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SENATE BILL NO. 1360

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology on January 27, 2021)

(Patron Prior to Substitute—Senator McClellan)

A BILL to amend and reenact §§ 2.2-522 and 2.2-3905 through 2.2-3908 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-3905.1, relating to the Virginia Human Rights Act; nondiscrimination in employment; sexual harassment and workplace harassment.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-522 and 2.2-3905 through 2.2-3908 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-3905.1 as follows:

§ 2.2-522. Filing with Division deemed filing with other state agencies.

Filing of a written complaint with the Division of Human Rights shall be deemed filing with any state agency for the purpose of complying with any time limitation on the filing of a complaint, provided the time limit for filing with the other agency has not expired. The time limit for filing with other agencies shall be tolled while the Division is either investigating the complaint or making a decision to refer it. Complaints under this article shall be filed with the Division within 180 days two years of the alleged discriminatory event.

§ 2.2-3905. Nondiscrimination in employment; definitions; exceptions.

A. As used in this section:

"Age" means being an individual who is at least 40 years of age.

"Employee" means an individual employed by an employer.

"Employer" means a person employing 15 five or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person. However, (i) for purposes of unlawful discharge under subdivision B 1 on the basis of race, color, religion, national origin, status as a veteran, sex, sexual orientation, gender identity, marital status, pregnancy, or childbirth or related medical conditions including lactation, "employer" means any employer employing more than five persons and (ii) for purposes of unlawful discharge under subdivision B 1 on the basis of age, "employer" means any employer employing more than five but fewer than 20 persons.

"Employment agency" means any person, or an agent of such person, regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer.

"Joint apprenticeship committee" means the same as that term is defined in § 40.1-120.

"Labor organization" means an organization engaged in an industry, or an agent of such organization, that exists for the purpose, in whole or in part, of dealing with employers on behalf of employees concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment. "Labor organization" includes employee representation committees, groups, or associations in which employees participate.

"Lactation" means a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.

"Sexual harassment" includes a sexual advance, a request for sexual favors, or any other conduct of a sexual nature, where (i) submission to the conduct is made either explicitly or implicitly a term or condition of employment; (ii) submission to or rejection of the conduct is used as the basis for an employment decision affecting the individual's employment; or (iii) the conduct unreasonably alters an individual's terms, conditions, or privileges of employment, including by creating an intimidating, hostile, or offensive work environment.

"Workplace harassment" means conduct on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, pregnancy, childbirth or related medical conditions including lactation, age, marital status, or status as a veteran, regardless of whether it is direct or indirect, or verbal or nonverbal, that unreasonably alters an individual's terms, conditions, or privileges of employment, including by creating an intimidating, hostile, or offensive work environment. "Workplace harassment" includes sexual harassment and is a form of unlawful discrimination as described in subsection B.

B. It is an unlawful employment practice for:

1. An employer to:

a. Fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to such individual's compensation, terms, conditions, or privileges of employment because of such

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60 individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,
61 childbirth or related medical conditions including lactation, age, status as a veteran, or national origin; or
62 b. Limit, segregate, or classify employees or applicants for employment in any way that would
63 deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect an
64 individual's status as an employee, because of such individual's race, color, religion, sex, sexual
65 orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including
66 lactation, age, status as a veteran, or national origin.

67 2. An employment agency to:

68 a. Fail or refuse to refer for employment, or otherwise discriminate against, any individual because of
69 such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,
70 childbirth or related medical conditions, age, status as a veteran, or national origin; or

71 b. Classify or refer for employment any individual on the basis of such individual's race, color,
72 religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical
73 conditions, age, status as a veteran, or national origin.

74 3. A labor organization to:

75 a. Exclude or expel from its membership, or otherwise discriminate against, any individual because
76 of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status,
77 pregnancy, childbirth or related medical conditions, age, status as a veteran, or national origin;

78 b. Limit, segregate, or classify its membership or applicants for membership, or classify or fail to or
79 refuse to refer for employment any individual, in any way that would deprive or tend to deprive such
80 individual of employment opportunities, or would limit such employment opportunities or otherwise
81 adversely affect an individual's status as an employee or as an applicant for employment, because of
82 such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,
83 childbirth or related medical conditions, age, status as a veteran, or national origin; or

84 c. Cause or attempt to cause an employer to discriminate against an individual in violation of
85 subdivisions a or b.

