

February 26, 2018

MEMORANDUM

To: Civil Rights, Utilities, Economic Development & Arts Committee Members
From: Asha Venkataraman, Council Central Staff
Subject: Council Bill 119202: Administrative charges alleging sexual harassment

On February 27, 2018, the Civil Rights, Utilities, Economic Development & Arts (CRUEDA) committee will discuss Council Bill (CB) 119202, proposed by Councilmember Herbold. In light of the recent news at the national, state, and local level regarding sexual harassment, Councilmember Herbold sent a letter to the Mayor on January 12, 2018, regarding reexamining how the City handles sexual harassment. Extending the amount of time a person has to file a sexual harassment claim is one of the items outlined in that letter and is reflected in CB 119202.

CB 119202 extends the time frame within which a person must file (also called a statute of limitations (“SOL”)) an administrative charge with the Seattle Office for Civil Rights (SOCR) for unfair employment, public accommodations, and contracting processes. It also specifies that the definition of discrimination includes sexual harassment, and defines the term sexual harassment in the Seattle Municipal Code (SMC) for these unfair processes as well as for unfair housing processes. This memorandum describes the protections and types of relief currently in place, the changes proposed in CB 119202, and their implications.

Current Protections and Types of Relief

SOCR enforces SMC provisions prohibiting discrimination based on race, sex, sexual orientation, national origin, religion, and other protected classes. Sexual harassment is a form of illegal discrimination based on sex in [employment](#), [public accommodations](#), [housing](#), and [contracting](#) laws at the City. The [Washington Law Against Discrimination](#) (WLAD) provides state protection. Federal protection against illegal sex-based discrimination exist in housing and employment.

Individuals alleging sexual harassment can pursue administrative and judicial recourse to varying degrees depending on the type of claim and the law under which they are pursuing relief. Attachment A contains a comparison of the amount of time available to file a charge or claim under the corresponding legal authority for each area of civil discrimination at each governmental level, including proposed changes. The City’s SOLs for administrative charges align with the amount of time within which a person must file an administrative charge under a corresponding state or federal law. City, state, and sometimes federal law also provide individuals alleging discrimination private rights of action to file claims in court. The SOLs for these claims are longer than those provided for administrative charges.

A person may file administrative charges or a claim under a private right of action, or both, under the SMC protections for employment, public accommodations, housing, and contracting. Filing an administrative charge is not a prerequisite to filing a private right of action under City law.¹ Similarly under state law, a person is not required to file an administrative charge with the Washington Human Rights Commission (WAHRC) to file a court claim. At the federal level, under the Fair Housing Act, a person is not required to file a claim with the Department of Housing and Urban Development (HUD) to file a court claim. However, for federal employment claims, a person must file a claim with the Equal Employment Opportunity Commission (EEOC) and receive a notice to sue before filing a court claim at the federal level under Title VII of the Civil Rights Act.

CB 119202

CB 119202 proposes three sets of changes to the SMC: (1) defining the term sexual harassment; (2) specifying that the definition of discrimination includes sexual harassment; and (3) extending the statutes of limitation for administrative charges.

1. Defining “sexual harassment”

Currently, the SMC does not define “sexual harassment.” Defining the term will make explicit what the City considers to be sexual harassment, which could be helpful in clarifying whether a person is experiencing it or another type of illegal sex- or gender-based discrimination. It could also explicitly inform persons not aware that the City’s anti-discrimination laws provide them rights and remedies of which they can take advantage. For a person considering whether they have an actionable claim, it would create an easily referenced code definition. However, there may be unintended consequences associated with codifying this definition in an ordinance.

Neither federal, state, nor city statutes codify a definition of “sexual harassment.” Thus, rather than interpreting an existing definition, the courts have developed a body of a case law interpreting how illegal discrimination on the basis of sex in the form of sexual harassment must be proven to establish a successful claim. Creating a static definition in the SMC would set a standard for proving a claim that may or may not be consistent with existing caselaw, narrow the universe of circumstances and behaviors currently encompassed in the case law regarding sexual harassment, and limit judicial interpretation in cases brought under a City court claim to how the SMC defines the term. Further legal analysis may be helpful to further augment this analysis.

In addition, defining sexual harassment when the SMC protects against discrimination based on a much wider range of protected classes could unintentionally create public perception that the

¹ Settlements, conciliation agreements, and Hearing Examiner cases can affect the ability and timing to file a court claim. Other parts of the SMC may also require filing of administrative claims, but SMC Chapters 14.04,.06, .08, and .10 do not.

City views sexual harassment as the most important type of discrimination. Though this is not the intent behind creating the definition, defining it, but not harassment based on race, sexual orientation, religion, or any of the other protected classes, could convey such a message. It could also lead to public perception that until the City created this definition, it was not enforcing sexual harassment as an illegal type of sex-based discrimination, which is inaccurate.

