

RISKY BUSINESS

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Counselor's Comments

New Legislation Brings Needed Reforms to Ohio Employment Discrimination Law

By Surdyk, Dowd and Turner

On January 12, 2021, Ohio Governor Mike DeWine signed H.B. 352, which will go into effect on April 15, 2021. This new legislation, otherwise known as the Employment Law Uniformity Act (ELUA), brings significant reforms to Ohio's employment discrimination statute, R.C. Chapter 4112. This new legislation simplifies Ohio's former employment discrimination statute and, in many ways, mirrors existing federal employment discrimination statutes.

Ohio's Former Employment Discrimination Statute

The nature of Ohio's former employment discrimination statute placed employers at a competitive disadvantage compared to employers in other states. Among other infirmities, the prior law:

- Had a six-year statute of limitations on civil actions for employment discrimination, which was the longest statute of limitations period in the country;
- Subjected individual managers and supervisors, in addition to the employer, to personal liability for discrimination;
- Provided three different routes for filing employment discrimination claims, each containing different remedies and procedural requirements;
- Lacked any exhaustion of administrative remedies prerequisite before an employee could file suite; and
- Provided no affirmative defense for hostile work environment claims.

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Counselor's Comments (continued)

The Employment Law Uniformity Act

The new legislation revises a number of former deficiencies in Ohio's employment discrimination law. ELUA's major reforms include:

Shortened Statute of Limitations: The new legislation creates a two-year statute of limitations for employees to bring employment discrimination claims. This two-year statute of limitations period applies to both civil and administrative actions and, therefore, creates uniformity and clarity.

Elimination of Supervisor and Manager Liability: The ELUA removes personal liability for individual supervisors and managers, which ensures that individuals in management positions can exercise appropriate judgment without fear of being sued. However, to balance the rights of employees, the new law does not protect supervisors or managers who have acted outside the scope of their employment, retaliated against an employee in violation of R.C. 4112.02(I), or engaged in conduct to aid, abet, incite, compel, or coerce a discriminatory practice in violation of R.C. 4112.02(J).

Greater Clarity for Age Discrimination Claims: The new law simplifies age discrimination claims by providing only a single cause of action that is subject to the same statute of limitations and exhaustion of administrative remedies requirement as all other discrimination claims.

Exhaustion of Administrative Remedies Requirement: Unlike the former statute, the ELUA requires plaintiffs to first exhaust their administrative remedies by filing a discrimination charge with the Ohio Civil Rights Commission before filing suit. Sixty days after filing a charge, the complainant may request a right to sue notice from the Commission. Upon receipt of the right to sue notice, or once 45 days have elapsed since requesting the notice but not receiving it, the complainant may bring a lawsuit.

Affirmative Defense to Hostile Work Environment Claims: The ELUA codifies an affirmative defense that employers can raise in hostile work environment claims. The affirmative defense, which parallels the *Faragher/Ellerth* affirmative defense under federal law, protects employers from liability if the employer can show (1) that it exercised reasonable care to prevent or promptly correct harassing behavior or an unlawful discriminatory practice, and (2) that the employee failed to take advantage of any preventative or corrective opportunities provided by the employer.

Damage Limitations for Employment Discrimination Claims: The new legislation categorizes employment discrimination lawsuits as a "tort action", thereby subjecting such claims to compensatory and punitive damage limitations under Ohio's Tort Reform Act.

The ELUA brings a welcomed change to Ohio's employment discrimination law. The new legislation will provide greater uniformity and predictability for Ohio employers, while still balancing and preserving the critical rights of employees.

FYI

MVRMA Employment Practices Legal Consultation Helpline

By: Tom Judy

MVRMA began offering a new resource in 2018 to assist members with potential – or actual – employment practices claims. I wanted to take this opportunity to remind the membership about the MVRMA Employment Practices Legal Consultation Helpline.

EPL claims and suits are problematic for a variety of reasons. They are among the most costly types of suits to defend and, if necessary, settle. Beyond the dollar cost to the employer – or its insurer – is the cost of a damaged reputation, decreased employee morale and lost productivity.

