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#MeToo Legislation: Did Congress Just Put Its Money Where Its Mouth is?

In an effort to create greater accountability and better resources for victims of sexual harassment, Congress passed S.3749 on Dec. 13, 2018. The law represents a bipartisan response to the onslaught of sexual harassment allegations plaguing Congress and the resulting torrent of resignations.

By Ariel E. Solomon | January 16, 2019

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The short answer is "Yes," the long answer is "No"; you read that correctly. When elected officials sexually harass and discriminate, the burden to compensate victims is borne entirely by taxpayers. Newly enacted legislation will alleviate taxpayer burden by making lawmakers personally liable for compensatory damages in harassment cases. In the past decade alone, taxpayers paid more than $17 million in awards and settlements brought against the legislative branch under the Congressional Accountability Act of 1995 (CAA). Office of Compliance FY2017 Annual Report at p.16. This figure does not include awards and settlements paid out by Agencies under the Executive Branch of Government.

In the wake of the #MeToo movement, the protections afforded under the CAA were largely regarded by lawmakers as antiquated and unnecessarily arduous for victims of sexual harassment to navigate. S.3749—115th Congress (2017-2018). In an effort to create greater

accountability and better resources for victims of sexual harassment, Congress passed S.3749 on Dec. 13, 2018. The legislation, which amends the Congressional Accountability Act of 1995 to create the Congressional Accountability Act of 1995 Reform Act (CAA Reform Act), was signed into law on Dec. 21, 2018. The law represents a bipartisan response to the onslaught of sexual harassment allegations plaguing Congress and the resulting torrent of resignations.

In pertinent part, the CAA Reform Act holds members of Congress personally liable for the payment of compensatory damage awards and settlements made to compensate victims of harassment in Congress. So, "Yes" Congress, more specifically Lawmakers, have skin in the game, so to speak. The Reform Act requires culpable members to reimburse the U.S. Department of the Treasury, and by extension U.S. taxpayers, the reimbursable portion of settlements and made in connection with harassment claims brought against members of Congress.

The CAA Reform Act was ultimately a compromise of a year-long negotiation between the U.S. Senate and House of Representatives. Id. Although a version of the bill was first passed in the House of Representatives as early as February 2018 (H. Res. 724, 115th Cong. (2018)), reform languished in the Senate, prompting all 22 female Senators, both Democrat and Republican, to express deep disappointment and to urge Senate Leadership to act swiftly in their pledge to update and strengthen the procedures available to survivors of sexual harassment and discrimination in congressional workplaces.

Commendable in its initiative, the new law is an important first step in the united effort to combat sexual harassment. Representative Jackie Speier (D-Calif.) particularly championed efforts to amend the legislation after sharing her experiences with sexual harassment as a young staffer on the Hill. However, the Reform Act is just that, a first step. U.S. taxpayers and advocates opposing sexual harassment can consider the CAA Reform Act to be an initial stab at overhauling decades-old legislation that imposed a procedural process not required of complainants in the Executive Branch of government. The #MeToo movement, and more specifically #CongressToo, has taught us that existing anti-discrimination laws do not adequately shield staffers from sexual harassment and have even emboldened certain members of the legislature to act with impunity. Many states, New York included, recently passed legislation to expand protections against sexual harassment.

The CAA Reform Act makes several key revisions to prevent sexual harassment and triage complaints more effectively. However, the long-answer is still "No." The long-term impact of the legislation as crafted is more likely to spawn litigation, frustrate settlement, and result in the need to segregate damages in civil actions. Congress created increased transparency and accountability but also made it harder for victims to obtain compensation without cost-prohibitive litigation.

What Is the Congressional Accountability Act of 1995?

Initially, Title VII applied only to competitive service employees in the legislative and judicial branches. The same was true under the ADEA. The Congressional Accountability Act adopted by reference the rights and remedies available to federal employees under Title VII, the Rehabilitation Act and the ADEA. Before the CAA's enactment, while Congress and the courts fastidiously carved out new rights for federal workers in the executive branch, they were less protective of their own workforce. Most legislative and judicial employees were exempted from coverage under Title VII, the Rehabilitation Act, and the ADEA. Claims brought under the CAA are enforced by the Office of Compliance. 2 U.S.C. 1301 et seq.

What Does the Reform Act Do?

