

By Senator Berman

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1 A bill to be entitled
2 An act relating to workplace sexual harassment and
3 sexual assault; creating s. 448.077, F.S.; providing
4 definitions; prohibiting an employer from requiring an
5 employee to sign a nondisclosure agreement, waiver, or
6 other document, as a condition of employment, to
7 prevent the employee from disclosing sexual harassment
8 or sexual assault; specifying that such nondisclosure
9 agreements, waivers, or documents are against public
10 policy and are void and unenforceable; prohibiting an
11 employer from discharging or retaliating against an
12 employee for disclosing or discussing workplace sexual
13 harassment or sexual assault; providing for relief for
14 violations of the act; providing for construction;
15 amending ss. 760.06 and 760.11, F.S.; conforming
16 provisions relating to the Florida Commission on Human
17 Relations to changes made by the act; providing an
18 effective date.

19
20 Be It Enacted by the Legislature of the State of Florida:

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22 Section 1. Section 448.077, Florida Statutes, is created to
23 read:

24 448.077 Nondisclosure agreements that prevent disclosure of
25 sexual assault or sexual harassment prohibited; exception.—

26 (1) As used in this section, the term:

27 (a) "Employee" means any individual employed by an
28 employer. The term does not include human resources staff,
29 supervisors, or managers when they are expected to maintain

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30 confidentiality as part of their assigned duties, or individuals
31 who are requested to maintain confidentiality in connection with
32 their participation in an open and ongoing investigation into
33 alleged sexual harassment or sexual assault.

34 (b) "Employer" has the same meaning as provided in s.
35 760.02(7).

36 (c) "Sexual assault" means any type of sexual contact or
37 behavior that occurs without the explicit consent of the
38 recipient.

39 (d) "Sexual contact" means any touching of the sexual or
40 other intimate parts of a person done for the purpose of
41 gratifying the sexual desire of either party or a third party.

42 (e) "Sexual harassment" means unwelcome sexual advances,
43 requests for sexual favors, sexually motivated physical contact,
44 or other verbal or physical conduct or communication of a sexual
45 nature if:

46 1. Submission to that conduct or communication is made a
47 term or condition, either explicitly or implicitly, of obtaining
48 employment;

49 2. Submission to or rejection of that conduct or
50 communication by an individual is used as a factor in decisions
51 affecting that individual's employment; or

52 3. Such conduct or communication has the purpose or effect
53 of substantially interfering with an individual's work
54 performance, or of creating an intimidating, hostile, or
55 offensive work environment.

56 (2) Except for settlement agreements authorized under
57 subsection (5), an employer may not require an employee, as a
58 condition of employment, to sign a nondisclosure agreement,

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59 waiver, or other document that prevents the employee from
60 disclosing or discussing sexual harassment or sexual assault
61 occurring in the workplace, at work-related events coordinated
62 by or through the employer, or between employees, or between an
63 employer and an employee, off the employment premises. Any such
64 nondisclosure agreement, waiver, or other document is against
65 public policy and is void and unenforceable.

66 (3) It is an unlawful employment practice for an employer
67 to discharge or otherwise retaliate against an employee for
68 disclosing or discussing sexual harassment or sexual assault
69 occurring in the workplace, at work-related events coordinated
70 by or through the employer, or between employees, or between an
71 employer and an employee, off the employment premises.

72 (4) An employee who is required to sign a nondisclosure
73 agreement, waiver, or other document that is prohibited by this
74 section as a condition of employment, or is discharged or
75 otherwise retaliated against in violation of this section, may
76 file a complaint with the Florida Commission on Human Relations.
77 Such an employee shall file the complaint in accordance with the
78 procedures specified in s. 760.11 and is entitled to the same
79 relief as provided under that section for violations of the
80 Florida Civil Rights Act of 1992.

81 (5) This section does not prohibit the inclusion of
82 confidentiality provisions in a settlement agreement between an
83 employee or former employee alleging sexual harassment and an
84 employer.

85 Section 2. Subsection (14) is added to section 760.06,
86 Florida Statutes, to read:

87 760.06 Powers of the commission.—Within the limitations

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88 provided by law, the commission shall have the following powers:

89 (14) To receive, and act upon, any complaints alleging a
90 violation of s. 448.077.

