



Ohio Legislative Service Commission

Bill Analysis

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(As Introduced)

Sens. Coley, Seitz, Jordan, Hite

BILL SUMMARY

- Restricts the definition of employer for the purpose of making discrimination claims with the Ohio Civil Rights Commission (OCRC) or bringing a civil action, excluding any person acting directly or indirectly in the interest of an employer.
- Restricts the definition of employer for the purpose of making discrimination claims or bringing a civil action to individuals employing four or more people in each of 20 or more calendar weeks, potentially excluding seasonal employers.
- Exempts religious organizations making decisions related to ministerial capacities from potential liability related to discriminatory practices.
- Makes a separate procedure for OCRC to follow when investigating a charge of discrimination related to employment.
- Prohibits claimants from pursuing both civil actions and OCRC claims relating to discrimination in the workplace.
- Changes the time in which civil actions related to discrimination in the workplace can be brought under Ohio law to 365 days from six years generally, and 180 days for certain age discrimination claims.
- Requires that civil actions against an employer alleging a claim of breach of implied contract, intentional infliction of emotional distress, or promissory estoppel be commenced within one year after the action accrued.
- Requires that civil actions related to discrimination in the workplace brought under federal law be brought within two years, which appears to be no change when compared to current law.

- Prescribes, for employers, an affirmative defense to liability resulting from an alleged unlawful discriminatory practice related to employment.
- Limits the amounts that can be awarded to individuals subsequent to civil actions related to discrimination brought under Ohio law, mirroring caps set in federal law.
- Specifies that the remedies for unlawful discriminatory practice set in the Ohio Civil Rights Law are the sole remedies for an aggrieved individual.
- Specifies that nothing contained in the Ohio Civil Rights Law is to be interpreted as altering, amending, or abrogating specified veterans' rights.

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CONTENT AND OPERATION

Definition of employer

The bill restricts the definition of employer for the purpose of making discrimination claims with the Ohio Civil Rights Commission (OCRC) or bringing a civil action for discrimination and a qualified immunity relating to employees with HIV.¹ The bill reduces the number and type of individuals who could be held accountable or liable for such actions.

¹ R.C. 4112.01(A)(2) and R.C. 3701.249, not in the bill.

Religious exemption

The bill exempts religious organizations making decisions related to ministerial capacities from potential liability related to discriminatory practices in employment. This means that, under the bill, a person could not bring either a civil suit or a complaint with OCRC against a religious organization for a job decision related to a ministerial position. The bill defines neither ministerial capacity nor religious organization.² The bill states that it is the General Assembly's intent, in creating this exception, to follow the holding of the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*. In that case, the Court recognized a "ministerial exception" regarding discrimination actions under federal law concerning the hiring of ministers, based upon the First Amendment to the U.S. Constitution.³

Agents of employer

The bill removes "any person acting directly or indirectly in the interest of an employer" from the definition of employer.⁴ Furthermore, the bill provides that "no person has a cause of action or claim [. . .] against a supervisor, manager, or other employee of an employer, unless that [employee] is the employer."⁵

Uncodified law included in the bill indicates that the intent of this change is to exclude managers and supervisors from personal liability in discrimination civil suits and claims. This section indicates the intent to supersede an Ohio Supreme Court case in which it was concluded that a supervisor can be held jointly, or individually, liable with the employer for discrimination claims.⁶ The changes discussed above are likely to achieve this effect, but the bill might also potentially exclude other third parties acting in the interest of the employer that are not necessarily managers or supervisors, such as personnel consultant firms responsible for direct hiring or personnel audits.

Private employers

Current law subjects a private employer to the Ohio Civil Rights Law only if the private employer employs four or more employees within Ohio. The bill additionally limits the application of the Ohio Civil Rights Law to private employers by additionally requiring the employer to employ four or more people for each working day in each of

² R.C. 4112.02(A).

³ 132 S. Ct. 694 (2012) and Section 3 of the bill.

⁴ R.C. 4112.01(A)(2).

⁵ R.C. 4112.08(A).

⁶ Section 3 of the bill; *Genaro v. Central Transport, Inc.*, 84 Ohio St.3d 293, 1999-Ohio-353.

20 or more calendar weeks in the current or preceding calendar year.⁷ This change would likely exclude small seasonal or part-time employers from the definition of employer for the purposes of making discrimination claims.