86 4. An employer, labor organization, or joint apprenticeship committee to discriminate against any
87 individual in any program to provide apprenticeship or other training program on the basis of such
88 individual's race, color, religion, sex, sexual orientation, gender identity, pregnancy, childbirth or related
89 medical conditions, age, status as a veteran, or national origin.

90 5. An employer, in connection with the selection or referral of applicants or candidates for
91 employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the
92 results of employment-related tests on the basis of race, color, religion, sex, sexual orientation, gender
93 identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, or
94 national origin.

95 6. Except as otherwise provided in this chapter, an employer to use race, color, religion, sex, sexual
96 orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status
97 as a veteran, or national origin as a motivating factor for any employment practice, even though other
98 factors also motivate the practice.

99 7. (i) An employer to discriminate against any employees or applicants for employment, (ii) an
100 employment agency or a joint apprenticeship committee controlling an apprenticeship or other training
101 program to discriminate against any individual, or (iii) a labor organization to discriminate against any
102 member thereof or applicant for membership because such individual has opposed any practice made an
103 unlawful employment practice by this chapter or because such individual has made a charge, testified,
104 assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

105 8. An employer, labor organization, employment agency, or joint apprenticeship committee
106 controlling an apprenticeship or other training program to print or publish, or cause to be printed or
107 published, any notice or advertisement relating to (i) employment by such an employer, (ii) membership
108 in or any classification or referral for employment by such a labor organization, (iii) any classification or
109 referral for employment by such an employment agency, or (iv) admission to, or employment in, any
110 program established to provide apprenticeship or other training by such a joint apprenticeship committee
111 that indicates any preference, limitation, specification, or discrimination based on race, color, religion,
112 sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical
113 conditions, age, status as a veteran, or national origin, except that such a notice or advertisement may
114 indicate a preference, limitation, specification, or discrimination based on religion, sex, age, or national
115 origin when religion, sex, age, or national origin is a bona fide occupational qualification for
116 employment.

117 C. Notwithstanding any other provision of this chapter, it is not an unlawful employment practice:

118 1. For (i) an employer to hire and employ employees; (ii) an employment agency to classify, or refer
119 for employment, any individual; (iii) a labor organization to classify its membership or to classify or
120 refer for employment any individual; or (iv) an employer, labor organization, or joint apprenticeship
121 committee to admit or employ any individual in any apprenticeship or other training program on the

122 basis of such individual's religion, sex, or age in those certain instances where religion, sex, or age is a
123 bona fide occupational qualification reasonably necessary to the normal operation of that particular
124 employer, employment agency, labor organization, or joint apprenticeship committee;

125 2. For an elementary or secondary school or institution of higher education to hire and employ
126 employees of a particular religion if such elementary or secondary school or institution of higher
127 education is, in whole or in substantial part, owned, supported, controlled, or managed by a particular
128 religion or by a particular religious corporation, association, or society or if the curriculum of such
129 elementary or secondary school or institution of higher education is directed toward the propagation of a
130 particular religion;

131 3. For an employer to apply different standards of compensation, or different terms, conditions, or
132 privileges of employment, pursuant to a bona fide seniority or merit system, or a system that measures
133 earnings by quantity or quality of production, or to employees who work in different locations, provided
134 that such differences are not the result of an intention to discriminate because of race, color, religion,
135 sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical
136 conditions, age, status as a veteran, or national origin;

137 4. For an employer to give and to act upon the results of any professionally developed ability test,
138 provided that such test, its administration, or an action upon the results is not designed, intended, or
139 used to discriminate because of race, color, religion, sex, sexual orientation, gender identity, marital
140 status, pregnancy, childbirth or related medical conditions, age, status as a veteran, or national origin;

141 5. For an employer to provide reasonable accommodations related to pregnancy, childbirth or related
142 medical conditions, and lactation, when such accommodations are requested by the employee; or

143 6. For an employer to condition employment or premises access based upon citizenship where the
144 employer is subject to any requirement imposed in the interest of the national security of the United
145 States under any security program in effect pursuant to or administered under any statute or regulation
146 of the federal government or any executive order of the President of the United States.

