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Maryland Employers Confronted with Additional Liability as a Result of the Newly Enacted Anti-Discrimination Measure

Carla Murphy
410-347-7680
cnmurphy@ober.com

Neil Duke
410-347-7598
neduke@ober.com

Stacy Bekman Radz
410-347-7596
sradz@ober.com

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Earlier this year, without a great deal of public attention, the General Assembly passed Senate Bill 678/House Bill 314, commonly referred to as the Civil Rights Preservation Act of 2006. In April 2007, the Bill was signed by Governor Martin O'Malley. Despite the lack of public awareness, the new law drastically altered the playing field for litigating employment discrimination cases in the State of Maryland by creating a private cause of action under Article 49B in state court.

To gain a real appreciation of the impact that this change will have on Maryland employers, a basic understanding of the relevant statute in its prior form is necessary. Maryland Article 49B prohibits discrimination in employment. Like Title VII and other federal anti-discrimination statutes, Article 49B precludes discrimination on the basis of race, color, religion, sex, age, national origin and physical or mental handicap. Unlike Title VII and its related federal statutes, Article 49B also prohibits discrimination on the basis of familial status, marital status, sexual orientation, and genetic testing.

Prior to the amendment of Article 49B, enforcement of the state law prohibiting discrimination was limited. The Maryland Commission on Human Relations ("MCHR") was empowered to receive charges of investigation and then attempt to resolve the claim through conciliation, and/or to refer the claim to a hearing examiner if circumstances warranted such an outcome. State law did not extend any rights to private individuals. Thus, in the past, a complainant's only relief under Article 49B was to file an administrative complaint with the MCHR and then rely upon that agency's investigation. At the conclusion of the MCHR's administrative investigation, an

employee was free to file suit in federal court under Title VII (if the employee also had filed his or her charge of discrimination with the EEOC), but the employee could not file suit in state court under Article 49B.

The Civil Rights Preservation Act of 2006, which took effect on October 1, 2007, changed that. For the first time, if the MCHR believes that a charge of discrimination is meritorious, it may elect to file a cause of action in the circuit courts based on the employee's charge of discrimination or to take an employee's claim to an administrative judge, who is authorized to award reinstatement, back pay, compensatory damages and/or other appropriate relief to aggrieved employees. Even more significantly, under the newly amended Article 49B, an employee now has the right to bring a private cause of action against his or her employer in state court, in the county where the alleged act of discrimination took place, after waiting 180 days from the filing of an administrative charge. An aggrieved employee may sue his or her employer in state court on state law claims seeking lost wages, compensatory damages, attorneys' fees, punitive damages and costs. As is true under Title VII, non-economic compensatory damages will be capped depending on the size of the employer. For instance, the maximum compensatory damages award that can be levied against an employer with 15 to 100 employees will be $50,000.00. An employer with more than 500 employees could be confronted with compensatory damages of $300,000.00.

In addition, an employer's exposure under Article 49B is broader than it is under Title VII because state law also prohibits discrimination on the basis of familial status, marital status, sexual orientation, genetic information and testing, as well as allowing age discrimination suits by people younger than 40.

Although the ultimate impact is still unclear, this new law and the remedies it provides will be unsettling for many employers (and their lawyers) who must navigate this new terrain. There is considerable concern among many that the new law will result in a dramatic increase in the number of discrimination claims against employers. There is also considerable concern among defense lawyers that their clients will be less able to obtain early dismissal of meritless claims, either through a motion to dismiss or on summary judgment, because the federal courts generally are perceived as being more likely to grant dispositive motions than their state counterparts. The rules of procedure and evidence in state court additionally may prove to be more favorable to a plaintiff employee because they often provide more latitude for claimants than the Federal Rules of Civil Procedure.

Exacerbating this concern is the fact that there is virtually no binding precedent at the outset of this new law to govern the myriad of issues that typically are presented in employment

discrimination cases. The fact that historically there has been no private cause of action under Article 49B means that there are no authorities interpreting the rights granted by that statute, although there is some limited authority interpreting the several Maryland county ordinances outlawing discrimination in employment that might be used to predict how the state courts would interpret Article 49B. Of course, Maryland's state court judges might well decide to rely on the federal authorities interpreting Title VII but they will not be compelled to do so, nor will they be compelled to follow the precedent of the Court of Appeals for the Fourth Circuit. It likely will be at least a decade before the Court of Appeals of Maryland resolves many of the important legal issues in discrimination claims like the relative burden of proof, presumptions, pretext, what constitutes a disability, and so on.

