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HOUSE BILL NO. 2155

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws
on January 28, 2021)

(Patron Prior to Substitute—Delegate Watts)

A BILL to amend and reenact §§ 2.2-522, 2.2-3905, 2.2-3907, and 2.2-3908 of the Code of Virginia, 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, 2.2-3905, 2.2-3907, and 2.2-3908 of the Code of Virginia are amended 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 unwelcome 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 veteran status, 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.

B. It is an unlawful employment discriminatory 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 individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, status as a veteran, or national origin; or

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

2. An employment agency to:

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

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

3. A labor organization to:

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

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

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

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

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

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

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

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

9. An employer, labor organization, or employment agency to engage in workplace harassment. In determining whether conduct constitutes workplace harassment, the following shall apply:

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

b. Incidents that may be workplace harassment shall be considered in the aggregate, with conduct of varying types viewed in totality, rather than in isolation, and conduct based on multiple protected

characteristics viewed in totality, rather than in isolation.

c. Factors to be considered in determining whether conduct constitutes workplace harassment include (i) the frequency of the conduct; (ii) the duration of the conduct; (iii) the location where the conduct occurred; (iv) the number of individuals engaged in the conduct; (v) the nature of the conduct, which may be physical, verbal, pictorial, auditory, or visual and which may occur in person or by transmittal, such as by electronic means; (vi) whether the conduct is threatening; (vii) any power differential between the alleged harasser and the person allegedly harassed; (viii) any use of epithets, slurs, or other conduct that is humiliating or degrading; and (ix) whether the conduct reflects stereotypes about individuals in the protected class involved.

d. Conduct may be workplace harassment regardless of whether (i) the complaining party is the individual being harassed; (ii) the complaining party acquiesced or otherwise submitted to or participated in the conduct; (iii) the conduct is also experienced by others outside of the protected class involved; (iv) the complaining party was able to continue carrying out the duties and responsibilities of such complaining party's job despite the conduct; (v) the conduct caused a tangible or psychological injury; or (vi) the conduct occurred outside of the workplace.

e. An employer shall be liable for workplace harassment pursuant to this section under the following conditions:

(1) With regard to workplace harassment based on a hostile work environment created by the actions of a supervisor where there is no tangible employment action, the employer shall be vicariously liable. However, an employer may be relieved of liability if it can show that (i) the employer exercised reasonable care to prevent and correct promptly any harassing behavior and (ii) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

(2) With regard to sexual harassment by a supervisor that has taken the form of a tangible employment action or quid pro quo harassment, the employer shall be vicariously liable for the actions of the supervisor. Unfulfilled threats by a supervisor to take a tangible employment action shall not constitute quid pro quo harassment; however, such threats shall be deemed to create or contribute to an atmosphere of harassment. In the case of unfulfilled threats, an employer may be relieved of liability if it can show that (i) the employer exercised reasonable care to prevent and correct promptly any harassing behavior and (ii) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

(3) With regard to workplace harassment created by coworkers, the employer shall not be vicariously or automatically liable, but the employer shall be liable if it knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(4) With regard to workplace harassment created by nonemployees, the employer shall not be vicariously or automatically liable, but the employer shall be liable if it has the ability to control the nonemployee and knew or should have known of the conduct. An employer shall be relieved of liability if it can show that it took immediate and appropriate corrective action.

f. As used in subdivision e, "supervisor" means (i) an individual who has authority to undertake or recommend tangible employment decisions affecting an employee or (ii) an individual who has authority to direct an employee's daily work activities.

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

1. For (i) an employer to hire and employ employees; (ii) an employment agency to classify, or refer for employment, any individual; (iii) a labor organization to classify its membership or to classify or refer for employment any individual; or (iv) an employer, labor organization, or joint apprenticeship committee to admit or employ any individual in any apprenticeship or other training program on the basis of such individual's religion, sex, or age in those certain instances where religion, sex, or age is a bona fide occupational qualification reasonably necessary to the normal operation of that particular employer, employment agency, labor organization, or joint apprenticeship committee;

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

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

conditions, age, status as a veteran, or national origin;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 2.2-3908. Civil actions by private parties.

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

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

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