

S.B. 450 (SMITH) & HB 1393 (QUEEN): PROVIDING NEEDED CLARITY TO THE DEFINITION OF WORKPLACE HARASSMENT

This legislation passed the Senate unanimously last session (SB 834). It was also reported favorably out of the House Economic Matters committee and was on the House floor to be voted on the last day of session when time ran out. It's time to finish what we started!

Maryland's current definition of workplace harassment fails survivors and employers.

In evaluating whether sexually or racially harassing conduct rises to the level of unlawful workplace harassment, courts consider whether the conduct is "severe or pervasive" enough to create a hostile work environment. This standard has become an unreasonably high burden for survivors because many courts have interpreted it so narrowly that cases challenging workplace behavior most people would find egregious and harassing are thrown out.

For example, courts in the 4th Circuit—the federal court cases to which Maryland courts will look—have found that each of the following incidents did not constitute "severe" or "pervasive" harassment and thus the law did not protect against this harassing behavior:

- A coworker staring at an employee's breasts, telling her that she should be spanked, and constantly telling her that he found her attractive.
- A supervisor inquiring about an employee's sex life, regularly commenting on the employee's physical appearance, positioning a magnifying glass over the employee's crotch, frequently entering the restroom when the employee was in the restroom alone, and on one of those occasions, pretending to lock the door and say, "Ah, alone at last," while approaching the employee.

The harm from the "severe or pervasive" standard extends beyond the courtroom into workplaces. The outdated and unreasonably burdensome standard keeps survivors from making complaints or seeking help for fear their claims will not be legally actionable. Moreover, it does little to incentivize employers to create safe and harassment-free workplaces and instead normalizes harassing behavior at work.

SB 450 provides a clear definition of harassment that reflects the realities of workplace harassment.

SB 450 explicitly disavows the severe or pervasive standard, stating that conduct need not be "severe" or "pervasive" to be unlawful. Under the bill's standard, survivors would have to show that "based on the totality of the circumstances, the conduct unreasonably creates a working environment that a reasonable person would perceive to be abusive and hostile." This language ensures that Maryland law is responsive to the lived experiences of Maryland workers. In 2020, Montgomery County, MD passed legislation that mirrors SB 450, recognizing the need to move away from this harmful standard.

SB 450 will benefit Maryland businesses.

This bill provides clarity to employers about what constitutes unlawful harassment, which will help employers prevent and stop harassment. In turn, it will help employers avoid liability and the lasting human impacts of harassment that translate into business costs, such as decreased productivity, increased absenteeism, and diminished recruitment and retention.

It is time for Maryland to pass this important legislation and move the needle forward to stop workplace harassment before it starts.