The best defense against an EPL lawsuit is prevention. A key component of prevention is a robust employee and supervisor training program. In recent years, MVRMA has offered training on a variety of EPL topics including employment law, workplace violence, workplace harassment and discrimination, and the workplace life cycle from hire to termination as well as general supervisory training. Despite the current COVID-related limitations, in 2021 we will be offering some such training in a virtual environment and are hopeful we will be able to resume traditional classroom training soon. Members are encouraged to take advantage of these offerings and to make suggestions to MVRMA staff if there are other topics you would like considered for a future training session.

Another key to controlling EPL claims is to ensure you have adequate access to competent in-house or outside counsel with expertise in employment law to advise you in all employment actions involving significant discipline or termination. Toward that end, effective November 1, 2018, MVRMA implemented its Employment Practices Legal Consultation Helpline. The EPL Helpline is a resource to provide members with access to expert legal advice prior to taking employment actions that could potentially result in an employment practices claim or litigation.

MVRMA contracted with the law firm Mazanec, Raskin & Ryder to provide MVRMA members with access to an attorney in the firm's Employment & Labor Law practice. By contacting this attorney before taking adverse employment actions, MVRMA members may be able to reduce the likelihood of a claim occurring or provide for a successful defense in the event a claim does occur.

Members may receive up to three (3) hours of legal consultation per issue at no cost to the member.

The program encompasses employment matters arising under the Americans with Disabilities Act (ADA), Fair Labor Standards Act (FLSA), Family Medical Leave Act (FMLA), Age Discrimination in Employment Act (ADEA), Title VII (discrimination on the basis of race, color, religion, sex or national origin) and other similar laws, as well as employment matters involving wrongful termination, harassment, retaliation and hostile work environment. The program will not cover benefit plan disputes, collective bargaining issues or union-related matters except as they are tangential to a permissible matter.

The EPL Helpline is designed to supplement the members' existing legal services. It is not intended to replace the members' law director, solicitor or labor counsel.

Please contact MVRMA staff if you have questions about the MVRMA Employment Practices Legal Consultation Helpline.

Loss Control Lowdown...

Essential Workers and the Mental Health Challenges During COVID19

Starr Markworth

The COVID-19 pandemic has had a major effect on all of our lives. Many of us are facing challenges that can be stressful, overwhelming, and cause strong emotions in both adults and children.

According to the CDC, public health actions such as social distancing, are necessary to reduce the spread of COVID-19, but they can make us feel isolated and lonely and can increase stress and anxiety. Learning to cope with stress in a healthy way will make you, the people you care about, and those around you become more resilient.

As the pandemic persists, frontline and other essential workers face particular risk of burnout and poor mental health outcomes. Roughly a third of U.S. adults report being essential workers during the pandemic, meaning they are still required to work outside their home during the pandemic. Surveys conducted in June 2020 found that although a substantial share of all adult workers reported symptoms of anxiety or depressive disorder, essential workers reported these adverse effects more often than non-essential workers (42% vs 30%, as shown in Figure 1). Essential workers, compared to non-essential workers, also reported higher rates of substance use (25% vs 11%) and suicidal thoughts (22% vs 8%). (Kaiser Family Foundation)

Recognize the symptoms of stress you may be experiencing.

- Feeling irritation, anger, or denial
- Feeling uncertain, nervous, or anxious
- Feeling helpless or powerless
- Lacking motivation
- Feeling tired, overwhelmed, or burned out.
- Feeling sad or depressed
- Having trouble sleeping
- Having trouble concentrating

Loss Control Lowdown (Continued)

During the pandemic, physical illness has been the main focus, but in order to stay healthy, you must also pay close attention to your stress levels and your mental health.

- Allow time for you and your family to recover from responding to the outbreak.
- Create a menu of personal self-care activities that you enjoy, such as spending time with friends and family, exercising, or reading a book.
- Take a break from media coverage of COVID-19.
- Ask for help if you feel overwhelmed or concerned that COVID-19 is affecting your ability to care for your family or handle your workload as you did before the outbreak.
- Take care of your body. Take deep breaths, stretch, or meditate. Try to eat healthy, well-balanced meals, exercise regularly, get plenty of sleep and avoid alcohol and drugs.
- Make time to unwind and remind yourself that strong feelings will fade.
- Connect with others. Share your concerns and how you are feeling with a friend or family member.
- Maintain a sense of hope and positive thinking.

