

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Ethics and Elections

BILL: SB 1628

INTRODUCER: Senator Book and others

SUBJECT: Sexual Harassment

DATE: January 25, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carlton	Ulrich	EE	Pre-meeting
2.			GO	
3.			RC	

I. Summary:

SB 1628 creates the Task Force on the Prevention of Sexual Harassment and Misconduct, which is tasked with studying the issue of sexual harassment within Florida’s government and making recommendations concerning existing policies and new policies that may be established. Specifically, the Task Force must examine complaint processes, reporting complaints, investigations, confidentiality of the complaints, victim support and assistance, training, and other states’ actions to reduce the incidences of harassment and to protect the rights of victims.

The bill also creates an express provision in the Code of Ethics for Public Officers and Employees which prohibits an officer, candidate for office, employee, or a lobbyist from engaging in sexual harassment.

This bill is effective upon becoming law.

II. Present Situation:

Section 110.1221, F.S., provides that sexual harassment is a form of discrimination.¹ That statute requires the Department of Management Services (“DMS”) to have uniform sexual harassment rules that apply to all executive agencies,² and specifies that the term “sexual harassment” must be defined in a manner consistent with the federal definition. The DMS has, pursuant to that statute, adopted rules which are currently located in Rule 60L-40.001, F.A.C.

¹ Additionally, a complaint process specifically available to career service employees who are the victims of sexual harassment has also been established in s. 110.227, F.S.

² The judicial branch, legislative branch, counties, municipalities, and special districts may adopt their own policies and procedures that are not inconsistent with applicable law. For example, the Senate recently amended existing rules and procedures in the Senate Policy and Procedures Manual to provide for complaints, investigation, and punishment of sexual harassment. *See*, Rule 1.49 of the Senate Policy and Procedures Manual.

Rule 60L-40.001, F.A.C., provides:

- Agencies shall not tolerate sexual harassment;³
- Agencies make it known to employees that sexual harassment will not be tolerated;⁴
- Agencies must develop and implement procedures to investigate and resolve written complaints of sexual harassment;⁵
- That filing a complaint pursuant to agency procedures does not preclude seeking redress through other appropriate venues;⁶
- Requires discipline of any employee who engages in sexual harassment;⁷
- Requires supervisors who have knowledge of any sexual harassment to report it to the agency person in charge of sexual harassment claims;⁸
- Specifies that a supervisor's failure to do so shall be grounds for disciplining that supervisor;⁹
- Provides the authority to discipline an employee that makes a false allegation of sexual harassment;¹⁰ or
- Requires that agencies shall not tolerate retaliation against a person who has in good faith made a complaint of sexual harassment; opposed a complaint of sexual harassment, or participated in any manner in an investigation or proceeding, involving allegations of sexual harassment.

Personal identifying information of the alleged victim in an allegation of sexual harassment is confidential and exempt from s. 119.07(1), F.S., and Art. I, s. 24(a), of the Florida Constitution.¹¹

Florida Commission on Ethics Proceedings Concerning Sexual Harassment

The Florida Commission on Ethics (“Commission”) is created pursuant to Art. II, s. 8, of the Florida Constitution. The state constitution provides the Commission with the authority to investigate and report on breaches of the public trust.¹² That section of the state constitution also is the authority for the Code of Ethics for Public Officers and Employees (“Code”), which is located in Part III, Ch. 112, F.S. The Code provides various standards of conduct, disclosure requirements, advisory opinion authority, investigation authority for complaints and referrals it receives alleging a breach of Art. II, s. 8 or the Code of Ethics, and the authority to recommend prescribed penalties. Additionally, the Code provides that documents and proceedings on complaints and referrals are confidential and exempt until such time a complaint is dismissed as legally insufficient, whether probable cause exists, the alleged violator requests in writing that the records and proceedings be made public, or, in the case of a referral, that the Commission has determined that it will not investigate the referral.¹³ The penalties that the Commission can recommend include: public censure and reprimand, impeachment, removal, dismissal from

³ Rule 60L-40.001(1), F.A.C.

⁴ Rule 60L-40.001(2), F.A.C.

⁵ Rule 60L-40.001(3), F.A.C.

⁶ Rule 60L-40.001(6), F.A.C.

⁷ Rule 60L-40.001(7), F.A.C.

⁸ Rule 60L-40.001(8), F.A.C.

⁹ *Id.*

¹⁰ Rule 60L-40.001(9), F.A.C.

¹¹ Section 119.071(2)(n), F.S.

¹² Art. II, s. 8(f), Fla. Const.

¹³ Section 112.324(2), F.S.

employment, forfeiture of public salary for up to 1 year, a civil penalty up to \$10,000 per violation, and restitution.¹⁴

While the Code does not have an express provision addressing sexual harassment, the Commission has routinely interpreted s. 112.313(6), F.S., since at least 1980, if not earlier, to prohibit sexual harassment. Section 112.313(6), F.S., prohibits misuse of public position. That section reads as follows:

MISUSE OF PUBLIC POSITION.—No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31.

For purposes of that section, the term “corruptly” means:

[D]one with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.¹⁵

The courts have upheld application of s. 112.313(6), F.S., in complaints alleging sexual harassment.¹⁶

III. Effect of Proposed Changes:

Task Force on the Prevention of Sexual Harassment and Misconduct

The bill creates the Task Force on the Prevention of Sexual Harassment and Misconduct (“Task Force”). The Task Force will meet for the first time no later than July 2018, and will meet at least every four years after that. The Task Force will meet as many times as it is necessary in order to perform its assigned duties.

