Senate Bill 268 - Employment Discrimination Reform
Ohio Manufacturers' Association
Betsy Swift and Jill Bigler, Bricker & Eckler LLP
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Senate Bill 268, which Senator Bill Seitz (R-Cincinnati) recently introduced, proposes to comprehensively overhaul Ohio's employment discrimination statutes in a manner that would benefit employers and bring Ohio's laws more in line with federal discrimination laws, but would continue to provide individuals avenues to assert state law discrimination violations. We have highlighted the key provisions below.

- **Adopt a 1-year statute of limitations for all employment discrimination claims.**

Current law: Depending on the type of claim, individuals currently have between 180 days and six years to file an employment discrimination lawsuit in court.

Proposed change: This bill seeks to reduce that timeframe to one year and apply it to *all* discrimination claims. *See* R.C. 4112.052(B); R.C. 4112.99(C). This will provide consistency to the discrimination statutes and bring Ohio more in line with federal discrimination laws, which have a much shorter statute of limitations than Ohio's 6 year period.

In addition to shortening the timeframe for filing employment discrimination claims, the bill also creates a one-year statute of limitation for other employment-related claims filed against employers, including promissory estoppel, breach of implied contract, and intentional infliction of emotional distress. *See* R.C. 2305.071(B).

- **Eliminate personal liability for managers and supervisors.**

Current law: Managers and supervisors can be held personally liable for their own discriminatory acts under Ohio's employment discrimination statutes. This is the case despite the fact that federal discrimination statutes (e.g., Title VII, ADA) do not provide for such liability. Frequently, managers and supervisors are named individually in lawsuits.

Proposed change: This bill would bring Ohio's statute in line with its federal counterpart by eliminating personal liability for managers and supervisors. Section R.C. 4112.08(A) states that no person may bring an employment discrimination claim against supervisors, managers, or other employees. Additionally, "employer" is no longer defined to include any person acting directly or indirectly in the interest of an employer. *See* R.C. 4112.01(A)(2).

While opponents of the bill have expressed concern that eliminating individual liability for managers and supervisors will protect sexual harassers, this is not the case. The bill states that it does not intend to abrogate statutory claims that may exist outside Chapter 4112 or any common-law remedies, such as claims for assault, battery, and intentional infliction of emotional distress. And, employers will continue to be exposed to liability for the unlawful acts of their supervisors and managers.

- **Cap non-economic and punitive damages based on the size of the employer.**

Current law: There are no caps on the amount of damages an employee can recover against the employer.

Proposed change: If the employer employs 4 – 100 employees, non-economic and punitive damages are capped at $50,000. If the employer employs 101 – 200 employees, non-economic and punitive damages are capped at $100,000. If the employer employs 201 – 500 employees, non-economic and punitive damages are capped at $200,000. If the employer employs more than 500 employees, non-economic and punitive damages are capped at $300,000. *See* R.C. 4112.14. These caps are consistent with the caps set by the Civil Rights Act of 1991 for federal discrimination claims.

- **Age discrimination claims are subject to the same procedures and remedies as every other protected class.**

Current law: Chapter 4112 contains four different ways an employee can file an age discrimination claim against an employer, each with a different statute of limitations, different procedures, and different remedies. Because there is no reason to treat age differently than other protected classes, these statutes create unnecessary complications and confusion for both employers and employees.

Proposed change: By eliminating the specific age discrimination provisions (Sections 4112.02(N) and 4112.14), age discrimination claims would be treated the same as every other type of employment discrimination claim in Ohio. This change would bring much-needed clarity to age discrimination claims.

- **Require individuals to elect between filing an administrative charge with the Ohio Civil Rights Commission (OCRC) or filing a discrimination lawsuit in court.**

Current law: Except for age discrimination claims, an individual can elect to file a charge of discrimination with the OCRC and/or file a lawsuit in court. Some age discrimination claims, however, are subject to an election of remedies. In those cases, an individual must elect between filing a charge of discrimination with the OCRC or filing a lawsuit, but cannot do both.