There are many resources available if you are struggling with stress and are feeling less like your old self before the pandemic. Do not be afraid to speak to your primary care provider, seek mental health assistance or contact the employee assistance program to get the help you need to get through these tough times.

Other helpful resources:

[Centers for Disease Control: Deal with Stress from COVID 19](#)

[WHO: Coping with Stress During the COVID Outbreak](#)

[Red Cross: Coping with Stress](#)

[Ohio Department of Health: Coping with COVID19 Anxiety](#)

Counselor's Comments

By *Surdky, Dowd and Turner*

EEOC Updates Its Policy Related to Systemic Discrimination

On January 8, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) unveiled a new page on its website titled "Systemic Enforcement at the EEOC." This page explains that the EEOC will make use of its administrative and litigation tools to identify and pursue systemic discriminatory practices of employers.

The EEOC defines "systemic" in its *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission* as "a pattern or practice, policy and/or class cases where the discrimination has a broad impact on an industry, profession, company or geographic location."

The EEOC additionally defines "systemic" as a "bias that is built into systems, originating in the way work is organized," and "patterns of behavior that develop within organizations that disadvantage certain employees and become harmful to productivity." The EEOC's purpose behind identifying and investigating systemic issues is to end patterns, practices, or policies that result in or facilitate decisions that are discriminatory. The EEOC will not only investigate systemic discrimination by employers with large numbers of employees, but also small employers.

The EEOC has identified types of policies that it may look at as potential examples of policies that could result in systemic discrimination:

Hiring/Promotion/Assignment/Referral

- Criminal/credit background checks
- Recruitment practices such as favoring or limited to word-of mouth
- Tap-on- the- shoulder promotion policies
- Steering of applicants to certain jobs or assignments based on race or gender
- Historically segregated occupations or industries
- Job ads showing preference ("young", "energetic", "recent graduate", "men only", "women only")
- Customer preference
- Big data- using algorithm to sort through applications
- Personality or customer service tests; physical ability or capacity tests; cognitive tests
- No rehire of retired workers or hiring of currently employed persons only

Policies/Practices

- Mandatory religious practices by employers who do not qualify as religious organizations
- Paternal leave policies that do not give the same benefits for men and women
- Mandatory maternity leave

Counselor's Comments (continued)

- Fetal protection policies
- English only rules
- Age-based limits on benefits or contributions to pension or other benefits

Lay-off/Reduction in Force/Discharge policies

- Mandatory religious practices by employers who do not qualify as religious organizations
- Paternal leave policies that do not give the same benefits for men and women
- Mandatory maternity leave
- Fetal protection policies
- English only rules
- Age-based limits on benefits or contributions to pension or other benefits

ADA/GINA

- Mandatory religious practices by employers who do not qualify as religious organizations
- Paternal leave policies that do not give the same benefits for men and women
- Mandatory maternity leave
- Fetal protection policies
- English only rules
- Age-based limits on benefits or contributions to pension or other benefits

The EEOC will identify systemic issues based on investigations of individual charges; commission charges under Title VII of the Civil Rights Act; the Americans with Disabilities Act ("ADA"); the Genetic Information Non-Discrimination Act ("GINA"); the Age Discrimination in Employment Act ("ADEA"); and the Equal Pay Act. Additionally, a Commissioner Charge may be issued based on the recommendation of a field office or on a Commissioner's own initiative. Investigations are performed by systemic coordinators, supervisors,

and attorneys, all of whom the EEOC indicates will be able to identify a potentially systemic case. After the identification of potential systemic discrimination, a case may be designated systemic by district office management through consultation between the District Director and Regional Attorney or other systemic designated and legal staff. While employers are notified of EEOC investigations, employers may not be directly notified if a systemic investigation is underway, which is why it is important to involve legal counsel as soon as possible when an employer is being investigated by the EEOC.

