OLR Bill Analysis
sSB 761 (File 857, as amended by Senate "A")*

AN ACT PROMOTING THE USE OF HONEST RECOMMENDATIONS BETWEEN EMPLOYERS AND PROHIBITING AN EMPLOYER’S USE OF A NONDISCLOSURE AGREEMENT RELATING TO ACTS OF DISCRIMINATION OCCURRING IN THE EMPLOYER’S WORKPLACE.

SUMMARY

This bill requires employers, when recommending or positively commenting on a current or former employee to a prospective employer, to disclose to the prospective employer any known act of sexual harassment or sexual assault occurring in their workplace by the current or former employee. It also makes the employer liable to any employee of the prospective (new) employer, if the new employer relied on the recommendation or comment, for any sexual harassment or assault the former employee commits in the new workplace.

The bill limits an employer’s duty to disclose, and thus its liability, to one year after the date on which the employer or its employee or agent has actual knowledge of an act of sexual harassment or sexual assault committed by the employee. It provides certain exemptions when an employer’s liability may terminate before the one-year period, such as when the prosecution of a sexual assault case is dismissed.

The bill also prohibits an employer from entering into a contract with an employee that, as condition of employment, contains a nondisclosure or nondisparagement clause that prevents an employee from disclosing or discussing discrimination, including harassment, occurring in the workplace. For violations of this prohibition, the bill (1) establishes a civil penalty of up to $500, issued by the Labor Department, and (2) permits a civil action in court for compensatory damages, costs, punitive damages, and equitable relief.
“Senate Amendment “A” (1) specifies that the duty to disclose applies when the employer has actual knowledge of the employee’s acts, (2) adds acts that constitute sexual harassment under federal regulations, (3) limits an employer’s liability for failure to disclose to one year after actual knowledge with certain exceptions, (4) adds the provision on complaints to the Equal Employment Opportunity Commission, (5) specifies that it does not prohibit nondisclosure clauses related to certain settlement agreements, and (6) makes minor and technical changes.

EFFECTIVE DATE: October 1, 2019

RECOMMENDATIONS BETWEEN EMPLOYERS

Definitions

The bill includes the following definitions:

1. “Sexual harassment,” by the employer or the employer's agent, is any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (a) submission is made, even implicitly, a condition of a person’s employment, (b) submission to, or rejection of, the conduct is used in employment decisions, or (c) the conduct substantially interferes with the person’s work performance or creates a hostile or offensive working environment. Under the bill, “sexual harassment” also includes any act constituting sexual harassment under federal law.

2. “Sexual assault” is 1st, 2nd, 3rd, and 4th degree sexual assault; aggravated 1st degree sexual assault; sexual assault in a spousal or cohabiting relationship; aggravated sexual assault of a minor; and 3rd degree sexual assault with a firearm.

3. “Occurring in the workplace” includes attendance at an off-premises work-related event that is coordinated by or through the employer, between employees, or between an employer and an employee.

Duty to Disclose Harassment and Assault
Under current law, an employer can reveal only limited information about an employee (i.e., dates of employment, title, and salary) without the employee’s permission, unless the circumstances meet specific exceptions (see BACKGROUND).

The bill supersedes this law by requiring employers, when giving a recommendation or positive comment regarding a current or former employee to a prospective employer, to disclose in a timely way any known act of sexual harassment or assault committed by the current or former employee. This applies to all employers, including the state, municipalities, and any other political subdivision of the state (such as quasi-public agencies).

The bill also establishes separate standards for when the employer is considered to have knowledge of sexual assault or sexual harassment. An employer knows about an act of sexual assault when the employer or its employee or agent, who provides the recommendation or positive comment, has actual knowledge of the assault. For both sexual harassment and assault, the duty to disclose is linked to the person giving the recommendation knowing of the act in question, but the bill is not clear about what constitutes knowledge in this context (e.g., first-hand knowledge of the act, a finding of a violation of an employer’s personal policy, or a criminal conviction).

Under the bill, an employer knows about an act of sexual harassment when the employer or its employee or agent, who provides the recommendation or positive comment, (1) has actual knowledge of the harassment and (2) a complaint alleging the sexual harassment was filed with the Commission on Human Rights and Opportunities (CHRO), the Equal Employment Opportunity Commission, or a court of competent jurisdiction.

The bill does not appear to apply to employers who provide neutral comments regarding former or current employees.

**Employer’s Liability For Failure to Timely Disclose**

The liability applies when (1) an employer does not disclose
incidents of sexual harassment or assault to a person evaluating the candidacy of a current or former employee as required under the bill, and (2) the new employer relies on the former employer’s recommendation or positive comments. The bill makes a former employer liable for a limited period to any of the new employer’s employees for any act of sexual harassment or sexual assault committed by the former employee in the new employer’s workplace.

Under the bill, former employers who fail to disclose sexual harassment are liable for sexual harassment committed by the former employee, while former employers who fail to disclose sexual assault are liable for both sexual harassment and sexual assault by the former employee.

**Termination of Liability Period**

Under the bill, an employer may be liable for failure to disclose up to one year after the date on which the employer or its employee or agent has actual knowledge of an act of sexual harassment or sexual assault committed by the employee; however, this duty must terminate before the expiration of the one-year period if, during such period:

1. a criminal prosecution involving the sexual assault (a) is dismissed, (b) results in the entry of a nolle prosequi (i.e., a decision not to prosecute) of the sexual assault charges, or (c) results in the acquittal of the former employee, or

2. in a CHRO proceeding involving a complaint of sexual harassment, the (a) complainant withdraws the complaint or (b) commission finds that there is no reasonable cause for the complaint.

**PROHIBITING NONDISCLOSURE AND NONDISPARAGEMENT CLAUSES**

The bill prohibits an employer from entering into or negotiating a contract with an employee or prospective employee that, as a condition of employment, continued employment, promotion, compensation, or employment benefits, contains a nondisclosure or
nondisparagement clause, waiver, or other provision that prevents the employee from disclosing or discussing discrimination, including harassment, occurring in the employer’s workplace or at an off-premises work-related event, coordinated by or through the employer, between employees, or between an employer and an employee.

The bill specifies that it does not prohibit an agreement from containing a nondisclosure clause that settles a claim for discrimination as long as the agreement is not a condition of the employee's continued employment of the employer.

The bill allows the Labor Department to issue a civil penalty of up to $500 for violations. It also allows employees or prospective employees to seek redress of violations in a court of competent jurisdiction. Violators may be liable for compensatory damages, attorney’s fees and costs, punitive damages, and legal and equitable relief that the court deems just and proper.

BACKGROUND

Limited Exceptions for Employers to Disclose Personnel File Information

The Personnel Files Act (1) requires employers to provide employees with access to the employee's personnel file and medical records and (2) generally prohibits the disclosure of information from the file without the employee's consent, but it allows an employer to disclose an employee's dates of employment, title, and salary.

The law permits the additional following disclosures without the employee’s permission:

1. to a third party who prepares employment-related records or performs services for the employer;

2. in response to an administrative summons, court order, or government audit;

3. in response to a law enforcement agency request for an employee’s home address and dates of work attendance;
4. due to a medical emergency;

5. required by local, state, or federal law; or

6. when the information is disseminated as part of a union contract (CGS § 31-128f).

COMMITTEE ACTION

Judiciary Committee

Joint Favorable Substitute
Yea  29  Nay  10  (04/10/2019)