

## What To Know About Mass. 'Psychological Safety' Bill

By **Amanda Ottaway**

Law360 (January 24, 2024, 9:05 PM EST) -- A potentially groundbreaking bill making its way through the Massachusetts State Legislature aims to broadly ensure psychological safety in the workplace, marking a key development in efforts to combat workplace bullying and potentially stoking momentum for similar bills in other jurisdictions.



A Massachusetts bill that advocates call the Workplace Psychological Safety Act would address forms of workplace mistreatment such as bullying that are not covered by existing protections. (iStock.com/AndreyPopov)

Bill H. 1882, which advocates are calling the Workplace Psychological Safety Act, would help close the gap between anti-bias law and forms of workplace mistreatment, such as bullying, that don't necessarily fall neatly within existing protections, experts said.

The bill is currently sitting in the state legislature's committee on labor and workforce development, and advocates have their sights set beyond Massachusetts as well to places like New York City, Connecticut and Rhode Island.

"As an employee side-attorney, I will say that there are a lot of people that I send away for not having viable legal claims who would fall under this law," said Gavi Bogin-Farber of Boston firm Segal Roitman.

Advocates want the law to include a cause of action for employees to sue if they're psychologically abused at work. Here, experts explore three things employers and workers should know about the bill currently in committee in the Bay State.

**'Bullies Beware. Businesses Be Prepared.'**

Employment lawyers on both sides of the bar said the bill addresses an important, often overlooked issue, and is worth watching closely.

"Based on the attention the model Workplace Psychological Safety Act has received in at least three statehouses" as well as the enthusiastic public testimony in favor of it, "the implication and messages leading into 2024-25 are clear: Bullies Beware. Businesses Be Prepared," said Philippe Weiss of Seyfarth Shaw, president of Seyfarth at Work, in an email.

Former Fox News anchor Gretchen Carlson, an outspoken workplace advocate whose own activism helped lead to two new federal laws in recent years, testified in support of the workplace psychological safety bill last fall.

Employees who experience forms of psychological abuse on the job — such as being left out of meetings or conversations, denied key information or having it misrepresented to them, being aggressively monitored or surveilled, or given inconsistent instructions so they can't complete their work or report misconduct — often have no real legal recourse, experts said.

End Workplace Abuse, the advocacy group behind the bill, cites a 2021 study from the Workplace Bullying Institute that found this kind of behavior affects over 48 million Americans, calling it an "epidemic."

Bogin-Farber said that while she understands workers aren't entitled to one hundred percent smooth sailing, there's a middle ground worth aiming for.

"Workplaces are not meant to be just like, happy, perfect, easy places. There are frictions, and there can be difficulties, and is it the job of the law to protect workers from all of that? I mean, that's just not feasible. But I do think there are certain behaviors that shouldn't be tolerated."

Bogin-Farber said she thinks the bill in its current form is likely too broad to pass. But while both she and fellow worker-side lawyer Rebecca Pontikes, who has her own firm in Boston, said they'd be surprised if it became law in its current form, they also said legislation along these lines is sorely needed.

"I think something like this has been a long time coming," Pontikes said. "There's a sense out there that people are fed up."

The bill could see some movement soon — its lead sponsor, state representative Jessica Ann Giannino, confirmed in an email Wednesday that workplace advocates this week presented new proposed language to the committee, and that legislators are looking closely at the recommended changes.

The committee must make a decision by next month about advancing the bill, activists say.

"It will be important to see the key differences between this language and other bill(s) that have been filed on the subject to ensure that all voices are heard, and a collaborative approach is used with other existing sponsors," Giannino wrote, adding that the topic is "deeply personal" to her.

"I look forward to working with my colleagues and advocates to ensure that psychological safety is considered as part of workplace protections moving forward."

**It Would Bridge Protections In Other Workplace Laws**

Under current law, if workers can't show their mistreatment was caused by their status in a protected class, they fall through the cracks, Bogin-Farber said. She said she sees a lot of people who feel they had no choice but to quit their jobs because of the abuse, but may not be able to convince a judge of that.

"I do see a lot of forcing out in various ways, but it rarely rises to the level that a court would consider constructive discharge," Bogin-Farber said, adding that constructive discharge is a difficult standard to meet. Clients come to her with stories of having work duties taken away or weathering nasty remarks, yelling or micromanagement, she said.

"They feel like their employer is trying to push them out, and they're probably right. I mean, maybe sometimes they're wrong, but they're probably right. But there's just no — there is often not a legal hook

that we can use," said Bogin-Farber.

Subjecting an employee to harassment that amounts to a hostile work environment is unlawful under federal Title VII of the Civil Rights Act of 1964 and also Massachusetts state law.

But the catch under current law is that if a supervisor bullies employees regardless of their race, sex, religion, age or other protected characteristics, that mistreatment may not necessarily be illegal.

A more incremental approach to a psychological safety law, Bogin-Farber said — while noting that she admires the bigger ideas and aims of the proposed bill — would simply apply protections against hostile work environments to all employees, "removing that requirement that it had to be connected to something protected," she said.

Debra Falzoi, a co-founder of the group End Workplace Abuse, which sent the proposed updates to the committee this week, said one of the goals of the legislation is to avoid forcing plaintiffs to show their alleged bullies had "malicious intent" in order to have a viable legal claim.

"We're saying that a toxic work environment that a reasonable person would deem toxic is the baseline for a legal claim. We don't want to wait for severe bullying or 'mobbing,'" she said, referring to a term that describes when multiple employees engage in a collective mistreatment of another. "We don't want to wait till people's health is destroyed to have some kind of legal claim."

### **It May Change The Workplace Safety Conversation**

Both worker and management-side lawyers, but particularly the latter, pointed to the importance of spreading awareness about psychological abuse in the workplace.

"To assume that implementing this law is going to end bullying, mobbing, and increase the well-being of all employees, I think is — I hate to use the word 'naive,' but maybe 'incomplete.' It's a good first step, but it's not the solution," said Maria Greco Danaher, who represents employers as a shareholder at Ogletree Deakins and is based in Pittsburgh.

The issues the bill tackles have been on her radar for a long time, she said.

After looking over the proposed new language for the bill, Danaher said she appreciated the definitions of various terms and the overall thoroughness, but said she thinks broader awareness of the issues addressed by psychological safety legislation will be key to its success.

"Much of the information is going to get a lot of pushback without some basic awareness first," she said.

For example, communication training for managers might be necessary, she said. Both the current and proposed versions of the bill include an affirmative defense for employers in which "acts intended to exercise a supervisor's authority to discipline with just cause" are lawful.

But there are multiple ways that scenario could play out in real life, Danaher said.

"If I'm the supervisor, and I say, 'Well, that was a stupid mistake. I can't believe you did that.' Or I say, 'You've made a mistake. Let's talk about what we can do, so it doesn't happen again' — both of those could be labeled as acts intended to exercise the supervisor's authority," she said. "But only one of them takes the mental health issue into account, and that is treating a person like a person."

Seyfarth's Weiss pointed out that harassment that is already unlawful, such as that based on race or sex, is better understood by workers and managers because it's more easily identified.

"Therefore, managers and staff can more easily spot and be sensitized to statements and situations that 'cross a line,'" he said.

If workplace psychological safety laws are passed, Weiss said, employers will need to be sure to train their employees using specific examples, so they can learn how to identify mistreatment that doesn't necessarily come with a label.

--Editing by Amy Rowe and Nick Petruncio.

