

**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.)

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

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BILL: CS/SB 1628

INTRODUCER: Ethics and Elections Committee, Senator Book, and others

SUBJECT: Sexual Harassment

DATE: January 30, 2018

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carlton	Ulrich	EE	Fav/CS
2.			GO	
3.			RC	

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/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.<sup>1</sup> That statute requires the Department of Management Services (“DMS”) to have uniform sexual harassment

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<sup>1</sup> 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.

rules that apply to all executive agencies,<sup>2</sup> 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.

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

- Agencies shall not tolerate sexual harassment;<sup>3</sup>
- Agencies make it known to employees that sexual harassment will not be tolerated;<sup>4</sup>
- Agencies must develop and implement procedures to investigate and resolve written complaints of sexual harassment;<sup>5</sup>
- That filing a complaint pursuant to agency procedures does not preclude seeking redress through other appropriate venues;<sup>6</sup>
- Requires discipline of any employee who engages in sexual harassment;<sup>7</sup>
- Requires supervisors who have knowledge of any sexual harassment to report it to the agency person in charge of sexual harassment claims;<sup>8</sup>
- Specifies that a supervisor’s failure to do so shall be grounds for disciplining that supervisor;<sup>9</sup>
- Provides the authority to discipline an employee that makes a false allegation of sexual harassment;<sup>10</sup> 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.<sup>11</sup>

### **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.<sup>12</sup> 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

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<sup>2</sup> 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.

<sup>3</sup> Rule 60L-40.001(1), F.A.C.

<sup>4</sup> Rule 60L-40.001(2), F.A.C.

<sup>5</sup> Rule 60L-40.001(3), F.A.C.

<sup>6</sup> Rule 60L-40.001(6), F.A.C.

<sup>7</sup> Rule 60L-40.001(7), F.A.C.

<sup>8</sup> Rule 60L-40.001(8), F.A.C.

<sup>9</sup> *Id.*

<sup>10</sup> Rule 60L-40.001(9), F.A.C.

<sup>11</sup> Section 119.071(2)(n), F.S.

<sup>12</sup> Art. II, s. 8(f), Fla. Const.

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.<sup>13</sup> The penalties that the Commission can recommend include: public censure and reprimand, impeachment, removal, dismissal from employment, forfeiture of public salary for up to 1 year, a civil penalty up to \$10,000 per violation, and restitution.<sup>14</sup>

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.<sup>15</sup>

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

### 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.

<sup>13</sup> Section 112.324(2), F.S.

<sup>14</sup> Section 112.317, F.S.

<sup>15</sup> Section 112.312(9), F.S.

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

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;
- 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 and amends existing provisions of the Code of Ethics to codify long-standing interpretation. The new sexual harassment prohibition in s. 112.3126, F.S. 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., a person required to register to lobby before the executive branch or the Constitution Revision Commission pursuant to s. 112.3215, F.S.; and a person who, for compensation, seeks to influence a political subdivision with respect to a decision of a political subdivision, or an agency thereof, with respect to policy and procurement, or attempts to obtain the goodwill of an official or employee of the political subdivision.
- “Sexually harass” includes an unwelcome sexual advance; a request for a sexual favor; 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.

The bill also prohibits a public officer, a candidate who has qualified to run for public office, an agency employee, or a lobbyist from taking retaliatory action against a complainant; it further prohibits knowingly or recklessly disclosing any information that can be used to ascertain the identity of the person who alleged the conduct without their consent. The bill also allows a victim to have the services of a victim advocate and attorney at Ethics Commission proceedings.

If a person gets personal knowledge of sexual harassment or misconduct, he or she is required to report it to the Commission or to the agency person designated to handle such complaints. The bill also prohibits the knowing or reckless filing of false complaints.

In regard to s. 112.313(2), F.S., which prohibits what are commonly referred to as “quid pro quo” gifts, the bill codifies the long-standing interpretation that sexual favors or sexual conducts are prohibited “favors” under the “quid pro quo” gifts law. That section is also amended to end the practice of using “a closer” by prohibiting anyone from offering or providing sexual favors or conduct to, or offer or engage in sexual conduct with, a public officer or employee in an effort to influence his or her official actions, judgment, or to obtain their goodwill. That provision is also amended to prohibit anyone from directing anyone else to be their “closer.”

The bill also amends s. 112.313(6), F.S., which prohibits corrupt misuse of one's public position or resources or property within their trust to benefit themselves or others, by codifying the long-standing interpretation of the term "benefit" to include sexual favors and sexual conduct.

The bill requires all public officers and employees who file financial disclosure to, beginning January 1, 2019, certify that they have read the applicable laws and rules concerning sexual harassment. Failure to do so is specifically made a substantive violation, as opposed to a de minimis violation. Also, lobbyists are required to certify on their lobbyist registration form that they have read the Code of Ethics for Public Officers and Employees, as well as the rules concerning lobbyist conduct that exist for the Legislative Branch and/or Executive Branch, if they lobby those entities.

