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# Legislation Proposed to Significantly Alter Minnesota Sexual Harassment Law

Last week, a bipartisan group of Minnesota legislators introduced legislation that, if enacted, would significantly alter sexual harassment law for Minnesota employers. The proposed legislation would amend the Minnesota Human Rights Act (MHRA) to eliminate the decades-old requirement that sexual harassment be severe or pervasive to be legally actionable. This proposed change comes amidst the #MeToo movement, which has prompted talk around the country about potential changes to harassment law to foster more respectful and nondiscriminatory work environments. The proposed legislation also follows the resignations last fall of several Minnesota legislators accused of sexual harassment and the Minnesota Legislatures revamp of its own internal harassment policy and response processes.

Since 1982, the MHRA has defined sexual harassment as:

> *unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when … that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.*

While the phrase severe or pervasive does not expressly appear in this definition, the Minnesota Supreme Court has, consistent with federal Title VII case law, interpreted the MHRA to include such a requirement. The severe or pervasive requirement was first established by the U.S. Supreme Courts 1986 decision in *Meritor Savings Bank v. Vinson*, in which the Court held that, for conduct to rise to the level of actionable sexual harassment, it must be sufficiently severe or pervasive to alter the conditions of [the employees] employment and create an abusive working environment. In applying the severe or pervasive standard, courts have routinely held that it is not workable to hold employers legally accountable to have and to enforce a general civility code for employees.

According to Minnesota House Minority Leader Melissa Hortman, DFL-Brooklyn Parkone of 35 sponsors of the proposed House bill the amendment to the MHRA is needed to bring the state sexual harassment definition in line with the higher societal expectations that people have for todays workplace environments. Over the years, the severe or pervasive standard has resulted in a number of sexual harassment lawsuits being dismissed on grounds that the behavior at issue was not sufficiently egregious or frequent enough to be legally actionable. In an effort to fewer case dismissals, HF 4459 proposes to add the following language to the MHRAs definition of sexual harassment [a]n intimidating, hostile, or offensive environment … does not require the harassing conduct or communication to be severe or pervasive. An identical companion bill, SF 4031, has been introduced into the Senate. If enacted, the new standard would apply to cases filed after Aug. 1, 2018 and would not be retroactive.

Earlier this week, the full Minnesota House voted in favor of the bill. The bill may, however, be stalled in the Minnesota Senate. It has been reported that the bills Senate sponsor, Karin Housley, R-District 39, stated yesterday that the Senate is unlikely to agree to the proposed amendment this year and needs more time to assess and address concerns raised about the proposed amendment to ensure no unintended, negative consequences.

Indeed, while the goals of harassment prevention and reasonable legal recourse are good ones, employers should note that the proposed MHRA amendment could have a number of potentially negative and concerning consequences for employers:

- While the proposed bill would eliminate the severe or pervasive standard for state law sexual harassment claim, the proposed bill does not replace the current standard with an alternative one. This will likely lead to a lack of clarity for employers on their legal obligations and to Minnesota judges being required to cobble together standards over time through case law with little legislative guidance.

- The proposed bill only seeks to eliminate the severe or pervasive standard for sexual harassment claims, not for harassment based on other protected characteristics such as race, national origin, age, etc. This arguably could create an odd dynamic of elevating the importance of sexual harassment prevention for employers over the prevention of other types of harassment.

- A lower legal standard is likely to lead to more legal claims, fewer MHRA cases getting dismissed before trial, and higher legal costs.

- Due to concerns about increased liability risks, employers may feel compelled to impose harsher employment penalties on individuals found to have engaged in inappropriate sexual talk or behavior even when the behavior falls on the less egregious end of the spectrum. This could mean more employee terminations in lieu of warnings and education. In turn, this could, ironically, chill some complainants from coming forward out of concern that reporting a less egregious incident may lead a coworker to be fired when the complainant just wants the behavior to stop.

Information on the proposed legislation can be found at: https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF4459&ssn=0&y=2018 (H4459) and https://www.revisor.mn.gov/bills/bill.php?b=Senate&f=SF4031&ssn=0&y=2017 (SF4031). Here at Gray Plant Mooty, we will continue to monitor the status of the proposed legislation in order to post future updates.