

October 7, 2023

To: Interested Parties  
Fr: David Yamada, Professor of Law and Director, New Workplace Institute  
Suffolk University Law School ([dyamada@suffolk.edu](mailto:dyamada@suffolk.edu))  
Re: Comparing the Healthy Workplace Bill (S. 1170) and Workplace Psychological Safety Act (H. 1882), versions filed for 2023-24 session, MA General Court

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I am providing this comparison of two bills designed to address workplace bullying and related behaviors:

- The Healthy Workplace Bill (HWB), Senate No. 1170, full text available here: <https://malegislature.gov/Bills/193/S1170>; and,
- The Workplace Psychological Safety Act (WPSA), House No. 1882, full text available here: <https://malegislature.gov/Bills/193/H1882>.

This analysis is based upon the originally filed versions.

With this second version of this memorandum, I also include for stakeholders' consideration two possible changes to Senate No. 1170, in response to suggestions and criticisms.

I readily acknowledge that I am not a disinterested party in this matter. I am the author of the underlying language of the Healthy Workplace Bill (S. 1170) and have advocated for its enactment in Massachusetts and other states.<sup>1</sup> I also have significant concerns about what I believe to be the significant overreach of the Workplace Psychological Safety Act (H. 1882), which I share below. I will consider each bill separately.

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### **THE HEALTHY WORKPLACE BILL (HWB), SENATE NO. 1170**

**Purpose of HWB** – The main purpose of the HWB (Senate No. 1170) is to fill a significant gap in current employment protections by (1) providing a legal claim for workplace bullying, mobbing, and generic harassment, and (2) creating liability-reduced incentives for employers to act preventively and responsively towards bullying at work.

**Key Provisions of HWB (Page numbers refer to originally filed version, currently on the General Court website)** -- The key features of the HWB include:

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<sup>1</sup> I have been researching and writing about the legal implications of workplace bullying for some 25 years. This includes authorship of leading commentaries on enacted and proposed responses to workplace bullying, mobbing, and generic harassment, both in the U.S. and on a global basis. My c.v. may be accessed here: <https://www.suffolk.edu/-/media/suffolk/documents/law/faculty/yamadacvJune23.pdf>.

- **New legal claim (pp. 1-2):** Provides workers with a legal claim for bullying at work, but with a high threshold. Plaintiffs must establish that the behavior was intentionally abusive and caused tangible physical and/or psychological harm.
- **“Abusive work environment” (pp. 1-2):** The HWB uses the term “abusive work environment” as a proxy for workplace bullying and models itself after the U.S. Supreme Court’s definitions of a hostile work environment for sexual harassment under Title VII of the Civil Rights Act of 1964. Employer liability standards are very similar to those under Title VII as well. Here is the operative language defining abusive conduct:

“...intentional acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature, and frequency of the conduct, including, but is not limited to: repeated verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal, non-verbal, or physical conduct of a threatening, intimidating, or humiliating nature; or the sabotage or undermining of an employee’s work performance. It shall be considered an aggravating factor if the conduct exploited an employee’s known psychological or physical illness or disability. A single act normally shall not constitute abusive conduct, but an especially severe and egregious act may meet this standard. Online communications shall be included in determining whether abusive conduct has occurred;”

- **Employer liability and incentives (pp. 3-4):** The HWB imposes liability on both employers and individual perpetrators, while allowing employers to minimize liability by preventing and responding to bullying situations.
- **Relief (p. 4):** Successful claims may recover compensatory damages, emotional distress damages, and punitive damages, but punitive damages may be awarded only when the bullying culminates in a tangible employment decision, such as a termination or demotion. Injunctive relief is also available.
- **Retaliation protections (p. 3):** The HWB includes an anti-retaliation provision for reporting bullying behavior and for cooperating with investigations and legal proceedings.
- **Claims initiated in court (p. 4):** The HWB is a new civil legal claim, to be brought in court; there is no enforcement agency involvement. Thus, claims would presumably originate in the Massachusetts Superior Court.
- **Reserving rights (pp. 3-4):** Express savings clauses are included to ensure no interference with collective bargaining laws and agreements and other worker protections, as well as employer protections for ordinary management functions.

**Strengths of HWB** – Here are what I see as its advantages:

- **Cleanly fills major void in worker protections:** The current version of the HWB reflects reviews and recommendations from many lawyers (both plaintiffs’ and defense counsel), workers advocates and HR staff, and legislative staffers, covering over 15 years. It cleanly fills a significant void in current employment protections.

