The Latest On Sexual Harassment Reform On The Hill

By **Bill Pittard**
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Sexual harassment in the workplace has been in the news. You may have noticed.

And that issue, as things in the news so often do, has made its way to the Hill: first, in the form of allegations of such misconduct by members of Congress and their staff; and, second, in the form of suggested reforms to the legal framework for handling such allegations.

This analysis examines the existing law and practice under which sexual harassment allegations in the congressional workplace typically are handled, and then also touches on the key elements of the leading House proposals to amend that framework.

The Current Structure

The Congressional Accountability Act governs most allegations of sexual harassment of congressional staff by their employers. Congress enacted the CAA in 1995, immediately following the Republican take-over of the House that ended more than three decades of Democratic House majority. That take-over involved soon-to-be-House Speaker Newt Gingrich touting a drain-the-swamp style contract with America — including a promise to "require [that] all laws that apply to the rest of the country also apply equally to the Congress." From that came the CAA, an effort to provide congressional employees with some of the same protections that Congress had extended to private sector employees. One such protection: A right of action for sexual harassment at work.

A fundamental feature of the CAA is the creation of a fictional "employing office" against which CAA claims may be brought. Employees first lodge their complaint with an "Office of Compliance," which supervises 30-day counseling and mediation periods; a still-unsatisfied employee can then demand compensation through an administrative process (also overseen by the Office of Compliance) or through a lawsuit in federal court.

The CAA also contemplates a set of government lawyers to defend its "employing offices" from CAA complaints and lawsuits. Complaining employees, on the other hand, must obtain their own counsel (or proceed without a lawyer). This is analogous, for better or for worse, to other claims against the federal government.

As to the money to pay any awards or settlements, the CAA limits the source of such payments, at least in connection with sexual harassment allegations, to an executive branch fund set aside "for the payment of awards and settlements," i.e., the Judgment Fund. The federal government draws from that fund to pay judgments, or settlements, in various circumstances where it has allowed itself to be sued for the misconduct of its officials, such

as under the Federal Tort Claims Act. (As we've seen in the recent news, it turns out that some CAA claims were settled via payments from a different source: the member's Representational Allowance, the fund House members use to run their respective congressional offices. That practice now appears to have ended.)

Finally, the CAA provides the Office of Compliance with discretion regarding whether to alert the relevant House or Senate ethics committee regarding employee allegations, but only where those allegations have been pursued administratively through that office. For claims resolved during the counseling or mediation process, the CAA mandates confidentiality. (Claims subsequently pursued through the federal courts presumptively will be public, and thus accessible to the relevant ethics committees).

Until recently, many of the legal issues that have arisen under the CAA have tended toward the esoteric: May a CAA claim be brought, or continue, against the office of a member after that member has left office, or died? How does the CAA process intersect with the protections of the speech or debate clause? May employment counsel, in representing the office of a member, make any decisions contrary to the member's instructions?

Now, however, the decided focus of proposed CAA reform has become its handling of allegations of sexual harassment.

Proposed CAA Reform

The proposed CAA reform generating the most attention is a bill (H.R. 4924) introduced in the House on Feb. 5, and passed by the House the next day. Entitled the Congressional Accountability Act of 1995 Reform Act, that bill now is pending in the Senate.

The CAA Reform Act adopts a number of provisions first included in a separate bill (H.R. 4396), which had garnered 150 House co-sponsors: the Member and Employee Training and Oversight on Congress Act (or "ME TOO Congress Act"). Not all of the ME TOO Congress Act provisions made it into the CAA Reform Act, however.

The CAA Reform Act

The CAA Reform Act would amend the CAA in at least four important ways.

First, the bill would accelerate the initial complaint process by dispensing with the current 30-day counseling and mediation periods. (Optional mediation would remain a possibility).

Second, the bill would engage the Office of Compliance (under its proposed new name of the Office of Congressional Workplace Rights), through its general counsel, in proactively investigating complaints, or at least those for which the complaining employee chooses to proceed administratively rather than through a federal lawsuit. Under the current law, by contrast, the factual development in such cases is left to the complaining employee and the "employing office," supervised by a hearing officer. In other words, the proposed changes would move toward an inquisitorial system, rather than one modeled after the traditional, adversarial Anglo-American judicial system.

Third, the bill would change the circumstances under which the renamed Office Of

Congressional Workplace Rights would refer matters to the House or Senate Ethics Committee. Rather than permitting a referral only where that office had supervised a complaint pursued administratively, that office now would be required to make a referral in either of two circumstances: First, wherever the office's general counsel concluded an investigation that involved certain allegations of wrongdoing (including allegations of sexual harassment) by a member personally; and second, wherever certain claims (including those of sexual harassment) were resolved through payment of a settlement or judgment based on claims of personal wrongdoing by a member or certain senior staff.

And, fourth, the bill would require a member personally to reimburse the Judgment Fund where that fund provided the monies to settle a complaint, or to satisfy a judgment, regarding allegations that the member personally engaged in certain misconduct, including sexual harassment. This provision might incentivize members to act appropriately, for fear of personal liability. It also may discourage members from settling claims (given that the member him- or herself now will feel the pocketbook bite), and thus may increase the number of claims ultimately resolved through litigation, rather than via settlement.

Other Aspects of the Proposed ME TOO Congress Act

The CAA Reform Act diverges in two significant ways from the ME TOO Congress Act.

First, the ME TOO Congress Act would have offered to complaining employees a "victims' counsel": a lawyer designated to assist the employee, confidentially and free-of-charge, on certain issues related to his or her complaint. While the CAA Reform Act drops this provision, the House, via House Resolution 724, has acted unilaterally to provide similar counsel for complaining House employees, via establishment of an Office of Employee Advocacy. That office will provide interested complaining employees with legal representation in CAA matters, up until any filing of a federal lawsuit. The head of this office will be removable only "for cause."

Second, the ME TOO Congress Act would have permitted complaining employees and employing offices to enter into settlements without obtaining individualized approval from a congressional oversight committee — e.g., in the House, the Committee on House Administration. This might have sped some settlements by avoiding situations in which the oversight committee hesitates to approve a settlement due to a concern that the complaint is frivolous, or at least not meritorious of a payment of a particular size. In short, this reform would have added expedition, though at the expense of oversight.

Conclusion

What comes next? The primary action now is in the Senate. Will it provide legal counsel for Senate employees complaining of sexual harassment and other CAA violations? And will it advance the CAA Reform Act and, if so, with what changes? So long as the public interest remains high, additional action seems inevitable.

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