Separate procedure for employment discrimination claims

The bill creates a separate procedure for OCRC to follow when investigating a charge of discrimination in the workplace.⁸ The procedure set out under the bill is largely similar to the current law requirements for hearing all discrimination charges made under the Ohio Civil Rights Law. Under current law, complaints go through the following general stages with OCRC:

- Initial mediation, attempting to bring both parties to agreement prior to investigation;
- Preliminary investigation, to determine if the claim meets all requirements and has merit;
- Recommendation to pursue or dismiss the complaint based upon probable cause;
- Informal methods of conference, conciliation, and persuasion to eliminate the practice;
- Issuance of a complaint if the informal methods are unsuccessful;
- Administrative hearing;
- Issuance of orders or dismissal of claim.⁹

The current procedure covers claims of discrimination related to employment, commerce (with the exception of housing, which is covered under a separate procedure), retribution for opposing a discriminatory practice, and aiding a discriminatory practice or obstructing a person from complying with the Ohio Civil Rights Law.¹⁰

⁷ R.C. 4112.01(A)(2).

⁸ R.C. 4112.051 and conforming changes in R.C. 4112.05, 4112.054, and 4112.055.

⁹ R.C. 4112.05 and the Ohio Civil Rights Commission Complaint Procedure, found at: http://crc.ohio.gov/complaint_procedure.htm (visited December 4, 2012).

¹⁰ R.C. 4112.02 and 4112.05(B).

Under the bill, the procedure for conducting discrimination claims related to employment would differ from current law in the following ways:

- An employment-discrimination claim must be filed within 365 days,¹¹ as opposed to six months under current law.¹²
- If OCRC determines that it is probable that an unlawful discriminatory practice occurred, OCRC may invite the parties to engage in mediation (before attempting to informally resolve the dispute of the conference, conciliation, and persuasion).¹³
- The complaint must be served on the respondent, the complainant, and any indispensable party; under current law, the complaint must be served on any person, including the respondent, the complainant, and any aggrieved person other than the complainant on whose behalf the complaint was issued.¹⁴
- The bill eliminates as a venue for the hearing the county in which the respondent resides.¹⁵
- The bill eliminates the right of aggrieved persons who claim an interest in the subject of the hearing (but who have not been joined) to appear, present evidence, examine witnesses, and be represented by counsel.¹⁶
- If at the conclusion of the hearing, OCRC determines that the respondent has not engaged in an unlawful discriminatory practice, the bill expressly requires that the order dismissing the complaint be served upon the respondent and any other affected party; current law only requires that it be served upon the complainant.¹⁷

¹¹ R.C. 4112.051(B).

¹² R.C. 4112.05(B)(1).

¹³ R.C. 4112.051(F).

¹⁴ R.C. 4112.051(G).

¹⁵ R.C. 4112.05(B)(5) and 4112.051(G)(1).

¹⁶ R.C. 4112.05(D).

¹⁷ R.C. 4112.05(H) and 4112.051(I).

- There is no deadline for formal complaints to be issued; under current law, a formal complaint must be issued by OCRC within one year after the initial charge was filed.¹⁸

Similar to current law, in those situations where OCRC determines that it is not probable that an unlawful discrimination has occurred, all information related to the complaint is considered confidential. However, OCRC may share such information with its legal counsel. In the situations where, after the preliminary investigation, OCRC determines that it *is* probable that unlawful discrimination has occurred, then the information related to the complaint is a public document.¹⁹

Prohibitions related to civil actions

Both current law and the bill prohibit a person from pursuing both a civil action and a complaint with OCRC in the case of age discrimination.²⁰ Under the bill, the prohibition is expanded to claims related to employment discrimination.²¹ Under the current law prohibition, any person who has filed a complaint related to age with OCRC, and then dropped the complaint has been barred from pursuing a civil action.²² It is likely that, under the bill, claims related to employment would be treated in a similar manner. Conversely, a person who has filed a civil suit alleging employment discrimination is prohibited from filing an administrative complaint with OCRC.²³

Under the bill, OCRC is required to notify an individual who files a charge of discrimination related to employment that the person is barred from bringing a civil action under the Ohio Civil Rights Law.²⁴

The bill maintains arbitration as the sole remedy available to a person who is discharged and who alleges age discrimination, in those situations where arbitration is available.²⁵

¹⁸ R.C. 4112.05(B)(7).

¹⁹ R.C. 4112.051(E) and (F)(1) and 4112.05(B)(2) and (4).

²⁰ R.C. 4112.02(N) and 4112.08 and R.C. 4112.14(B) (repealed by the bill).

²¹ R.C. 4112.051(C).

²² *Vinson v. Diamond Triumph Auto Glass, Inc.*, 149 Ohio App.3d 605; 2002-Ohio-5596.

²³ R.C. 4112.052(B).

²⁴ R.C. 4112.04(A)(11).

²⁵ R.C. 4112.052(C) and R.C. 4112.14(C) (repealed by the bill).