In the event that any person who violates the Code's prohibitions on sexual harassment, retaliation and disclosing information about the victim's identity in s. 112.3126, F.S., and sexual misconduct in violation of ss. 112.313(2) and 112.313(6), F.S., are punishable by a minimum fine of \$5,000 per violation and a maximum fine of \$20,000 per violation. A person who violates those provisions is also liable for costs associated with a victim advocate and the victim's attorneys' fees. All other violations created by the bill can be punished by public censure and reprimand, a civil penalty of up to \$10,000 per violation. Additionally, lobbyists can have their lobbying privileges suspended or revoked.

The bill allows a person who is designated as an agency's sexual harassment/sexual misconduct contact to make a written referral to the Commission on Ethics for investigation. Additionally, any person can file an unsworn complaint, subject to the aforementioned prohibition on false complaints. The bill also 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. Penalties must be imposed within 90 days.

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: 11.045, 112.313, 112.317, 112.3215, 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 Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Ethics and Elections on January 30, 2018:**

The Committee Substitute makes substantial changes to the provisions being added to the Code of Ethics for Public Officers and Employees as follows:

- Amends the definition of “lobbyist” to include local lobbyists;
- Clarifies that only one sexual advance or one request for sexual favors constitutes sexual harassment;
- Prohibits public officers, candidates, public employees, and lobbyists from retaliating against a person who files a sexual harassment complaint;
- Prohibits intentionally or recklessly disclosing the personal identifying information, or any information that could be used to identify the complainant without their consent;
- Requires a person who has personal knowledge of sexual harassment or sexual misconduct to report it to the Commission or to the agency’s designated person who handles such allegations within 10 days;
- Prohibits knowingly or recklessly filing a false complaint involving sexual misconduct or sexual harassment;
- Authorizes a victim to have a Victim’s Advocate and their attorney present at commission proceedings on their complaint;
- Codifies that “favor” includes sexual favors and sexual conduct for purposes of the “quid pro quo” gift ban in s. 112.313(2);
- Ends the practice of using “a closer” by prohibiting anyone from offering or providing sexual favors or conduct to, or offer or engage in sexual conduct with, a public officer or employee in an effort to influence his or her official actions, judgment, or to obtain their goodwill;
- Prohibits anyone from directing anyone else to be their “closer;”
- Codifies the long-standing application of the Misuse of Public Position statute to sexual harassment and sexual misconduct by specifically identifying that sexual favors or sexual conduct are a “benefit” for purposes of that law;
- Requires all public officers and employees who file financial disclosure to certify that they have read the applicable law and policies concerning sexual harassment on their financial disclosure forms;
- Provides that failure to certify that they have read the sexual harassment law and policies on their financial disclosure form is a substantive violation of the Ethics Code, and is not de minimis;
- Requires lobbyists to certify on their lobbyist registration that they have read the Code of Ethics for Public Officers and Employees and any rules regulating their conduct as a legislative and/or executive branch lobbyist;
- Provides that any person who violates the Code’s prohibitions on sexual harassment, retaliation, disclosing information about the victim’s identity, and sexual misconduct in violation of ss. 112.313(2) and 112.313(6), F.S., are punishable by a minimum fine of \$5,000 per violation and a maximum fine of \$20,000 per violation;

- Provides that any person who violates the Code's prohibitions on sexual harassment, retaliation, disclosing information about the victim's identity, and sexual misconduct in violation of ss. 112.313(2) and 112.313(6), F.S., are liable for the costs associated with the victim's victim advocate and the victim's attorney's fees;
- Provides that any civil penalty for violations of the Code's prohibitions on sexual harassment, retaliation, disclosing information about the victim's identity, and sexual misconduct in violation of ss. 112.313(2) and 112.313(6), F.S., are to be deposited into the Crimes Compensation Trust Fund;
- Provides that any lobbyist who violates the Code's prohibitions on sexual harassment, retaliation, disclosing information about the victim's identity, and sexual misconduct in violation of ss. 112.313(2) and 112.313(6), F.S., may have their lobbying privileges suspended or revoked;
- Provides for unsworn written complaints alleging a violation of the new sexual harassment law in s. 112.3126, F.S., and sexual misconduct in violation of ss. 112.313(2) and 112.313(6), F.S., to be filed with the Commission on Ethics;
- Authorizes an agency person designated to handle complaints related to sexual misconduct and sexual harassment to make a written referral to the Commission for it to investigate;
- Provides that personal identifying information of the victim is confidential and exempt pursuant to s. 119.071(2)(n), F.S., and, therefore, must be redacted;
- Provides the President, Speaker, or Governor and Cabinet with the authority to impose penalties for violations of s. 112.3126, F.S., and sexual misconduct in violation of ss. 112.313(2) and 112.313(6), F.S., and
- Requires imposition of penalties for violations of s. 112.3126, F.S., and sexual misconduct in violation of ss. 112.313(2) and 112.313(6), F.S., within 90 days.

B. Amendments:

None.