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By E-mail

Re: Substantial New Exposure for Maryland Employers

Dear :

Maryland's Civil Rights Preservation Act was recently signed into law. This law amended Maryland Article 49B. It drastically increases employer exposure to discrimination claims by creating a new private right of action for Maryland employees.

Expanded Reach, Exposure and Increased Remedies: Maryland Article 49B prohibits discrimination in employment. Like Title VII of the Civil Rights Act, Article 49B prohibits discrimination on the basis of race, color, religion, sex, age, national origin and physical or mental disability, and requires the provision of reasonable accommodation to qualified individuals with disabilities. However, Article 49B goes beyond that federal law to prohibit discrimination and harassment based on familial status, marital status, sexual orientation, and genetic testing, as well as by allowing age discrimination suits by individuals under age 40.

Prior to the amendment of Article 49B, enforcement of Maryland's law prohibiting discrimination was limited. Basically, the Maryland Commission on Human Relations ("MCHR") processed charges of discrimination and attempted to resolve them by conciliation or administrative proceedings before a hearing examiner. A complainant's only relief under Article 49B was to file an administrative complaint with MCHR, rely on MCHR's investigation, and, if dissatisfied, to pursue that claim in federal court under Title VII, if the charge had been cross-filed with the EEOC. The employee could not file suit in a Maryland court under Article 49B.

The Civil Rights Preservation Act empowers MCHR to file a lawsuit in a Maryland Circuit Court based on the employee's charge of discrimination, without having to first participate in an administrative hearing. More important, Article 49B gives plaintiff-employees the right to sue their employer in a Maryland circuit court after filing an administrative charge, without receiving authorization from MCHR, and to seek lost wages, compensatory damages, attorneys' fees, expert witness fees, costs, and punitive damages in that action.

Many More Discrimination Claims Will Go to Court: It is anticipated that new Article 49B will result in a substantial increase in the number of discrimination claims filed against employers in Maryland courts, and further, that Maryland courts will be less likely than federal courts to summarily dismiss meritless claims without requiring a full trial on the merits.

Anticipate Protracted Litigation and Pro-Plaintiff Holdings: At this point in time, there is virtually no binding precedent interpreting new Article 49B to govern the many issues that typically arise in employment discrimination litigation. This is because Maryland courts have yet to interpret the panoply of rights that have been granted by the new law. More important, Maryland courts are not bound by federal precedents that have often been relatively conservative in recent years. For example, in a recent decision, the Maryland Court of Appeals rejected U.S. Supreme Court precedent in Title VII cases to extend the time period in which Maryland plaintiff-employees may file employment discrimination claims against their employers under Article 49B. (*Haas v. Lockheed Martin Corp.*, 396 Md. 469, 914 A.2d 735 (2007).) It will likely be years before Maryland's Court of Appeals addresses and resolves many of the issues that are presented by amended Article 49B. Consequently, protracted litigation will take place in the interim, and pro-plaintiff outcomes like *Lockheed Martin* may well be the result.

What You Can Do: A variety of proactive measures should be undertaken. First, employers should update and diligently implement their non-discrimination, anti-harassment, and non-retaliation policies to assure that appropriate legal standards have been met. Second, management personnel and supervisors should receive updated training on how to identify, prevent, correct, and remediate discrimination and harassment under Maryland and federal law. Third, non-supervisory employees should receive training to assure that they understand and comply with current non-discrimination and anti-harassment requirements and company expectations. Fourth, employers should train HR personnel to monitor all aspects of personnel decision-making to assure equal treatment in employment. Such training should include the utilization of exit interviews to uncover and remediate any e.e.o. and other concerns prior to the employee's departure. Employers should also consider the advisability of taking further measures such as requiring employees to enter into binding arbitration agreements in order to reduce exposure to unpredictable jury verdicts in Maryland under new Article 49B.

Feel free to call to discuss any proactive measures that you believe would be useful for your company. We remain available to prepare and present non-discrimination and anti-harassment training programs for management and employees, and to facilitate company compliance activities.