147 D. Nothing in this chapter shall be construed to require any employer, employment agency, labor
148 organization, or joint apprenticeship committee to grant preferential treatment to any individual or to any
149 group because of such individual's or group's race, color, religion, sex, sexual orientation, gender
150 identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, or
151 national origin on account of an imbalance that may exist with respect to the total number or percentage
152 of persons of any race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,
153 childbirth or related medical conditions, age, status as a veteran, or national origin employed by any
154 employer, referred or classified for employment by any employment agency or labor organization,
155 admitted to membership or classified by any labor organization, or admitted to or employed in any
156 apprenticeship or other training program, in comparison with the total number or percentage of persons
157 of such race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth
158 or related medical conditions, age, status as a veteran, or national origin in any community.

159 E. The provisions of this section shall not apply to the employment of individuals of a particular
160 religion by a religious corporation, association, educational institution, or society to perform work
161 associated with its activities.

162 **§ 2.2-3905.1. Workplace harassment.**

163 *In determining whether conduct constitutes workplace harassment as defined in § 2.2-3905, the*
164 *following shall apply:*

165 1. *A determination shall be made on the basis of the record as a whole, according to the totality of*
166 *the circumstances. A single incident may constitute workplace harassment.*

167 2. *Incidents that may be workplace harassment shall be considered in the aggregate, with conduct of*
168 *varying types, such as expressions of sex-based hostility, requests for sexual favors, and denial of*
169 *employment opportunities due to sexual orientation, viewed in totality, rather than in isolation, and*
170 *conduct based on multiple protected characteristics, such as sex and race, viewed in totality, rather than*
171 *in isolation.*

172 3. *Factors to consider in determining whether conduct constitutes workplace harassment include (i)*
173 *the frequency of the conduct; (ii) the duration of the conduct; (iii) the location where the conduct*
174 *occurred; (iv) the number of individuals engaged in the conduct; (v) the nature of the conduct, which*
175 *may include physical, verbal, pictorial, audio, or visual conduct, as well as conduct that occurs in*
176 *person or is transmitted, such as by electronic means; (vi) whether the conduct is threatening; (vii) any*
177 *power differential between the alleged harasser and the person allegedly harassed; (viii) any use of*
178 *epithets, slurs, or other conduct that is humiliating or degrading; and (ix) whether the conduct reflects*
179 *stereotypes about individuals in the protected class involved. The factors listed in this subdivision are*
180 *not exhaustive and no one of the factors listed in this subdivision shall be considered to be*
181 *determinative in establishing whether conduct constitutes workplace harassment.*

182 4. *Conduct may be workplace harassment regardless of whether (i) the complaining party is the*

183 *individual being harassed; (ii) the complaining party acquiesced or otherwise submitted to, or*
184 *participated in, the conduct; (iii) the conduct is also experienced by others outside of the protected class*
185 *involved; (iv) the complaining party was able to continue carrying out duties and responsibilities of the*
186 *party's job despite the conduct; (v) the conduct caused a tangible or psychological injury; or (vi) the*
187 *conduct occurred outside of the workplace.*

188 **§ 2.2-3906. Civil action by Attorney General.**

189 A. Whenever the Attorney General has reasonable cause to believe that any person or group of
190 persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights
191 granted by this chapter, or that any person or group of persons has been denied any of the rights granted
192 by this chapter and such denial raises an issue of general public importance, the Attorney General may
193 commence a civil action in the appropriate circuit court for appropriate relief.

194 B. In such civil action, the court may:

195 1. Award such preventive relief, including a permanent or temporary injunction, restraining order, or
196 other order against the person responsible for a violation of this chapter, as is necessary to assure the
197 full enjoyment of the rights granted by this chapter.

198 2. Assess a civil penalty against the respondent (i) in an amount not exceeding \$50,000 for a first
199 violation and (ii) in an amount not exceeding \$100,000 for any subsequent violation. Such civil penalties
200 are payable to the Literary Fund.

201 3. Award a prevailing plaintiff reasonable attorney fees ~~and~~, *including costs and reasonable litigation*
202 *expenses.*

203 C. The court or jury may award such other relief to the aggrieved person as the court deems
204 appropriate, including compensatory damages and punitive damages.

205 D. Upon timely application, any person may intervene in a civil action commenced by the Attorney
206 General under subsection A that involves an alleged discriminatory practice pursuant to this chapter with
207 respect to which such person is an aggrieved person. The court may grant such appropriate relief to any
208 such intervening party as is authorized to be granted to a plaintiff in a civil action under § 2.2-3908.

