



# TACIR

The Tennessee Advisory Commission  
on Intergovernmental Relations



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## MEMORANDUM

TO: Commission Members

FROM: *Jynnisie* Jynnisie Roehrich-Patrick  
Executive Director

DATE: 20 November 2014

SUBJECT: The Healthy Workplace Act—Draft Policy for Review and Comment

The draft policy required by the Healthy Workplace Act (Public Chapter 997, Acts of 2014) is attached. A final version incorporating your feedback will be presented at the January 2015 commission meeting for your approval. The Act, also attached, requires the Commission to create a model policy by March 1, 2015, that state and local government employers may adopt to address abusive conduct in the workplace. Any government that adopts this policy or any policy that conforms to the requirements set out in Tennessee Code Annotated, Section 50-1-503(b), is immune from suit for any employee's abusive conduct that results in negligent or intentional infliction of mental anguish. To obtain immunity under this new law, the policy has to do two things as set forth in the referenced subsection:

1. Assist employers in recognizing and responding to abusive conduct in the workplace; and
2. Prevent retaliation against any employee who has reported abusive conduct in the workplace.

The Act defines abusive conduct as acts or omissions that would cause a reasonable person, based on the severity, nature, and frequency of the conduct, to believe that an employee was subject to an abusive work environment, which can include but is not limited to

- repeated verbal abuse in the workplace, including derogatory remarks, insults, and epithets;
- verbal, nonverbal, or physical conduct of a threatening, intimidating, or humiliating nature in the workplace; or
- the sabotage or undermining of an employee's work performance in the workplace.

The Act directs the Commission to consult with the Tennessee Department of Human Resources and various interested municipal and county organizations to develop the model policy. The workgroup formed to comply with this directive includes the following agencies and members:

- **Tennessee Municipal League**—Roger Campbell, Assistant City Manager City of Maryville
- **Tennessee County Services Association**—David Connor, Executive Director
- **Municipal Technical Advisory Service**—Richard Stokes, Human Resource Consultant,
- **County Technical Assistance Service**—Libby McCroskey, Legal Consultant
- **Tennessee Department of Human Resources**
  - Danielle Barnes, Assistant Commissioner/General Counsel
  - Ashley Fuqua, Legislative Liaison and Public Information Officer
- **Tennessee State Employees Association**—Jonathan Stephens, Staff Attorney
- **Tennessee Healthy Workplace Advocates**—Jackie Gilbert, Ph.D., Professor of Management, Middle Tennessee State University
- **Tennessee General Assembly**—Connie Ridley, Director, Office of Legislative Administration
- **Administrative Office of the Courts**—Cindy Saladin, Human Resources Manager

Before convening the workgroup, staff interviewed several people knowledgeable about workplace abuse issues, including the bill's sponsors or the sponsors' staff, representatives of national organizations that promote prevention of workplace bullying, and individuals who have experienced abusive conduct in the workplace. In addition, staff reviewed various materials on this topic to better understand how workplace abuse is defined in other contexts and how the issue has been addressed elsewhere.

The workgroup met five times between July 21 and October 16, 2014, hearing presentations on the history of abusive conduct in the workplace and reviewing healthy workplace policies from Tennessee and other states. The workgroup also reviewed model policies developed by two healthy workplace advocacy organizations, the Workplace Bullying Institute and Civility Partners, LLC. Using these examples as a springboard for discussion, the workgroup developed the draft model policy, seeking to make it consistent with existing state and local government policies to the greatest extent possible.

The members of the workgroup reached agreement on all but one issue: how much language defining abusive conduct to include in the model policy. Some of the policies used as examples

contained specific language on this topic, and some members thought including it would help people understand the policy. Others felt that more specific language would make it more difficult to determine whether any particular act or omission met the definitions in the policy and, thereby, make the policy more difficult to enforce. The policy drafted by the workgroup is a compromise and has less specific language than several members would like. As part of the compromise, the workgroup recommends incorporating more detailed lists and examples into training materials to accompany the policy. Developing those materials is beyond the scope of this project.

## **Request for Attorney General Opinion**

The Healthy Workplace Act raises a few questions that the workgroup could not answer related to its implementation and effect. At their request, Chairman Norris asked the Attorney General for an opinion in a letter dated September 2, 2014. Since that time, staff identified a statute requiring express language to create a private right of action, which may answer two of the questions submitted.

- Does this act create a new cause of action against state or local employers for abusive conduct in the workplace?
- Does this act create a new cause of action against state or local employees for abusive conduct in the workplace?

Tennessee Code Annotated, Section 1-3-119, includes the following provisions, which may answer the first two questions:

- a) In order for legislation enacted by the general assembly to create or confer a private right of action, the legislation must contain express language creating or conferring the right.
- b) In the absence of the express language required by subsection (a), no court of this state, licensing board or administrative agency shall construe or interpret a statute to impliedly create or confer a private right of action except as otherwise provided in this section.

## **Effect of Immunity Provision**

The Healthy Workplace Act includes the following statement about governmental immunity and employees' personal liability for abusive conduct in the workplace (codified at Tennessee Code Annotated, Section 50-1-504):

Notwithstanding § 29-20-205, if an employer adopts the model policy created by TACIR pursuant to § 50-1-503(a) or adopts a policy that conforms to the requirements set out in § 50-1-503(b), then the employer shall be immune from suit for any employee's abusive conduct that results in negligent or intentional

infliction of mental anguish. Nothing in this section shall be construed to limit the personal liability of an employee for any abusive conduct in the workplace.