The CAA Reform Act amended the Congressional Accountability Act of 1995 in relevant part, to:

- eliminate CAA counseling and "cooling-off" requirements and make mediation optional before filing a claim alleging the violation with the Office of Compliance (OOC) (2 U.S.C. 1401);
- require current and former Members of Congress to reimburse the Treasury for compensatory damages (the reimbursable portion) included in an award or settlement resulting from the Member's alleged act of harassment (2 U.S.C. 1415, as amended by §111);
- require referral to congressional ethics committees of final disposition of claims alleging CAA violations by Members of Congress and senior staff of employing offices (2 U.S.C. 1416(e));
- require non-congressional legislative offices that violate CAA requirements to reimburse the Treasury for resulting award or settlement payments (2 U.S.C. 1415, as amended by §115);
- modify the rules on confidentiality of proceedings (2 U.S.C. 1416(b));
- extend CAA nondiscrimination requirements and remedies to uncompensated legislative branch interns, detailees, and fellows (2 U.S.C. 1401 et seq., as amended by §302);
- provide OOC and CAA resources and services to employees outside of the Washington, DC area (Id., as amended by §307); and

• rename the OOC to the Office of Congressional Workplace Rights to better reflect its purpose (Id., as amended by §308).

The Reform Act also requires the OOC, now the Office of Congressional Workplace Rights (OCWR) to report and publish online every six months, information on awards and settlements. Reports must include: the employing office; the amount of the award or settlement; the violation claim(s); and, when a claim was issued against a Member, whether the Member has personally repaid the Treasury account. Within 30 days, the OCWR will publish all settlements and awards, the amount, and the public funds used for all §201(a) claims. Patently, the Congressional intent here is to increase transparency. 2 U.S.C. 1415(a).

However, several sections of the Reform Act will make it more difficult for complainants to obtain meaningful relief, including:

(1) The Act's distinguishes between harassment and discrimination when requiring reimbursement for compensatory damages. This section will increase litigation expenses and complicate the characterization of damages in settlement agreements. Complaints are brought against the Government. The member of Congress is not named in their personal capacity, but when implicated, will receive notice of their involvement and an opportunity to obtain independent counsel. The result, more likely than not, will be two different defense attorneys and two different settlement authorities; both of whom having competing goals with respect to the characterization of damages. The member of Congress will advocate for payment by lump sum in an amount that shall not represent compensatory damages. While Congress, a steward of taxpayer funds, should advocate for language that characterizes payments in an amount that minimizes taxpayer liability (i.e., as compensatory damages). Alternatively, a complainant or plaintiff could enter into a settlement with the member of congress and continue with a civil action against the Government, or vice versa. Even if settlement is entered into with the member of Congress, rarely does a discrimination complaint allege a single theory of discrimination. It is unlikely that a settlement of only the harassment claim will resolve the entire case. In a civil action, this will require the fact finder to segregate damages resulting from actions by the member of Congress and those attributable to the Government.

(2) The mandatory public reporting creates both transparency and a corresponding disincentive for members of congress to settle cases that in practice, are normally resolved before a civil action is ever commenced. The lack of a confidentiality, although instrumental in creating transparency, will have a chilling effect on settlement. As defendants, sensitive to political fallout may have the incentive (and more importantly the means) to drag out litigation when settlement for a nominal sum may be in all parties' best interest.

(3) The act fails to manage the actual and or perceived political backlash for filing sexual harassment complaints. This omission will result in the continued reticence to

file complaints. Staffers often forgo the complaint process in its entirety and endure harassment until a better position comes along. See Rachael Bade and Elana Schor, "Capitol Hill's sexual harassment policy 'toothless,' 'a joke,'" Politico (Oct. 27, 2017). In the Executive branch of government, for example, Title 5 employees can sometimes transfer to another office location or supervisor, thereby tempering the threat of making the career ending decision to file a complaint.

As the #MeToo wave of litigation continues, one enduring fact has become abundantly clear: Anti-discrimination and harassment laws do not adequately prevent sexual harassment. Thwarting the potential of settlement will merely deprive plaintiffs of timely relief and make the disproportionate allocation of resources between staffers and lawmakers a significant barrier to obtaining justice. (Members of the Senate may establish a legal expense fund to defray costs of legal proceedings of any nature, arising by virtue of his or her service in the Senate, including, but not limited to congressional inquiry, and criminal or civil proceedings. S. Res. 508 (96th Cong., 2d Sess.)) As lawmakers continue to haggle over the letter of the law, the next step (of many) should be to focus on maintaining its spirit. Congress must increase the likelihood complaints will be brought in the first place, and ensure victims actually receive timely, make-whole relief when appropriate.

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