Given the potential concerns regarding defining sexual harassment in the SMC, several other options could achieve the same purposes of providing a set definition to easily reference and make people aware of their rights but with a potentially lower level of risk regarding the implications identified above. SOCR could conduct a rulemaking process to define terms not currently codified, which would allow for legal research and community input and awareness. In addition, or instead, SOCR could issue guidance or conduct more outreach and education to increase awareness of what harassment encompasses, not only based on sex, but for other forms of harassment or discrimination, and that such discrimination is already subject to enforcement under the SMC. All of the rules, educational material, or guidance could be posted to SOCR's website and otherwise distributed in the places where people access their information.

2. Adding sexual harassment to the definition of discrimination

Including the term sexual harassment within the definition of discrimination in the employment, public accommodations, housing, and contracting sections of the SMC explicitly makes sexual harassment a type of discrimination. Such an inclusion could clarify to those not currently aware that sexual harassment is unambiguously illegal discrimination. It does not create a new category of discrimination against which the City will start protecting. The City already prohibits illegal discrimination in the form of harassment based on a protected class, only one form of which is sexual harassment.

However, revising the code to clarify that discrimination includes sexual harassment highlights this one particular type of harassment as a form of illegal discrimination. Doing so has the same potential for unintended public perception as described above regarding the higher value of protecting against sexual harassment than harassment based on race, sexual orientation, gender identity, religion, or any of the other protected classes. It could also detract from the public's understanding that all these types of discrimination are and will continue to be illegal.

Outreach and education could help ameliorate unintended consequences of codifying this specific type of harassment in the definition of discrimination while still achieving the purpose of explicitly stating that harassment is a form of discrimination and making people aware that it is currently protected as illegal discrimination.

3. Extending statutes of limitation

CB 119202 extends the SOL for filing an administrative charge regarding employment and contracting from 180 days to one year and six months, an extension of one year. It extends the SOL for filing an administrative charge regarding public accommodations from 180 days to one year. For housing, the one-year SOL remains unchanged.

A. Considerations Affecting the Length of Extension

In drafting this legislation, Councilmember Herbold's staff and Central Staff consulted with SOCR and the City Attorney's Office regarding whether and how much longer to extend SOLs for administrative charges. Considerations included how much time was left after an administrative proceeding is completed to file a claim under a private right of action, the length of SOLs for other administrative proceedings and private rights of action, and the implications for other rights and remedies. Currently, the City's SOLs for administrative charges and private rights of action are shorter than or equal to state and federal SOLs. Extending the City SOL for administrative charges longer than state or federal SOLs may impact the ability to file in different forums.

Filing a claim under a private right of action is sometimes used as a recourse for a final administrative decision that does not provide a claimant with the relief desired. Thus, keeping the SOL for administrative charges under the anti-discrimination laws shorter than that for private rights of action was in line with that purpose of a court claim. The City's private right of action SOLs are at least double the administrative charge SOLs. That ratio was retained to allow a sufficient cushion of time between the completion of an administrative process and the end of an SOL to file a private right of action. Thus, the employment SOL increased by one year and the public accommodations and contracting SOLs increased by six months. The SOL for housing is one year, half of the two-year private right of action SOL, and thus remains unchanged.

B. Impacts on Existing Rights

Employment anti-discrimination charges would bear the most impact of an SOL change. With the current 180-day SOL, when a person files a timely charge with the City, it is dual-filed with the EEOC within its 180- or 300-day SOLs, and could also be filed at the same time under WLAD's six-month SOL. Extending the 180-day SOL by one year would accomplish the goal of the legislation to allow a person more time to file a charge with the City. However, if a person waited to file any administrative charge until one year and six months after the alleged incident occurred, that person would lose their ability to file an administrative charge with the WAHRC, as the SOL is six months to file under WLAD. They will also lose the ability to file a claim with the EEOC, as the SOL to file an EEOC claim is at most 300 days. In addition, as described above, because Title VII of the Civil Rights Act requires administrative exhaustion, failing to file with the EEOC would also preclude that person from filing a private right of action under Title VII.

For public accommodations and contracting, persons alleging a discrimination claim would face the same state-level issue in filing with WAHRC under WLAD if they chose to file any administrative charge until the end of the City's SOL. Extending the City's administrative charge SOLs beyond 180 days (one year for public accommodations and one year and six months for contracting) could mean that if a person wanted to wait till the end of the SOL to file with the City, they would have to file a charge with WAHRC within the state's six-month SOL, then file a separate claim with the City to pursue administrative charges, rather than filing all at the same time. If the person only filed an administrative charge with the City at the end of the proposed SOLs, they would lose the ability to file with the WAHRC. In these cases, there are fewer consequences at the federal level, as discrimination based on sex is not federally protected in public accommodations and independent contractors do not have the same protections against sex-based discrimination as employees, or otherwise.