As a preview of what might occur, however, a recent decision by the Court of Appeals of Maryland rejected settled precedent from the United States Supreme Court and, instead, aligned itself with a minority of jurisdictions, when the Court of Appeals held that the start of the limitations period for discrimination claims begins to run when an adverse job action is implemented rather than when the employee received notice of the adverse job action. *Cf, Haas v. Lockheed Martin Corp.,* 396 Md. 469.914 A.2d 735 (2007) (statute of limitation under a county ordinance outlawing disability discrimination begins to run when the adverse job action is implemented against the employee); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* 127 S. Ct. 2162 (2007) (statute of limitations under Title VII begins to run when the adverse job action is announced to the employee). In a prelude of how the Court of Appeals might be more favorably predisposed to an employee's claim than the federal courts, in reaching its decision, the *Haas* Court stated that its ruling was necessary to prevent "sharp" employers from providing "exceptionally long" notice periods prior to termination in an effort to deter employees from filing suit.

Limiting Exposure

In light of the new private cause of action under Article 49B, a number of practical steps can be taken by employers to minimize the risks. The amendment presents another opportunity to encourage employers to adapt, revise, and enforce company-wide anti-discrimination and non-harassment policies. Among other things, supervisors and management personnel should receive training on an ongoing basis to detect and prevent discrimination and harassment. Employers also should require exit interviews any time an employee's employment is terminated. These exit interviews may help to defuse complaints, allow the employer an opportunity to offer to remediate any legitimate problem identified and, more importantly, to hear of the basis of any possible legal claims prior to the employee's departure. An employee who participates in an exit interview and who fails

to register a complaint about any alleged discrimination may find it more difficult later to pursue a discrimination claim with the administrative agency and in court.

The changes in Maryland's anti-discrimination law also make it appropriate for employers to consider requiring employees to enter into mediation agreements, arbitration agreements, or to sign waiver of jury trial agreements. Even the best-behaved employers are aware that discrimination and harassment lawsuits can expose them to unpredictable juries and jury verdicts, particularly in state court. Obviously, one way to avoid a jury trial is to require employees to agree to binding arbitration. However, employers that do not want to commit themselves to binding arbitration may want to consider requiring employees sign an agreement waiving their right to a trial by jury, which might avoid the risk associated with a jury trial, while preserving for both the employer and the employee the formality of the judicial process and the right to appeal an adverse ruling.

Although there is no Maryland authority on jury trial waivers in the employment context, the logic of earlier Court of Appeals decisions upholding an employee's waiver of the right to a jury trial in favor of binding arbitration would tend to support a more limited waiver of the right to a jury trial in favor of a bench trial. As is also true with arbitration provisions, consideration to support an employees' waiver of a jury trial must be provided if a waiver is to be enforceable. That consideration preferably would be provided if the waiver is required at the time an offer of employment is extended or when a promotion or other significant employment benefit is granted; although somewhat more controversial and perhaps open to challenge, employers also may establish consideration to support a jury trial waiver by at-will employees through reciprocal promises to commit disputes to binding arbitration. *See Cheek v United Healthcare of the Mid-Atlantic, Inc.,* 378 Md. 139, 835 A.2d 656 (2003) (mutual promise by employer and employee to commit to binding arbitration would provide consideration to support employee's waiver but finding employer's unilateral right to withdraw arbitration agreement made consideration illusory); *Holloman v. Circuit City Stores, Inc.,* 391 Md. 580,894 A.2d 547 (2006) (mutual promise by employer and employee to arbitrate dispute was supported by consideration even though arbitration clause allowed employer to repudiate arbitration agreement upon 30 days' notice).

There is a clear financial benefit to employers who are able to avoid jury trials of employment related disputes. A 2001 Civil Justice Survey of State Courts done by the United States Department of Justice determined that in 2001 prevailing employees in employment discrimination cases, on average, received a jury award of $218,000, whereas they only received $40,000 from judges. For that reason alone, plaintiffs' counsel and defense counsel are likely to continue

to struggle over the appropriate vehicle for resolution of employment disputes.

Ober, Kaler, Grimes & Shriver

Maryland
120 East Baltimore Street, Baltimore, MD 21202
Telephone **410-685-1120** , Fax 410-547-0699

Washington, D.C.
1401 H Street, NW, Suite 500, Washington, DC 20005
Telephone **202-408-8400** , Fax 202-408-0640

Virginia
407 North Washington Street, Suite 105, Falls Church, VA 22046
Telephone **703-237-0126** , Fax 202-408-0640