91 Section 3. Subsections (1), (3), (4), (5), (6), and (7) of
92 section 760.11, Florida Statutes, are amended to read:

93 760.11 Administrative and civil remedies; construction.—

94 (1) Any person aggrieved by a violation of ss. 760.01-
95 760.10 may file a complaint with the commission within 365 days
96 of the alleged violation, naming the employer, employment
97 agency, labor organization, or joint labor-management committee,
98 or, in the case of an alleged violation of s. 760.10(5), the
99 person responsible for the violation and describing the
100 violation. Any person aggrieved by a violation of s. 448.077 or
101 s. 509.092 may file a complaint with the commission within 365
102 days of the alleged violation naming the person responsible for
103 the violation and describing the violation. The commission, a
104 commissioner, or the Attorney General may in like manner file
105 such a complaint. On the same day the complaint is filed with
106 the commission, the commission shall clearly stamp on the face
107 of the complaint the date the complaint was filed with the
108 commission. In lieu of filing the complaint with the commission,
109 a complaint under this section may be filed with the federal
110 Equal Employment Opportunity Commission or with any unit of
111 government of the state which is a fair-employment-practice
112 agency under 29 C.F.R. ss. 1601.70-1601.80. If the date the
113 complaint is filed is clearly stamped on the face of the
114 complaint, that date is the date of filing. The date the
115 complaint is filed with the commission for purposes of this
116 section is the earliest date of filing with the Equal Employment

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117 Opportunity Commission, the fair-employment-practice agency, or
118 the commission. The complaint must ~~shall~~ contain a short and
119 plain statement of the facts describing the violation and the
120 relief sought. The commission may require additional information
121 to be in the complaint. The commission, within 5 days of the
122 complaint being filed, shall by registered mail send a copy of
123 the complaint to the person who allegedly committed the
124 violation. The person who allegedly committed the violation may
125 file an answer to the complaint within 25 days of the date the
126 complaint was filed with the commission. Any answer filed shall
127 be mailed to the aggrieved person by the person filing the
128 answer. Both the complaint and the answer shall be verified.

129 (3) Except as provided in subsection (2), the commission
130 shall investigate the allegations in the complaint. Within 180
131 days of the filing of the complaint, the commission shall
132 determine if there is reasonable cause to believe that
133 discriminatory practice has occurred in violation of the Florida
134 Civil Rights Act of 1992 or that an unlawful employment practice
135 has occurred in violation of s. 448.077. When the commission
136 determines whether or not there is reasonable cause, the
137 commission by registered mail shall promptly notify the
138 aggrieved person and the respondent of the reasonable cause
139 determination, the date of such determination, and the options
140 available under this section.

141 (4) In the event that the commission determines that there
142 is reasonable cause to believe that a discriminatory practice
143 has occurred in violation of the Florida Civil Rights Act of
144 1992 or that an unlawful employment practice has occurred in
145 violation of s. 448.077, the aggrieved person may either:

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146 (a) Bring a civil action against the person named in the
147 complaint in any court of competent jurisdiction; or

148 (b) Request an administrative hearing under ss. 120.569 and
149 120.57.

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151 The election by the aggrieved person of filing a civil action or
152 requesting an administrative hearing under this subsection is
153 the exclusive procedure available to the aggrieved person
154 pursuant to this act.

155 (5) In any civil action brought under this section, the
156 court may issue an order prohibiting the discriminatory practice
157 or unlawful employment practice and providing affirmative relief
158 from the effects of the practice, including back pay. The court
159 may also award compensatory damages, including, but not limited
160 to, damages for mental anguish, loss of dignity, and any other
161 intangible injuries, and punitive damages. The provisions of ss.
162 768.72 and 768.73 do not apply to this section. The judgment for
163 the total amount of punitive damages awarded under this section
164 to an aggrieved person shall not exceed \$100,000. In any action
165 or proceeding under this subsection, the court, in its
166 discretion, may allow the prevailing party a reasonable
167 attorney's fee as part of the costs. It is the intent of the
168 Legislature that this provision for attorney's fees be
169 interpreted in a manner consistent with federal case law
170 involving a Title VII action. The right to trial by jury is
171 preserved in any such private right of action in which the
172 aggrieved person is seeking compensatory or punitive damages,
173 and any party may demand a trial by jury. The commission's
174 determination of reasonable cause is not admissible into