The complexity of the timelines and filing requirements could make it more difficult for a person to keep track of all the deadlines within which they would need to make timely filings to avoid losing the ability to file administrative charges (and potentially judicial claims under federal law) in multiple forums. Education and outreach about the impacts of extending the SOLs is likely very important to ensure that claimants are careful in noting when specific claims must be filed in the forum in which they choose to file.

Attachments:

- A. Statutes of Limitation under Local, State, and Federal Law for Civil Discrimination Claims

cc: Kirstan Arestad, Central Staff Director
Amy Tsai, Supervising Analyst

ATTACHMENT A: Statutes of Limitation under Local, State, and Federal Law for Civil Discrimination Claims

Type of anti-discrimination claim	City			State		Federal	
	Administrative charges	CB 119202 administrative charge	Private right of action	Administrative charges	Private right of action	Administrative charges	Private right of action
Employment	<u>180 days</u> after the occurrence of the alleged unfair employment practice ⁱ	<u>One year and six months</u> after the occurrence of the alleged unfair employment practice	<u>Three years</u> after the occurrence of the alleged unfair employment practice ⁱⁱ	Washington Law Against Discrimination (WLAD) - <u>six months</u> after the alleged act of discrimination to file with Human Rights Commission (HRC) ⁱⁱⁱ	<u>Three years</u> after the cause of action has accrued ^{iv}	Title VII of the Civil Rights Act - <u>180 days</u> after the alleged unlawful employment practice occurred or <u>300 days</u> if dual filing with a state or local agency to file with the Equal Employment Opportunity Commission (EEOC) ^v	Title VII of the Civil Rights Act – <u>90 days</u> for a federal charge or <u>three years</u> for state charge after EEOC issues a notice of right to sue *Administrative exhaustion is required to file.
Public Accommodations	<u>180 days</u> after an alleged unfair practice has occurred or terminated ^{vi}	<u>One year</u> after an alleged unfair practice has occurred or terminated	<u>Two years</u> after the occurrence of termination of an alleged unfair practice, whichever occurs last ^{vii}	WLAD - <u>six months</u> after the alleged act of discrimination to file with HRC ^{viii}	<u>Three years</u> after the cause of action has accrued ^{ix}	None (no protection based on sex)	None (no protection based on sex)
Housing	<u>One year</u> after the alleged unfair practice has occurred or terminated ^x	No change – remains <u>one year</u>	<u>Two years</u> after the occurrence or the termination of an alleged unfair practice, whichever occurs last ^{xi}	WLAD – <u>one year</u> after the alleged act of discrimination to file with HRC ^{xii}	<u>Three years</u> after the cause of action has accrued ^{xiii}	FHA - <u>one year</u> after an alleged discriminatory housing practice has occurred or terminated to file with the Department of Housing and Urban Development (HUD) ^{xiv}	FHA – <u>Two years</u> from occurrence of termination of an alleged discriminatory housing practice ^{xv}
Contracting	<u>180 days</u> after the occurrence of the alleged unfair contracting practice ^{xvi}	<u>One year and six months</u> after the occurrence of the alleged unfair contracting practice	<u>Three years</u> after the occurrence of the alleged unfair contracting practice ^{xvii}	WLAD - <u>six months</u> after the alleged act of discrimination to file with HRC ^{xviii}	<u>Three years</u> after the cause of action has accrued ^{xix}	N/A	N/A

ⁱ SMC 14.04.090.A.

ⁱⁱ SMC 14.04.185.

ⁱⁱⁱ RCW 49.60.230(2).

^{iv} RCW 49.60.230(2); 4.16.080(2) (“The following actions shall be commenced within three years:...An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

^v 42 U.S.C. 2000e-5e(1).

^{vi} SMC 14.06.050.

^{vii} SMC 14.06.040.A (the SOL is tolled during the administrative proceedings).

^{viii} RCW 49.60.230(2).

^{ix} RCW 49.60.230(2); 4.16.080(2); *see also Floeting v. Group Health Cooperative*, 200 Wn. App. 758 (2017).

^x SMC 14.08.110.

^{xi} SMC 14.08.095.A (the SOL is tolled during the administrative proceedings).

^{xii} RCW 49.60.230(2).

^{xiii} RCW 49.60.230(2); 4.16.080(2).

^{xiv} 42 U.S.C. 3610(a)(1)(A)(i).

^{xv} 42 U.S.C. 3613(a)(1)(A).

^{xvi} SMC 14.10.060.

^{xvii} SMC 14.10.170.A.

^{xviii} RCW 49.60.230(2).

^{xix} RCW 49.60.230(2); 4.16.080(2); *see also Marquis v. City of Spokane*, 76 Wash.App. 853 (1995).