- **Opens door to liability carefully:** Because establishing liability for workplace bullying is a new approach for U.S. employment law, the HWB opens this door carefully by aiming liability standards at intentional, targeted workplace bullying that has caused physical and/or psychological impairment, and by establishing anti-retaliation protections for those who report bullying situations.
- **Major incentives to employers:** The HWB strongly encourages employers to establish and follow anti-bullying policies and procedures, thus sharply reducing liability exposure if the employer can show that it has acted preventively and responsively to workplace bullying concerns.
- **Minimal fiscal impact:** By directing that claims be brought in court, rather than through an administrative agency, the HWB avoids the significant fiscal impact of burdening administrative agencies with these claims or creating a new agency to handle them.

**Main Criticisms/Concerns about HWB** – Here are common criticisms and complaints that have been lodged against the HWB over the past 15 years, among with my responses:

*From the corporate and employer side:*

- **“Opens litigation floodgates”:** The HWB has been criticized by corporate interests and employer trade groups for potentially creating a floodgate of frivolous litigation. However, by modeling Title VII liability standards, setting the recovery bar at reasonably high level, creating employer defenses, and requiring claims to be brought in court, the HWB will discourage frivolous claims.
- **“Current employer protections are sufficient”:** Simply put, there are no direct legal protections against targeted workplace bullying that cannot be tied to protected class status (e.g., race, sex, religion, etc.) or specific types of whistleblower retaliation. This is the most significant gap in worker protections in the U.S.

*From worker advocates:*

- **“Too high a recovery threshold”:** Some worker advocates continually criticized earlier versions of the HWB for requiring plaintiffs to establish that defendants acted with malice, a high legal standard. That element has been removed in this and other recent versions. Instead, S.1170 requires a showing of intentional behavior to create an abusive work environment, which can be inferred from a defendant’s actions.
- **“Plaintiffs should not have to prove the behavior was intentional”:** The HWB retains a requirement of showing that the creation of an abusive work environment was intentional. This is based on the presumption that the HWB is designed to provide a remedy against the most targeted types of workplace bullying, as well as a recognition that intent has been considered a dividing line between workplace bullying and less severe workplace incivility. However, it is possible to remove the intent requirement, as I suggest below.
- **“Plaintiffs should not have to show health harm”:** Going back to the pioneering origins of the work of Drs. Gary and Ruth Namie of the Workplace Bullying Institute, health harm has always been a core element in separating bullying from less severe

forms of workplace discord. Furthermore, it is a practical reality that virtually every legal claim brought under the HWB will include some prayer for relief based on physical impairments and/or emotional distress damages.

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## **THE WORKPLACE PSYCHOLOGICAL SAFETY ACT (WPSA), HOUSE NO. 1882**

**Purpose of the WPSA:** The WPSA is largely a response to perceived limitations and weaknesses of the HWB. Its scope is very broad reaching, creating legal rights to challenge a wide array of workplace directives, decisions, and behaviors on grounds that they are psychologically abusive or violative of individual dignity. In addition, the WPSA (1) requires all employers to quickly hire an independent investigator to engage in a fact-finding and liability determination for any internal complaint brought under its provisions, and (2) directs federal agencies to advise complainants and engage in enforcement actions against employers. Employers, co-employees (including alleged bystanders), and contractors may be subjected to both civil and criminal penalties and restraining orders.

**Key Provisions of the WPSA (Page numbers refer to originally filed version, currently on the General Court website):** The WPSA's provisions and specific, detailed internal procedure requirements for employers are numerous, but I am attempting to summarize the most salient features here:

- **Broad-based protections and liability for workplace dignity violations (pp. 2-6):** The WPSA imposes broad legal mandates on employers to ensure that all workers are free from psychological abuse and are treated “respectfully and with dignity,” while imposing employer and individual liability for a wide variety of behaviors and actions that fall under the category of “psychological abuse.” Like the Healthy Workplace Bill, the WPSA uses a reasonableness standard in weighing these behaviors and actions and reserves a number of employer prerogatives.
- **Mandates appointment of third-party investigators (pp. 7-8):** Within 5 days of the receipt of any internal complaint under the WPSA, an employer is required to appoint a neutral, third-party investigator, subject to veto power by the complaining employee.<sup>2</sup> The investigator shall determine whether a statutory violation has occurred and whether minimal levels of damages have been established. The results are binding on the employer, and the statute spells out specific required steps for implementation. The statute does not provide for any opportunity to resolve complaints informally or to negotiate settlements outside of this investigatory process and findings.

