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Speaking Up and Standing Tall

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Maryland's Response to #MeToo:

New Law Increases Sexual Harassment Protections and Requires Disclosure of Settlements

By Donna M. Glover

The #MeToo movement has not only increased social awareness regarding sexual harassment in the workplace, it has spawned new legal requirements for Maryland employers. Maryland has joined a number of other states in enacting laws intended to prevent employers from shielding individuals who engage in sexual harassment in the workplace. On May 15, 2018, Governor Hogan signed the Disclosing Sexual Harassment in the Workplace Act of 2018, which will take effect on October 1, 2018. The new law prohibits employers from including certain terms in employment and related agreements and imposes reporting requirements related to sexual harassment settlements. But will the legislation have any real impact? Hindered by limited enforcement provisions and faced with a potential constitutional challenge, the it may not have a significant impact on employer tactics for avoiding and handling sexual harassment claims.

Prohibitions on Waivers of Substantive or Procedural Rights

The law as written prohibits all Maryland employers from asking employees to waive their substantive or procedural rights or remedies in an employment agreement, a policy or other agreement related to a *future* claim of sexual harassment or a retaliation claim. Employers are also prohibited from taking any adverse action against an employee who refuses to sign an agreement that contains any of the above limitations on their rights and remedies for sexual harassment claims. "Adverse action" is defined to include discharge, suspension, demotion and "any other retaliatory action that results in a change to the terms or conditions of employment that would dissuade a reasonable employee from making a complaint."

The act also shifts an employee's attorney's fees to any employer who attempts to enforce a waiver in violation of the law. Thus, employers who enforce or attempt to enforce a prohibited waiver in an employment agreement, policy, or other agreement would be liable for the employee's reasonable attorneys' fees and costs. The law only applies to employment contracts and policies; as such, it should not affect arbitration agreements with contractors, vendors, or other third parties. Similarly, it does not prohibit employers from entering into settlement agreements because it only applies to contract provisions that would restrict employees' rights or remedies with respect to sexual harassment claims accruing in the future.

Requirement to Report Sexual Harassment Settlements

In addition to the prohibition on certain waivers of rights and remedies, the legislation requires employers with 50 or more employees to report their *history* of sexual harassment settlements to the Maryland Commission on Civil Rights (MCCR). Specifically, covered employers must disclose:

- The number of settlements the employer has made after an employee alleged sexual harassment;

- The number of times the employer has paid a settlement to resolve a sexual harassment allegation against *the same* employee over the past 10 years of employment;
- The number of settlements made after an allegation of sexual harassment that included a provision requiring both parties to keep the terms of the settlement confidential; and
- Information on whether the employer took a personnel action against the employee who was the subject of a settlement.

The MCCR will conduct the survey in December 2020 and again in December 2022. The Commission will make the information publically available, including employers' identities, but it will not release the identities of the alleged harassers or victims. This disclosure requirement contains a sunset provision, which means that no additional surveys will be conducted after June 30, 2023, unless disclosure is mandated by a new law.

Is the Act a Law with No Teeth?

Certainly the legislation is well-intentioned. However, will it ultimately advance the objectives is was intended to achieve? Because the Act purports to ban mandatory arbitration of sexual harassment claims, it will likely be challenged under the Federal Arbitration Act (FAA) as interpreted by the US Supreme Court in *AT&T Mobility LLC v. Concepcion,* 569 U.S. 333 (2011). Although not an employment case, in *Conception* the Court held "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id*. at 339. So, it is likely that the law will eventually be subjected to a preemptory challenge under the FAA and such a challenge would thwart its well-intended objectives.

Further weakening the law's impact, it does not impose penalties on employers that fail to report sexual harassment claims or that report false or inaccurate information to the MCCR. Finally, it does not expressly create a private right of action or administrative process for addressing violations; however, an employee would have the right to file a wrongful discharge claim in violation of Maryland public policy. Thus, its impact may not be as potent as the Maryland General Assembly had apparently intended.

Recommendations for Maryland Employers

Maryland employers should carefully review their existing contracts, policies and agreements to determine whether they contain any impermissible waivers, such as an arbitration clause, a jury trial waiver or a provision that cuts short an employee's statutory right to bring a sexual harassment claim. Any such waiver provisions should be eliminated by October 1, 2018. Or, perhaps a Maryland employer will decide to seek a court's interpretation as to whether the Act is preempted by the FAA.

Additionally, employers subject to the reporting requirement should begin reviewing their records of sexual harassment claims in preparation for the MCCR's survey. In light of this new law, employers should take a close look at their relevant policies and practices to make clear their expectations regarding workplace civility and anti-harassment and train their supervisors and managers multiple times and employees regarding the same.

Biography

Donna M. Glover is an associate in Baker Donelson's Baltimore office. Ms. Glover represents a wide variety of employers, including construction, property management, scientific and technology solution companies and not-for-profit organizations. She advises clients on day-to-day management issues relating to employees, guides clients in a way that minimizes exposure, defends them against charges of discrimination and wage complaints filed with the federal, state and local agencies and handles various employment-related litigation matters. She identifies training needs and designs and facilitates training for managers and employees on various topics, such as #MeToo and workplace civility, handling workplace investigations, federal, state and local employment law developments, ADA and FMLA compliance and wage and hour developments and compliance.