

## Ohio's New Anti-Discrimination Statute

On Dec. 22, the Ohio Senate passed the Employment Law Uniformity Act - HB 352. Governor Mike DeWine signed the bill into law on Jan. 12, 2021.

The bill is the culmination of 20 years of work by the Ohio Chamber of Commerce to address expansion of Ohio's anti-discrimination statute resulting from Ohio Supreme Court decisions that interpreted Ohio Revised Code Section 4112 expansively. HB 352 alters Ohio's anti-discrimination statute by:

- Lowering the statute of limitation for civil workplace discrimination actions from six years to two years;
- Requiring the exhaustion of administrative remedies at the Ohio Civil Rights Commission prior to commencing a lawsuit;
- Removing personal liability for managers and supervisors;
- Providing an affirmative defense to harassment claims to employers who take appropriate action to prevent and promptly correct harassing behavior in the workplace; and
- Modifying the process of filing and bringing an age discrimination action.

### **Statute of Limitation**

Ohio's current six-year statute of limitation on civil actions for employment discrimination was not set by the legislature, but instead by the Supreme Court of Ohio with its decision in *Cosgrove v. Williamsburg of Cincinnati Management Company, Inc.*, 70 Ohio St.3d 281 (1994). It is the nation's longest limitation period for discrimination claims.

In addition to civil actions for workplace discrimination, individuals can pursue administrative remedies at the Ohio Civil Rights Commission (OCRC) within the 180-day statute of limitation.

The Employment Law Uniformity Act amends the statute of limitation for filing a civil action and a charge with OCRC by creating a uniform two-year statute of limitation for workplace discrimination in both civil and administrative actions.

### **Exhaustion of Administrative Remedies**

Currently in Ohio, workplace discrimination claims can be filed with the OCRC *or* in a county court of common pleas. Current state law does not preclude individuals from filing a charge with OCRC and a civil lawsuit simultaneously. Under the Employment Law Uniformity Act, an individual cannot file a civil action unless a timely charge has been filed with the OCRC and the OCRC has either issued a right-to-sue notice or more than 45 days have passed and no right-to-sue notice has been issued. The statute of limitation to file a civil claim will be tolled while the claim is investigated by OCRC.

### **Individual Supervisor Liability**

Individual supervisor liability was first recognized by the Supreme Court of Ohio in *Genaro v. Cent. Transport, Inc.*, 84 Ohio St.3d 293 (1999). In *Genaro*, the Court extended Ohio's

employment discrimination law by allowing plaintiffs to sue individual supervisors, in addition to the employer, for discrimination.

Under the Employment Law Uniformity Act, as in federal law, individual supervisors or managers cannot not be held personally liable under the employment law statutes when that individual is acting in the interest of an employer (unless that individual is the employer).

The act does not protect supervisors and managers from being found personally liable if it is determined the individual acted outside the scope of their employment, retaliated against the plaintiff, or engaged in discriminatory practices.

### **Affirmative Defense**

The Employment Law Uniformity Act codifies the affirmative defense available to employers for sexual harassment claims under Title VII, the federal law that, among other things, makes workplace sexual harassment illegal. The defense, often referred to as the “*Faragher/ Ellerth* affirmative defense” provides employers with a defense to hostile work environment claims when the employer can show that it had anti-harassment policies and complaint procedures in place and the employee failed to take advantage of these policies and procedures.

Specifically, the Employment Law Uniformity Act grants an employer the ability to raise an affirmative defense in hostile work environment harassment claims if it can prove ***all of the following***:

- That it had an effective harassment policy;
- That it properly educated employees about the policy and complaint procedures;
- That it exercised reasonable care to prevent or promptly correct the harassing behavior; and
- That the complainant failed to take advantage of any preventative or corrective opportunities.

The Employment Law Uniformity Act provides exceptions in the event a complainant can prove that taking preventative or corrective action would have failed or would have been futile. Also, the affirmative defense cannot be used when the alleged unlawful discriminatory action resulted in adverse, tangible employment action against the complainant, such as failure to hire or promote, firing, or demotion.

### **Age Discrimination**

In Ohio, age discrimination claims can be pursued under multiple statutory remedies, unlike discrimination claims based upon the other recognized protected classes. The Employment Law Uniformity Act aligns the procedural requirements for filing age discrimination claims with all other protected classes. These causes of action are subject to the same two-year statute of limitation and administrative exhaustion requirements as other discrimination claims and will still allow a plaintiff to make the choice of seeking either monetary or injunctive relief.