Proposed change: The bill provides that if an individual files any charge of discrimination with the OCRC, the individual is then prohibited from bringing a civil action that is based, in whole or in part, on the same allegations and practices *and* the charge is still pending with the OCRC. *See* R.C. 4112.04(A)(11)(a); R.C. 4112.053(B). The individual is not prohibited from

filing a lawsuit in court once the charge is no longer pending with the OCRC, and the statute of limitations to file a lawsuit is tolled while the charge is pending. *See* R.C. 4112.053(C).

Conversely, an individual many not file a charge of discrimination if he or she has brought a lawsuit that is pending and is based, in whole or in part, on the same allegations and practices. *See* R.C. 4112.053(A).

The purpose of requiring an individual to elect his or her remedies is to prevent an employer from having to defend a case in two different forums and to prevent an individual from recovering twice for a single wrong.

- **Offer mediation only *after* the OCRC determines there is probable cause that discrimination has occurred.**

Current law: The OCRC currently offers the parties the option of engaging in mediation as the first step after a charge is filed, but before the OCRC conducts its investigation. On average, the OCRC successfully resolves a high percentage of all cases that choose mediation.

Proposed change: The bill provides for mediation through the OCRC only *after* the OCRC determines there is probable cause to find discrimination. *See* R.C. 4112.051(E)(1). In the event the parties do not agree to mediate, the OCRC will attempt to eliminate the alleged unlawful discriminatory practices by informal methods of conference, conciliation, and persuasion. The reality of the latter process is often a demand by the OCRC for the employer to provide a "make whole" remedy to the individual.

While delaying mediation until after the OCRC determines that the charge has merit might discourage some individuals from filing baseless charges with the hope of getting a quick settlement (although not all individuals have this level of understanding of the process), employers would have incurred the time and expense of responding to a charge before the possibility of OCRC mediation. That said, there is nothing preventing the parties from resolving the charge early on in the process without the assistance of the OCRC.

- **Establish a statutory affirmative defense to discrimination claims where the alleged unlawful discriminatory practice does not result in an adverse, tangible employment action against the individual.**

Current law: There are no statutory affirmative defenses available to employers under Ohio's discrimination statutes. However, a common law defense is available to employers as a result of two U.S. Supreme Court cases: *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). This defense is colloquially referred to as the *Faragher-Ellerth* defense and is commonly raised in federal court proceedings in response to harassment or hostile work environment claims.

Proposed change: The bill provides employers with a statutory affirmative defense to discrimination claims if the alleged unlawful discriminatory practice did not result in an "adverse, tangible employment action" and the employer proves: (1) the employer exercised

reasonable care to prevent or promptly correct the unlawful discriminatory practice or behavior; *and* (2) the employee alleging the unlawful discriminatory practice unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer, utilize a complaint procedure, or to avoid harm otherwise. *See* R.C. 4112.054(B)(1) and (B)(2). An "adverse, tangible employment action" means an action resulting in "material economic detriment such as failure to hire or promote, firing, or demotion." R.C. 4112.054(A).

For the employer to show that it exercised reasonable care, it must show that it promulgated an applicable, reasonable anti-discrimination or anti-harassment policy that includes a complaint procedure, provided that the employer does all of the following: (a) publishes and distributes the policy to employees and managers; (b) informs employees about the prohibited conduct and complaint procedure; (c) publishes and enforces a reasonable policy prohibiting retaliation for reporting, participating in investigations, or opposing harassment or discrimination; (d) acts upon internal complaints concerning discrimination, harassment, or hostile work environments in a prompt and reasonable manner; and (e) enables an employee alleging discrimination, harassment, or a hostile work environment to pursue a complaint through individuals that are not the individual or individuals that are alleged to have committed such violations. *See* R.C. 4112.054(B)(1).

The affirmative defense is not available if the employee can show that use of the preventative or corrective opportunities provided by the employer would have been futile, or as mentioned above, the alleged unlawful practice resulted in an adverse, tangible employment action. *See* R.C. 4112.054(C) and R.C. 4112.054(A), respectively.

The bill essentially codifies the *Faragher-Ellerth* defense and expands it to apply to all forms of discrimination. As stated by proponents of the bill, the purpose of the defense is to encourage employers to implement meaningful anti-discrimination policies and foster a work environment that is fair and tolerant. This defense will give human resources professionals the first opportunity to resolve personnel complaints and rectify detrimental workplace behavior before it results in costly litigation.