Changes to statutes of limitations

Cases brought under state law

The bill makes several changes to the time in which civil actions may be instituted. First, the bill requires that civil actions related to discrimination in relation to employment be instituted within 365 days after the alleged discriminatory practice took place.²⁶ Under current law, the Ohio Civil Rights Law does not specify a statute of limitations for such civil actions. However, the Supreme Court of Ohio held that the general six-year statute of limitations for statutory liabilities other than forfeiture or penalties applies.²⁷ Currently, unless an action is brought under R.C. 4112.14 (see "**Age discrimination action consolidated**," below), the six-year limitation does not apply to age discrimination cases, for which the period for filing a civil action is 180 days. Actions brought under R.C. 4112.14 *are* subject to the six-year limitation. Under the bill, all age discrimination cases would have the same statute of limitations of 365 days.²⁸

The bill also requires that civil actions against an employer alleging a claim of breach of implied contract, intentional infliction of emotional distress, or promissory estoppel be commenced within one year after the cause accrued.²⁹ "Promissory estoppel" is a method to enforce a promise that fails to meet the requirements of a contract. According to *Black's Law Dictionary*, 9th edition, it is the principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment. The bill specifies that the one-year limitation is not to be interpreted as prohibiting or limiting an employee's use of evidence of promissory estoppel, breach of implied contract, or intentional infliction of emotional distress on the part of the employer as an affirmative defense against an action brought by an employer against the employee.³⁰

Cases brought under federal law

The bill requires that civil actions based on 42 U.S.C. 1981a, 42 U.S.C. 1983, or 42 U.S.C. 1985 be brought within two years after the cause of action accrues, but this

²⁶ R.C. 4112.052(A).

²⁷ *Cosgrove v. Williamsburg of Cincinnati Management Company, Inc.*, 70 Ohio St.3d 281, 1994-Ohio-295.

²⁸ R.C. 2305.07, 4112.02(N), and 4112.052(A).

²⁹ R.C. 2305.07 and 2305.071.

³⁰ R.C. 2305.071(B).

period of limitations does not apply to causes of action based on 42 U.S.C. 1981.³¹ There is no statute of limitations for these violations set in federal law. As such, the courts have used state law as a guide.³² Claims made under these sections of federal law are deemed general personal injuries and the courts have applied the Ohio two-year statute of limitation.³³ Thus, for claims of this type, the bill would have no impact.

Affirmative defense

The bill prescribes what an employer must prove, by a preponderance of the evidence, to raise an affirmative defense to liability resulting from an unlawful discriminatory practice relating to employment. The affirmative defense has two basic elements. First, the employer must show that the employer exercised reasonable care to prevent or promptly correct the unlawful discriminatory practice or harassing behavior. This portion of the affirmative defense may be satisfied by demonstrating that the employer promulgated an applicable, reasonable anti-discrimination or anti-harassment policy that includes a complaint procedure. This first prong of the defense is dependent upon the employer having done all of the following:

- Publishing and distributing the policy to its employees and managers;
- Informing employees of the prohibited conduct and complaint procedure;
- Publishing and enforcing a reasonable policy prohibiting retaliation for reporting, participating in investigations, or opposing harassment or discrimination;
- Acting upon internal complaints concerning discrimination, harassment, or hostile work environments in a prompt and reasonable manner;
- Enabling an employee alleging discrimination, harassment, or a hostile work environment to pursue the complaint through those alleged to have engaged in such conduct.

Second, the employer must show that the employee alleging the unlawful discriminatory practice failed to take advantage of any preventive or corrective opportunities provided, including failure on the part of the employee to use a complaint procedure provided by the employer. An employer does not satisfy the

³¹ R.C. 4112.052(D).

³² *Vodila v. Clelland*, 836 F.2d 231, 1987 U.S. App. Lexis 16818.

³³ *Owens v. Okure*, 488 U.S. 235 (1989); *Durante v. Ohio Civil Rights Commission*, 902 F.2d 1568, 1990 U.S. App. Lexis 8558.

second prong if the employee alleging discrimination can demonstrate that use of the preventive or corrective opportunities provided would have been futile. Additionally, this affirmative defense is unavailable to those employers where the alleged unlawful discriminatory practice resulted in an adverse, tangible employment action against the employee making the allegation.³⁴ An "adverse, tangible, employment action" is an action that results in material economic detriment to the employee, such as failure to hire or promote, firing or demoting the employee.³⁵

Limitations on damages

The bill places limitations on the amounts that can be awarded to individuals for noneconomic losses and punitive damages, dependent upon the size of the employer in question. These limitations largely mirror the caps set forth in federal law in the "Civil Rights Act of 1991"³⁶ with the only difference being that, under federal law, the lowest tier applies to employers employing between 14 and 100 employees, as opposed to between 4 and 100 under the bill. This difference reflects Ohio's definition of "employer" under the Ohio Civil Rights Law. The award limitations are shown in the table below.