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<sup>2</sup> There is no requirement that the investigator have any legal expertise. Also, practically speaking, in one of the many unanswered questions posed by reasonably anticipated situations under this bill, there is no provision addressing what happens if the 5-day statutory deadline for appointing the investigator is missed, even if due to the complainant's unavailability or refusal to approve an investigator.

- **Mandates reporting to federal OSHA and DOL (pp. 8-9):** The WPSA mandates annual workplace climate surveys and quarterly reports on virtually all potential employment violations, gender and race statistics, and wage and salary data to the U.S. Occupational Safety and Health Administration and the U.S. Department of Labor, Labor Standards, thus implicitly obliging them to accept these reports.
- **Mandates federal OSHA and DOL support to and representation of complainants (pp. 9-10):** As an alternative to the internal investigatory process, an employee may involve federal OSHA and DOL, which are then required to provide potential complainants with advice and case evaluations, as well as initiating proceedings under this statute and imposing penalties upon violators, and possibly filing a legal claim on the employee's behalf.
- **Individual criminal liability (p. 11):** Any employee "who allows, engages in or promotes" conduct in violation of the WPSA may be subject to a criminal complaint, filed at the option of the complainant, for unspecified violations of the Massachusetts criminal statutes. (The term "allows" potentially allows bystanders who did not intervene on the complainant's behalf to be named in a criminal complaint.)

**Strengths of the WPSA:** This ambitious bill attempts to create a legal superstructure designed to address virtually any imaginable undermining of worker dignity or well-being, to allow workers to challenge employer directives considered psychologically abusive, and to provide substantial monetary and injunctive remedies for violations. In addition to addressing more severe, targeted behaviors, its provisions allow challenges to behaviors and directives that cause someone to feel disrespected. In that sense, it helps us to think about the limitations of how the law can be used to mandate the creation of an emotional state – psychological safety – at work.

**Concerns about the WPSA:** Unfortunately, the countervailing concerns about the WPSA far outweigh its potential merits. It goes way too far in opening the door to liability, it micromanages employers, and it has many legally problematic provisions. The most obvious and significant problems include:

- **Walking on eggshells:** The WPSA sets out a broad range of legally actionable behaviors and actions and, among other things, allows for filing internal complaints that automatically trigger an independent fact-finding process and a liability assessment. Accordingly, instead of ensuring psychological safety for workers, the WPSA likely will turn some workplaces into more stressful, even fearful work environments. Virtually every angry word exchanged, disagreeable directive issued, or harshly worded evaluation, could be cited as potential grounds for filing internal complaints and cross-complaints that will, in turn, fill the workplace with active investigations. In such situations, everyone is walking on eggshells.
- **Definitional uncertainties:** In terms of behaviors and actions categorized as psychological abuse under the WPSA, some are obviously objectionable (as they would be under the Healthy Workplace Bill), such as targeted sabotage of a worker's performance, verbally abusive conduct, and humiliating mistreatment. However,

other behaviors listed as psychologically abusive are potentially problematic, especially without explanation of context, such as: “frequent request for work below competence level,” “consistent taking credit for work,” “exclusion from work related gatherings or communications,” “looking into...private facts about the employee,” “behaviors without just cause,” “degrading role changes that could jeopardize future career prospects,” “physical isolation,” “unreasonable put downs,” “excessive monitoring,” “threat of dismissal,” and “removal of job duties.”