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175 evidence in any civil proceeding, including any hearing or
176 trial, except to establish for the court the right to maintain
177 the private right of action. A civil action brought under this
178 section shall be commenced no later than 1 year after the date
179 of determination of reasonable cause by the commission. The
180 commencement of such action shall divest the commission of
181 jurisdiction of the complaint, except that the commission may
182 intervene in the civil action as a matter of right.
183 Notwithstanding the above, the state and its agencies and
184 subdivisions shall not be liable for punitive damages. The total
185 amount of recovery against the state and its agencies and
186 subdivisions shall not exceed the limitation as set forth in s.
187 768.28(5).

188 (6) Any administrative hearing brought pursuant to
189 paragraph (4)(b) shall be conducted under ss. 120.569 and
190 120.57. The commission may hear the case provided that the final
191 order is issued by members of the commission who did not conduct
192 the hearing or the commission may request that it be heard by an
193 administrative law judge pursuant to s. 120.569(2)(a). If the
194 commission elects to hear the case, it may be heard by a
195 commissioner. If the commissioner, after the hearing, finds that
196 a violation of the Florida Civil Rights Act of 1992 or s.
197 448.077 has occurred, the commissioner shall issue an
198 appropriate proposed order in accordance with chapter 120
199 prohibiting the practice and providing affirmative relief from
200 the effects of the practice, including back pay. If the
201 administrative law judge, after the hearing, finds that a
202 violation of the Florida Civil Rights Act of 1992 or s. 448.077
203 has occurred, the administrative law judge shall issue an

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204 appropriate recommended order in accordance with chapter 120
205 prohibiting the practice and providing affirmative relief from
206 the effects of the practice, including back pay. Within 90 days
207 of the date the recommended or proposed order is rendered, the
208 commission shall issue a final order by adopting, rejecting, or
209 modifying the recommended order as provided under ss. 120.569
210 and 120.57. The 90-day period may be extended with the consent
211 of all the parties. An administrative hearing pursuant to
212 paragraph (4) (b) must be requested no later than 35 days after
213 the date of determination of reasonable cause by the commission.
214 In any action or proceeding under this subsection, the
215 commission, in its discretion, may allow the prevailing party a
216 reasonable attorney ~~attorney's~~ fee as part of the costs. It is
217 the intent of the Legislature that this provision for attorney
218 ~~attorney's~~ fees be interpreted in a manner consistent with
219 federal case law involving a Title VII action.

220 (7) If the commission determines that there is not
221 reasonable cause to believe that a violation of the Florida
222 Civil Rights Act of 1992 or s. 448.077 has occurred, the
223 commission shall dismiss the complaint. The aggrieved person may
224 request an administrative hearing under ss. 120.569 and 120.57,
225 but any such request must be made within 35 days of the date of
226 determination of reasonable cause and any such hearing shall be
227 heard by an administrative law judge and not by the commission
228 or a commissioner. If the aggrieved person does not request an
229 administrative hearing within the 35 days, the claim will be
230 barred. If the administrative law judge finds that a violation
231 of the Florida Civil Rights Act of 1992 or s. 448.077 has
232 occurred, he or she shall issue an appropriate recommended order

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233 to the commission prohibiting the practice and recommending
234 affirmative relief from the effects of the practice, including
235 back pay. Within 90 days of the date the recommended order is
236 rendered, the commission shall issue a final order by adopting,
237 rejecting, or modifying the recommended order as provided under
238 ss. 120.569 and 120.57. The 90-day period may be extended with
239 the consent of all the parties. In any action or proceeding
240 under this subsection, the commission, in its discretion, may
241 allow the prevailing party a reasonable attorney ~~attorney's~~ fee
242 as part of the costs. It is the intent of the Legislature that
243 this provision for attorney ~~attorney's~~ fees be interpreted in a
244 manner consistent with federal case law involving a Title VII
245 action. In the event the final order issued by the commission
246 determines that a violation of the Florida Civil Rights Act of
247 1992 or s. 448.077 has occurred, the aggrieved person may bring,
248 within 1 year of the date of the final order, a civil action
249 under subsection (5) as if there has been a reasonable cause
250 determination or accept the affirmative relief offered by the
251 commission, but not both.

252 Section 4. This act shall take effect October 1, 2019.