Award Limitations Based on Number of Employees	
Number of employees	Noneconomic and punitive damages cap
4 to 100	\$50,000
101 to 200	\$100,000
201 to 500	\$200,000
501 +	\$300,000

When determining which cap applies, to be counted, employees must be employed in each of 20 or more calendar weeks in the current or preceding calendar year.³⁷

"Noneconomic loss" means nonpecuniary harm that results from an injury or loss to person or property. It includes intangible losses such as pain and suffering, loss of

³⁴ R.C. 4112.053.

³⁵ R.C. 4112.053(D).

³⁶ 42 U.S.C. 1981a(b)(3).

³⁷ R.C. 4112.14.

consortium, and mental anguish. "Economic loss" means any of the following types of pecuniary harm: (1) lost compensation, (2) expenditures for medical care, rehabilitation services, or other services, products, or accommodations, and (3) other expenditures incurred as a result of an injury or loss to person or property, other than attorney's fees.³⁸

Prohibited claims

The bill specifies that the procedures and remedies for unlawful discriminatory practices set forth in the Ohio Civil Rights Law are the sole and exclusive procedures and remedies for such a practice. Causes of action based on public policies embodied in that law or in state, federal, or local fair employment laws are specifically barred.³⁹ Uncodified language included in the bill specifies that the intent of this change is that common law claims for wrongful discharge are not to be available for actions arising out of an unlawful discriminatory practice.⁴⁰

To provide some context, common law is the term used to describe non-legislative law determined by court decisions. Previous court decisions have held that the intent of the legislature in enacting the Ohio Civil Rights Law was to provide a range of remedies by which an employee could combat discrimination, and have allowed civil actions related to workplace discrimination under common law, meaning that different limitations and restrictions apply to these actions than to actions brought under the Ohio Civil Rights Law.⁴¹

Veterans' rights

The bill specifies that nothing contained in the Ohio Civil Rights Law is to be interpreted as altering, amending, or abrogating R.C. Chapters 5903. and 5906.⁴² Chapter 5903. deals with general veterans' rights related to topics such as reemployment after military service, training programs, and continuing education. Chapter 5906. pertains to leave and employment benefits of spouses or family members of an individual called to active duty.

³⁸ R.C. 2315.18, not in the bill.

³⁹ R.C. 4112.08(B).

⁴⁰ Section 3 of the bill.

⁴¹ *Helmick v. Cincinnati Word Processing, Inc.*, 45 Ohio St.3d 131 (1989).

⁴² R.C. 4112.08(C).

Age discrimination actions consolidated

Under current law, an individual who feels that the individual has been discriminated against because of age in an employment decision can file a civil action under either R.C. 4112.02, the general prohibition against unlawful discriminatory practices based on age or R.C. 4112.14, which prohibits an employer from discriminating in any job opening against any applicant or discharging without just cause any employee aged 40 or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee. The bill repeals the action made available under R.C. 4112.14.⁴³ Actions brought under R.C. 4112.14 were subject to a six-year statute of limitations.⁴⁴ Under the bill, all age discrimination claims are subject to the 365-day limitation described above.

Definitions

Age

The bill changes the definition of "age" as it relates to discrimination claims. Under current law, the definition of age is at least 40 years old. Under the bill, "age" means an *individual* aged 40 years or older. (See **COMMENT**.)⁴⁵

Unlawful discriminatory practice relating to employment

The bill defines unlawful discriminatory practice relating to employment as those practices related to employment that are prohibited under R.C. 4112.02(A), (B), (C), (D), (E), and (F).⁴⁶ The term also includes retaliatory practices, practices that assist or compel someone to commit an unlawful discriminatory practice, and practices that obstruct or prevent compliance with the Ohio Civil Rights Law prohibited by R.C. 4112.02(I) or (J) and that are related to a practice prohibited by the previous provisions.

COMMENT

The definition of age contained in the bill is potentially problematic. The inclusion of the word "individual" to define a characteristic of an individual is problematic because it is both redundant and circular.

⁴³ R.C. 4112.14 (repealed) and R.C. 4112.02(N) and (O) and 4112.08.

⁴⁴ *Howe v. City of Akron*, 789 F.Supp.2d 786, 802 (N.D. Ohio 2010).

⁴⁵ R.C. 4112.01(A)(14).

⁴⁶ R.C. 4112.01(A)(24).

HISTORY

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