- **Tailor made for high-conflict personalities:** Whether by their general nature or due to a psychiatric condition (e.g., Anti-Social Personality Disorder, Narcissistic Personality Disorder, or Borderline Personality Disorder), a high-conflict individual can use the WPSA to wreak havoc on a workplace and create stressful challenges for even the most respectful and caring of managers and co-workers.<sup>3</sup> One of the unintended consequences of the WPSA will likely be the empowerment of such individuals, who can easily exploit the internal complaint and investigation processes to cause fear in fellow employees and disrupt the workplace.
- **Potentially empowers abusers and provocateurs:** Those who are adept at passive-aggressive button-pushing could leverage the WPSA by carefully prodding others into acting out verbally and angrily, followed by the filing of a complaint. Such scenarios would enable a dynamic known as DARVO – Deny, Attack, Reverse Victim and Offender – developed by Dr. Jennifer Freyd.<sup>4</sup>
- **Tremendous HR and legal expenses and management burdens for employers:** The requirement that independent investigators be hired for every internal complaint would multiply HR and legal costs by untold sums. Complying with the broad provisions and liability exposure of this bill could quickly become an extraordinary HR and financial burden for even the most well-intentioned employers, especially small businesses.
- **Lawyers and liability insurance for everyone?:** The ease of filing a complaint that requires fact-finding and a liability assessment, and the possibility of facing major legal expenses to defend everyday work directives and interactions, may result in many employees (especially mid-level managers) having to keep legal counsel on retainer and protect themselves with individual workplace liability insurance that covers even the mildest of alleged transgressions.
- **Unauthorized directives to federal agencies:** As an alternative route to relief, the WPSA directs federal OSHA and the federal DOL to render assistance to potential complainants and to impose penalties and pursue legal actions on their behalf. Clearly such unilateral directives to federal agencies are unlawful and non-enforceable. Practically speaking, while this process allows advocates for the WPSA to claim minimal fiscal impact on state enforcement agencies, it would impose considerable burdens on federal agencies.

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<sup>3</sup> The work of mediator and attorney Bill Eddy on dealing with high conflict individuals is deeply relevant here, especially, BILL EDDY, HIGH-CONFLICT PEOPLE IN LEGAL DISPUTES (HIGH CONFLICT INSTITUTE PRESS, 4<sup>TH</sup> ED., 2012). His High Conflict Institute website is at: <https://www.highconflictinstitute.com>.

<sup>4</sup> This site describes Dr. Freyd’s work on DARVO: <https://dynamic.uoregon.edu/jjf/defineDARVO.html>.

- **Enormous confusion:** For reasons that would take many pages of explanation to unpack and explain fully, there are numerous loose ends, key terms undefined, and other drafting issues raising questions of statutory interpretation and procedure that would require costly and extensive litigation to clarify.

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## **DISCUSSION OF PROPOSED POTENTIAL CHANGES TO THE FILED VERSION OF SENATE 1170, THE HEALTHY WORKPLACE BILL**

Based on the stakeholder meeting hosted by Reps. Giannino and Doherty (lead sponsors of House 1882, WPSA), attended by advocates for both bills, the following main criticisms of the HWB were identified:

- **Intent requirement** – To establish legally actionable “abusive conduct,” the HWB currently requires a showing of “**intentional** acts, omissions, or both, that a reasonable person would find abusive...” (p. 1, definition of “abusive conduct,” emphasis added). **This word could be removed from the bill, making it equivalent to the WPSA in terms of no requirement of showing intent to prove a statutory violation.**
- **Agency involvement** – In the current draft, a claim under the HWB is filed directly in court; there is no administrative agency involvement. The main reasons for this provision are (1) to avoid the HWB having significant fiscal impact, as necessitated by increasing staffing in an existing administrative agency charged with enforcement responsibilities; and (2) to avoid the significant delay in case processing that exists in many state agencies. The most obvious administrative agency to handle HWB claims would be the Massachusetts Commission Against Discrimination (MCAD). Directing HWB claims to MCAD would likely require a budget funding increase of at least 50 percent, while still requiring newly filed cases to stand in line behind a multi-year backup of previously filed claims. **However, if we can obtain a commitment to significant agency funding to cover HWB claims, an administrative agency portal may be viable, without overburdening the agency and subjecting claims to long delays that would only extend the litigation misery for bullying targets.**
- **Requirement of showing physical or psychological harm** – A prima facie HWB violation requires the showing of physical or psychological harm (p. 2). This draws on the longstanding definition of workplace bullying by the Workplace Bullying Institute, the leading North American resource on workplace bullying. It also helps us to assure employers that we are not creating a legal claim for lesser forms of workplace incivility. **While this requirement could be removed, it is likely unnecessary,** for as stated above, virtually every legal claim brought under the HWB will be seeking damages for health impairments or emotional distress, which will require all medical records and other evidence of health impairments to be disclosed during discovery anyway.

*This is a revised version of a memorandum originally dated September 17, 2023.*