In fiscal year 2020, the Office of General Counsel filed 93 merits suits, 13 of which were systemic lawsuits (13.9%). Additionally, there were 41 cases on the EEOC's active litigation docket that were systemic suits, which accounted for 20.3% of the 201 active merit suits in 2020. Finally, the Office of General Counsel resolved 33 systemic cases in 2020, recovering \$69.9 million for approximately 25,000 individuals. As such it is advisable that employers are proactive and audit their policies for any of the above identified policies, or any related issues, before they become a problem. Such policy reviews can be done in house by human resources or a legal team, however, law firms that specialize in employment law, like Surdyk, Dowd & Turner Co., L.P.A, can assist in reviewing your policies and making recommendations to help employers avoid running afoul of the EEOC's regulations and costly lawsuits and settlements.



Broker's Beat

Cyber Update

Insurance carriers are being overwhelmed with ransomware claims and there is no class of business that has been immune to ransomware attacks. No class of business however has been as successfully targeted and with as great of a frequency as public entities and public school systems as this class is believed to be the least prepared due to older software/computer equipment, lack of training and low IT security budgets. The estimated global damage from ransomware in 2020 is estimated at \$20 billion¹. This has resulted in a challenging cyber insurance market.

The public entity sector is now being viewed very closely by insurance company management, and the market is continuing to tighten especially for JPAs/Pools/Public Entities with Protected Health Information. Carriers are also worried about the vast number of members with the same ransomware exposure under the same policy.

This has led to a more critical examination of underwriting information and many insurance companies are now requesting additional information including ransomware supplemental applications. Premium increases are expected and we are seeing reduced capacity and less expansion of coverage terms in the market.

How long will this last? Only time will tell. The next 12 months are critical to watch. If ransomware eases up and no other new form of loss takes its place, the industry could recover quickly.

If you do experience a ransomware incident, the FBI recommends the following steps to protect your network from ransomware including:

- Immediately secure backup data or systems by taking them offline.
- Contact law enforcement immediately.
- Collect and secure partial portions of the ransomed data that might exist.
- Change all online account passwords and network passwords after removing the system from the network.
- Delete Registry values and files to stop the program from loading.

Also notify Beazley, the primary insurance company for the MVRMA Cyber Liability insurance program ASAP.



The Claims File...

Craig Blair

There were two new factors that affected the 2020 Loss Year.

The first factor is the change in the claim reporting threshold for 1st party claims (damages to city property) which was raised from \$1,000 to \$2,500.

The second factor is, of course, the COVID crisis. It has affected all phases of our lives and for the member cities it has caused numerous challenges in the day-to-day services they offer. Members have had to close facilities, cancel programs and events.

These two factors have led to fewer claims being reported by our members. In the 2020 loss year, 235 claims were reported to MVRMA. This number is down significantly (30%) from the previous year's averages. Once COVID is behind us and we are back to normal, we expect more traffic on the roadways, members to re-open facilities, and once again be able to provide more programs and events for the public to enjoy.

If a 3rd party is at fault for damaging city property, this would be considered a subrogation claim and can be reported to our office to handle collection. The members reported 77 subrogation claims to MVRMA for handling. This figure is down from the previous year but these numbers typically fluctuate from year to year. Another COVID-related impacts is that it has also taken longer to get reimbursed by insurance companies.

If any member city, or department, has questions on claims please contact MVRMA.

Calendar of Events

Upcoming Training Events

Due to COVID-19, in-person training events have been temporarily suspended. Visit www.mvrma.com for a list of on-line training opportunities.

Upcoming Board Events

Committee Meetings Via GoToMeeting

Risk Management - February 25th, 10:00 AM

Finance - February 25th, 1:30 PM

Board Meeting

March 15th, 9:30 AM **Via GoToMeeting**

From The Board Room

December 21, 2020

- Approved 2021 Liability Coverage Document
- Approved 2021 Liability Renewal with GEM and Genesis
- Approved Actuarial Surplus Modeling Study
- Approved 2021 Crime Coverage Renewal
- Approved Excess Cyber Coverage
- Approved 2021 Budget
- Approved Bylaw Amendments
- Approved 2021 Meeting Dates