CLIENT ALERTS & INSIGHTS

Ohio Enacts Employment Discrimination Law Requiring More from Prospective Plaintiffs

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Authors: Adam Primm

On January 13, 2021, Governor Mike DeWine signed into law H.B. 352, overhauling the state's employment discrimination laws in several significant respects. Most notably, the new law requires that prospective plaintiffs file administrative charges with the Ohio Civil Rights Commission ("OCRC" or "Commission") prior to bringing a lawsuit, and imposes a universal two-year statute of limitations for all employment discrimination claims in the state. These changes bring Ohio's employment discrimination laws in line with federal laws and analogous laws in other states.

New, Shorter Statute of Limitations

The first key change is that the new law imposes a two-year statute of limitations on all employment discrimination lawsuits, with the statute beginning to run as of the date of the alleged discriminatory practice. This includes lawsuits for age discrimination in employment. This change represents a significant shift, as the law previously provided statutes of limitations extending as far as six years.

Administrative Exhaustion

OCRC Charge Now Generally a Prerequisite to Civil Action

The law creates a new section of the code, O.R.C. § 4112.052, that requires that claims of discrimination under Ohio state law be filed first with the OCRC. Only once the OCRC process (as further described below) is exhausted may a plaintiff file a civil lawsuit. The only exceptions to the requirement that the administrative process be exhausted first are where a plaintiff (1) is only seeking injunctive relief, or (2) has filed a charge with both the OCRC and the analogous federal agency, the EEOC, and the EEOC has issued a notice of right to sue. If a plaintiff circumvents the administrative procedure of § 4112.051 because the plaintiff initially only sought injunctive relief, but later seeks damages in their complaint, the amendment to the complaint will relate back to the original filing date under very limited circumstances.

Additionally, age discrimination lawsuits under O.R.C. § 4112.14 are now explicitly preempted if the plaintiff has already brought an action O.R.C. § 4112.052, and vice versa, if the second action "is based, in whole or in part, on the same allegations" as the first, eliminating confusion regarding the current procedure for age discrimination claims.

New Administrative Procedure

The law also creates O.R.C. § 4112.051, which outlines the OCRC's procedure and obligations with respect to an employment discrimination charge brought by a complainant-employee. An employee is responsible for initiating the process by filing a charge in writing and under oath with the OCRC

within two years of the alleged discriminatory practice. The OCRC then proceeds by initiating a preliminary investigation "to determine whether it is probable that an alleged unlawful discriminatory practice . . . has occurred or is occurring." The OCRC is prohibited from making information obtained through its probable cause investigation public until a finding of probable cause or no probable cause is issued. Importantly, a complainant may request in writing that the commission cease its investigation and issue a notice of right to sue before the OCRC reaches a finding. In such a case, the complainant is precluded from refiling a charge with the OCRC.

If the OCRC reaches a finding of no probable cause, the Commission is to (1) notify the complainant that it will not issue a complaint in the matter and (2) issue a notice or right to sue to the complainant. If the OCRC does find probable cause, it is to notify the complainant and allow the complainant to withdraw the charge and file a civil action. If the complainant chooses to proceed with the OCRC, the OCRC "shall endeavor to eliminate the alleged unlawful discriminatory practice" via informal methods, including conference, conciliation, persuasion, and alternative dispute resolution.

If, after these informal methods are undertaken by the OCRC, the Commission believes that the discriminatory practice has not been eliminated, the Commission will issue a complaint, with a hearing before the Commission to follow. Both complainant and respondent are entitled to be represented at the hearing, with the complainant represented by the attorney general. If, following the hearing, the Commission finds unlawful discriminatory practices, the Commission will issue a cease and desist order and may award rehiring, reinstatement, or promotion, as well as back pay and restoration to union membership, where applicable. Failure to find discriminatory practices through the hearing will result in dismissal of the administrative complaint.

Codifies *Faragher-Ellerth* Affirmative Defense and Eliminates Individual Liability

The law also codifies a new affirmative defense to claims of hostile work environment sexual harassment claims. Specifically, where the hostile work environment did not result in adverse "tangible employment action" as defined by the statute, the employer may assert an affirmative defense where the employer can prove:

1. It maintained an effective harassment policy;
2. It properly educated employees about the policy and complaint procedures;
3. It exercised reasonable care to prevent or promptly correct the harassing behavior; and
4. The complainant failed to take advantage of the preventative or corrective actions.

Finally, the law eliminates individual statutory liability for the employee's "supervisor, manager, or [an]other employee" unless that supervisor, manager, or other employee is the employer.

Effective Date

The law will become effective on the 91st day following Governor DeWine's signature, which is April 13, 2021.

Implications for Employers

This law presents a significant paradigm shift in favor of employers, imposing significant hurdles before a prospective plaintiff may bring a lawsuit against his or her employer alleging employment discrimination. Importantly, the law precludes any recourse other than what is explicitly noted in the law, clarifying that "**the procedures** and remedies for unlawful discriminatory practices relating to employment **in this chapter are the sole and exclusive procedures and remedies available** to a person who alleges such discrimination actionable under this chapter." Equally importantly, the law's universally-reduced statute of limitations for these claims reduces the maximum look-back period for which employers need to be concerned about future employment discrimination liability.

For more information, please contact a member of Benesch's Labor & Employment Practice Group.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.

Corey Clay at cclay@beneschlaw.com or 216.363.4158.

Eric M. Flagg at eflagg@beneschlaw.com or 216.363.6196.