

LEGAL UPDATES

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Service

Labor & Employment

Missouri Legislature Amends Missouri Human Rights Act to Conform with Federal Discrimination Laws and Creates the Missouri Whistleblower Protection Act

In legislation approved by both the Missouri Senate and House on April 13, 2011, the Legislature has presented Governor Jay Nixon with amendments to the Missouri Human Rights Act that will overturn decisions of the Missouri Supreme Court and bring Missouri Law in line with existing federal laws prohibiting discrimination on the basis of race, color, religion, national origin, ancestry, sex age, or disability as interpreted by federal courts. The legislation also establishes the Missouri Whistleblower Protection Act to define the claims that could be brought by whistleblowers and preclude further erosion of the employment-at-will doctrine.

Beginning with the decision of *State ex rel. Diehl v. O'Malley* in 2003, which recognized the right to trial by jury in employment discrimination cases, the Missouri Supreme Court has sought to differentiate the Missouri Human Rights Act from Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the Americans with Disabilities Act. The legislation submitted to the Governor conforms interpretations of the Missouri law to federal court interpretations of analogous federal laws and imposes limits on the damages available under the Missouri Human Rights Act. These Missouri Supreme Court decisions resulted in a lower burden of proof, unlimited damages, and the ability to sue individuals as well as the employer, and the perception in the plaintiffs' bar that state court juries would be more receptive to discrimination claims than federal juries. As a result, almost all discrimination cases in Missouri since late 2003 have been filed in the state courts, rather than in the federal courts. The ability to sue individuals

as well as the employer made it much more difficult for out-of-state employers to remove cases to federal court when a Missouri resident was named as a co-defendant.

Key provisions of the changes to the Missouri Human Rights Act as interpreted by the Missouri Supreme Court include:

Moves the burden of persuasion from whether the claimed act of unlawful bias was a “contributing factor” in the challenged decision to a “motivating” factor in that decision.

Imposes caps on damages for plaintiffs that are equivalent to those under federal law, from \$50,000 for employers that employ less than 100 employees to \$300,000 for those that employ more than 500 employees.

Excludes individuals from the definition of employer.

Requires Missouri courts to rely heavily upon judicial interpretations of federal discrimination laws.

Requires that, if requested, the court must give a business judgment instruction to the jury that in considering the employer’s reason for the adverse action at issue, that it is not the jury’s role to second-guess a business decision by the employer so long as it was not made for a discriminatory reason.

Directs Missouri courts to utilize the summary judgment procedures of the Missouri Rules of Civil Procedure to remove factually insubstantial cases from crowded dockets, and in considering such motions, courts are to analyze the cases following U.S. Supreme Court framework, depending on the nature of the evidence.

Precludes the award of punitive damages against the state or political subdivisions of the state.

The approved legislation also contains the Whistleblower’s Protection Act to provide the sole and exclusive remedy for any unlawful employment discharge or retaliation against an individual who reported to proper authorities unlawful acts of the employer or its agent,

reported to an employer serious misconduct of the employer or its agent of “a clear mandate of public policy as articulated in a constitutional provision, statute, regulation promulgated or statute, or rule created by a governmental body,” or

refused to carry out a directive of the employer or its agent if that directive, if completed, would be a violation of the law.

This act would also protect individuals from discharge or retaliation because of that person's status as a protected person under the Missouri Human Rights Act. Damages for violations of the Whistleblower Protection Act would be limited to the caps as defined in the amendments to the Missouri Human Rights Act. The purpose of the Whistleblower's Protection Act is to "codify existing common law exceptions to the at-will employment doctrine, and to limit their future expansion by the courts."

Whether Governor Nixon, a Democrat, signs this legislation into law or vetoes it is an open question. However, it is likely, given the number of Republican legislators, that any veto would be overridden by the Legislature.

What This Means to You

When this legislation becomes law, Missouri employers will have greater protection against runaway verdicts, and it will be more difficult for plaintiffs to prove intentional discrimination. In recognition of this fact, we are already seeing a great influx of case filings in state court as plaintiffs anticipate the law soon will change and they want as many cases as possible to be filed under the existing law. Employers with their principal place of business outside the state of Missouri will have the option to remove cases from state court to federal courts, which are generally perceived to provide a more favorable venue because of the pulling of juries from a broader area and the greater likelihood that the meritless cases will be winnowed out by motion practice because the federal courts have more staff and a tradition of disposing of cases by motion.

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