The Task Force’s express purpose is studying the problem of sexual harassment and misconduct and examining best practices to prevent sexual harassment and misconduct, particularly in government settings and as applied to the conduct of public officers, candidates for public office, agency employees, and lobbyists. The Task Force is created within the legislative branch for administrative purposes only. The Governor, the President of the Senate, and the Speaker of the House of Representatives shall assign staff to assist the Task Force in performing its duties.

The Task Force membership is as follows:

- One member of the Senate, and one full time employee of the Senate, appointed by the President of the Senate;
- One member of the House of Representatives, and one full time employee of the House of Representatives, appointed by the Speaker of the House of Representatives;
- One member appointed by the Governor;

¹⁴ Section 112.317, F.S.

¹⁵ Section 112.312(9), F.S.

¹⁶ *Bruner v. Commission on Ethics*, 384 So.2d. 1339 (Fla. 1st DCA, 1980); *Garner v. Commission on Ethics*, 415 So. 2d 67 (Fla. 1st DCA, 1982); *Garner v. Commission on Ethics*, 439 So.2d 894 (Fla. 2nd DCA, 1983).

- One member representing the Florida Council Against Sexual Violence, appointed by the Council's executive director;
- One member representing the Florida Association of Counties, appointed by the Association's president;
- One representative of the Florida League of Cities, appointed by the League's president;
- One representative of the Florida Association of Professional Lobbyists, appointed by the Association's chair;
- One representative of the Florida Press Association, appointed by the Association's chair; and
- One representative of the Florida Behavioral Health Association, appointed by the Association's chair.

Members of the Task Force shall serve without compensation, but members are entitled to reimbursement for per diem and travel expenses in accordance with s. 112.061, F.S., to be paid by the appointing authority.

A person making appointments to the Task Force is required to consider the diversity of the Task Force in making his or her appointments. If a vacancy occurs, it is filled in the same manner as the person is leaving the Task Force was appointed. Once the Task Force is constituted, the members must designate a chair at their first meeting.

The Task Force must consider, at a minimum, the following:

- The adequacy of current methods of reporting complaints, and the investigations thereof, of sexual harassment or misconduct;
- Current procedures regarding the maintenance of the confidentiality of complaints, investigations, and the identity of victims;
- Victims' ability to obtain support, care, and assistance;
- The adequacy of measures currently available to hold offenders accountable;
- Any training and educational programs addressing sexual harassment or misconduct currently offered by governmental entities and whether further changes are needed to such programs to increase their effectiveness; and
- Measures taken in other states to reduce the incidence of sexual harassment or misconduct involving public officers, candidates, and agency employees and to protect the rights of victims.

The Task Force shall report its findings and recommendations, including any recommendations for proposed legislative changes, to the Governor, the President of the Senate, and the Speaker of the House of Representatives by January 15 before the next regular session of the Legislature.

Florida Commission on Ethics Proceedings Concerning Sexual Harassment

In addition to creating the Task Force, the bill also creates a new section of the Code of Ethics for Public Officers and Employees specifically addressing sexual harassment. The prohibition states:

A public officer, a candidate who has qualified to run for public office, an agency employee, or a lobbyist may not sexually harass any individual, regardless of whether an employment relationship exists.

For purposes of this prohibition, the following definitions apply:

- “Lobbyist” means a person who is either required to register to lobby before the legislative branch pursuant to s. 11.045, F.S., or required to register to lobby before the executive branch or the Constitution Revision Commission pursuant to s. 112.3215, F.S.;
- “Sexually harass” includes unwelcome sexual advances; requests for sexual favors; or any other conduct of a sexual nature by a public officer, a candidate for public office, an employee of an agency, or a lobbyist which is directed toward any individual when:
 - Submission to such conduct is made either explicitly or implicitly a term or condition of the individual’s employment;
 - Submission to or rejection of such conduct by an individual is used as the basis for how the public officer, candidate, agency employee, or lobbyist makes decisions relating to his or her position which affect such individual; or
 - Such conduct has the purpose or effect of creating an intimidating, a hostile, or an offensive working environment.

In the event that a public officer or employee is found to have violated the prohibition against sexual harassment, the existing penalties enumerated above will apply. In the case of a lobbyist who is found to have violated the prohibition, the bill specifies that he or she can be punished by public censure and reprimand, a civil penalty of up to \$10,000 per violation, and a prohibition on lobbying the legislative and executive branches for a specified period.

The bill provides that personal identifying information of an alleged victim of a violation of the sexual harassment prohibition contained in a complaint or referral, and all materials relating to the complaint or referral, shall remain confidential and exempt from s. 119.07(1), F.S., and Art. I, s. 24(a), Fla. Const., as provided in s. 119.071(2)(n), F.S.

If a Senator or Senate employee is found to have violated the prohibition, the Senate President will have the authority to impose appropriate punishment. In the case of a violation by a member or employee of the House of Representatives, the Speaker of the House of Representatives will have the authority to impose appropriate punishment. In the case of a violation by any other public officer, public employee, former public officer or public employee, candidate or former candidate, the Governor will have the authority to impose appropriate punishment. In the case of a violation by an executive branch lobbyist, the Governor and Cabinet will have the authority to penalties on the executive branch lobbyist. Finally, the bill provides that the President of the Senate and the Speaker of the House, jointly, have the authority to impose penalties on legislative lobbyists for violations of the new sexual harassment prohibition.

The bill is effective upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Even though the law already provides the Florida Commission on Ethics jurisdiction over sexual harassment via the misuse of public position statute, expressly prohibiting sexual harassment may increase the number of complaints and referrals to the Commission on Ethics. This number is not expected to significantly increase the caseload of the Commission at this time. Therefore, the fiscal impact of this bill on the Commission is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 112.317 and 112.324.

This bill creates the following sections of the Florida Statutes: 11.9006 and 112.3126.

IX. Additional Information:

- A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
