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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~~ *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

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

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.

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

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

1. *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.*

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

3. *Factors to consider 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 include physical, verbal, pictorial, audio, or visual conduct, as well as conduct that occurs in person or is transmitted, 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. The factors listed in this subdivision are not exhaustive and no one of the factors listed in this subdivision shall be considered to be determinative in establishing whether conduct constitutes workplace harassment.*

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.