harassment using examples;

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

d. Directions on how to contact the Department.

e. The legal prohibition against retaliation.

(4) Supervisor training.

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

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

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

b. Such training shall include all of the following:

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

2. The legal prohibition against retaliation.

(5) Training provided prior to January 1, 2019.

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

(6) Numerosity and training requirement.

a. Employers do not count applicants or independent contractors towards the numerosity requirement under this subsection.

b. Employers are not required to provide training under this subsection to applicants, independent contractors, or employees employed less than 6 months continuously.

c. Employment agencies are the only employers required to count and provide training to employees placed by employment agency under this subsection.

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

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

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

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

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

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

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

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

(c) The administrative process requires the following:

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

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

a. Dismissing the charge unless additional information is received which warrants further investigation;

b. Referring the case for mediation requiring the parties' appearance; or

c. Referring the case for investigation.

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

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

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

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