209 **§ 2.2-3907. Procedures for a charge of unlawful discrimination; notice; investigation; report;**
210 **conciliation; notice of the right to file a civil action; temporary relief.**

211 A. Any person claiming to be aggrieved by an unlawful discriminatory practice may file a complaint
212 in writing under oath or affirmation with the Division of Human Rights of the Department of Law (the
213 Division) *within two years of the alleged unlawful discriminatory practice.* The Division itself or the
214 Attorney General may in a like manner file such a complaint. The complaint shall be in such detail as
215 to substantially apprise any party properly concerned as to the time, place, and facts surrounding the
216 alleged unlawful discrimination.

217 B. Upon perfection of a complaint filed pursuant to subsection A, the Division shall timely serve a
218 charge on the respondent and provide all parties with a notice informing the parties of the complainant's
219 rights, including the right to commence a civil action, and the dates within which the complainant may
220 exercise such rights. In the notice, the Division shall notify the complainant that the charge of unlawful
221 discrimination will be dismissed with prejudice and with no right to further proceed if a written
222 complaint is not timely filed with the appropriate general district or circuit court.

223 C. The complainant and respondent may agree to voluntarily submit the charge to mediation without
224 waiving any rights that are otherwise available to either party pursuant to this chapter and without
225 incurring any obligation to accept the result of the mediation process. Nothing occurring in mediation
226 shall be disclosed by the Division or admissible in evidence in any subsequent proceeding unless the
227 complainant and the respondent agree in writing that such disclosure be made.

228 D. Once a charge has been issued, the Division shall conduct an investigation sufficient to determine
229 whether there is reasonable cause to believe the alleged discrimination occurred. Such charge shall be
230 the subject of a report made by the Division. The report shall be a confidential document subject to
231 review by the Attorney General, authorized Division employees, and the parties. The review shall state
232 whether there is reasonable cause to believe the alleged unlawful discrimination has been committed.

233 E. If the report on a charge of discrimination concludes that there is no reasonable cause to believe
234 the alleged unlawful discrimination has been committed, the charge shall be dismissed and the
235 complainant shall be given notice of his right to commence a civil action.

236 F. If the report on a charge of discrimination concludes that there is reasonable cause to believe the
237 alleged unlawful discrimination has been committed, the complainant and respondent shall be notified of
238 such determination and the Division shall immediately endeavor to eliminate any alleged unlawful
239 discriminatory practice by informal methods such as conference, conciliation, and persuasion. When the
240 Division determines that further endeavor to settle a complaint by conference, conciliation, and
241 persuasion is unworkable and should be bypassed, the Division shall issue a notice that the case has
242 been closed and the complainant shall be given notice of his right to commence a civil action.

243 G. At any time after a notice of charge of discrimination is issued, the Division or complainant may
244 petition the appropriate court for temporary relief, pending final determination of the proceedings under

245 this section, including an order or judgment restraining the respondent from doing or causing any act
246 that would render ineffectual an order that a court may enter with respect to the complainant. Whether it
247 is brought by the Division or by the complainant, the petition shall contain a certification by the
248 Division that the particular matter presents exceptional circumstances in which irreparable injury will
249 result from unlawful discrimination in the absence of temporary relief.

250 H. Upon receipt of a written request from the complainant, the Division shall promptly issue a notice
251 of the right to file a civil action to the complainant after (i) 180 days have passed from the date the
252 complaint was filed or (ii) the Division determines that it will be unable to complete its investigation
253 within 180 days from the date the complaint was filed.

254 **§ 2.2-3908. Civil actions by private parties.**

255 A. An aggrieved person who has been provided a notice of his right to file a civil action pursuant to
256 § 2.2-3907 may, *within one year of receiving such notice*, commence a ~~timely~~ civil action in an
257 appropriate general district or circuit court having jurisdiction over the person who allegedly unlawfully
258 discriminated against such person in violation of this chapter.

259 B. If the court or jury finds that unlawful discrimination has occurred, the court or jury may award
260 to the plaintiff, as the prevailing party, compensatory and punitive damages and the court may award
261 reasonable attorney fees ~~and~~, *including costs and reasonable litigation expenses*, and may grant as relief
262 any permanent or temporary injunction, temporary restraining order, or other order, including an order
263 enjoining the defendant from engaging in such practice, or order such affirmative action as may be
264 appropriate.

265 C. Upon timely application, the Attorney General may intervene in such civil action if the Attorney
266 General certifies that the case is of general public importance. Upon intervention, the Attorney General
267 may obtain such relief as would be available to a private party under subsection B.