The state is immune from suit under Article 1, Section 17, of the Tennessee constitution, and a claimant may not seek relief from the state except as provided in Tennessee Code Annotated, Section 9-8-307(a), which authorizes certain monetary claims against state government. Similarly, the Government Tort Liability Act (GTLA) found in Tennessee Code Annotated, Title 29, Chapter 20, Parts 1 and 2, removes common-law governmental immunity in specifically enumerated situations. Tennessee Code Annotated, Section 29-20-201(a) provides that

Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.

To clarify whether and how the Healthy Workplace Act affects these laws, the request to the Attorney General included the following questions:

- Would adoption of the model policy or policy conforming to Tennessee Code Annotated, Section 50-1-503(b) create immunity for the state or its local governments beyond that provided elsewhere, including by the Governmental Tort Liability Act (GTLA) and Tennessee Code Annotated, Section 9-8-307?
- If a governmental entity does not adopt such a policy, under what conditions and to what extent would that entity be liable for an employee's abusive conduct? Would it be protected from liability by the GTLA or Tennessee Code Annotated, Section 9-8-307?

### **Authority to Adopt the Model Policy**

The Healthy Workplace Act does not say what entity within a city or county government has authority to adopt an abusive conduct-prevention policy, which is a concern particularly for county governments because they include several independent elective offices. To address this concern, the request to the Attorney General posed this question: "Who has the authority to adopt such a policy in a county government or city government?"

### **Government Entities Affected by Legislation**

The Healthy Workplace Act applies to "any department, commission, board, office, or other agency of the executive, legislative, or judicial branch of state government. The act also defines "employer" as "any agency, county, metropolitan government, municipality, or other political subdivision of this state." Whether it extends to quasi-governmental agencies such as housing authorities, utility districts, and development districts is not clear, so the request to the Attorney General included this question as well: "Does the Healthy Workplace Act extend to quasi-governmental agencies such as housing authorities, utility districts, and development

districts?" Although the Act also does not specify whether it applies to higher education or the pre-K-12 system, the workgroup raised that issue after the request to the attorney general had been sent.

## **Implementation Issues**

Workgroup members identified several issues affecting implementation of the Healthy Workplace Act by various state and local government organizations, including agency or employer size and structure; the relationship to other policies; training and organizational culture; and codification of the requirements in a part of the code related to employers and employees generally, rather than in parts related specifically to government employers and employees.

### **Variation in Government Size and Structure**

Developing a policy and process to address abusive conduct that any governmental entity in Tennessee could adopt is challenging because of variation in the governments themselves. The state's executive branch, for example, and several large cities and counties have separate human resources departments. Most small governments do not. The workgroup addressed these differences by making the language in the draft model policy general enough to apply to different levels and sizes of government. Even so, the smallest jurisdictions, such as very small municipalities that have only a few employees, may have difficulty identifying someone to fulfill all of the investigative responsibilities required by the policy, raising the question whether, as a practical matter, they should be exempt.

### **Relationship to other policies and practices**

Tennessee's state and local governments already have myriad laws and policies affecting workplace conduct. Government workers are protected by federal civil rights laws that prohibit harassment based on race, gender, age, and disability. Tennessee Code Annotated, Title 20, Chapter 14, addresses violence in the workplace and includes some behaviors also mentioned in the Healthy Workplace Act. The violence in the workplace law applies to all employers that have one or more employees including "the state, its political subdivisions and instrumentalities." The workgroup sought to develop a policy that would work in concert with these and other applicable laws and policies, including those established for various kinds of grievances, as well as processes for evaluating and training employees, but each employer will need to consider how the proposed policy will affect other guiding laws, rules, and policies that affect that workplace.

### **Training**

Various experts identify training as a key component of any effort to prevent abusive conduct in the workplace, but training is not yet available. Therefore the draft model policy encourages, rather than requires, all supervisors and employees to receive training that

identifies factors that contribute to a healthy workplace, familiarizes participants with responsibilities under this policy, and provides steps to address abusive conduct incidents. For the state government and the larger local governments, this is probably not a major challenge, but for the smallest of Tennessee's governments, training may be scarce. MTAS and CTAS may make training available in the future, but it is not presently available.

### **Addressing Organizational Culture**

Although The Healthy Workplace Act requires creation of a healthy workplace policy, having a policy is just one part of creating a positive workplace culture. Catherine M. Mattice, in *Seeking Civility? How Managers and Leaders Can Create a Bully-free Workplace*, notes that "Organizations that focus on respect, civility, collaboration, innovation, and positive internal relationships generally would not allow bullying." Conversely, "organizations that focus only on what is being done wrong and how to fix it, and think about the bottom line more than their most valuable asset—employees—foster a workplace where bullying is just a normal way of life." Several sources on workplace conduct note that prevention of abusive conduct in the workplace begins with a healthy organizational culture in which positive behaviors are encouraged in addition to having processes to address negative behaviors.

### **Statutory Placement of Healthy Workplace Laws**

The Act added new language to Tennessee Code Annotated, Title 50, Chapter 1, which addresses employment relationships and practices for all employers, both public and private. However, since the Act pertains only to government employers, workgroup members felt that implementation could be made easier by clarifying how to implement it in sections of the Code related more specifically to state, county, and municipal governments. For example, Tennessee Code Annotated, Section 4-3-1703, which describes the powers and duties of the state's department of human resources, and Section 8-30-104 which describes the commissioner's responsibilities, could be amended to stipulate how the executive branch of the state government should implement the policy. Similarly, implementation requirements could be spelled out in Section 5-23-104, which lists required personnel policies for counties, and in Section 6-54-123, which addresses personnel requirements for municipal governments.