Maryland Employers, Are You Ready? New Sexual Harassment Law Takes Effect October 1

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Maryland's "Disclosing Sexual Harassment in the Workplace Act of 2018" takes effect on October 1, 2018. The Act prohibits certain waivers related to an employee's future sexual harassment claims and future retaliation claims for making a sexual harassment claim. It also requires employers with at least 50 employees to complete a survey disclosing the number of sexual harassment settlements in which the employer has entered.

The Act passed the Maryland General Assembly nearly unanimously and was signed into law by Governor Larry Hogan in May.

Restrictions on Agreements

The Act specifies that, effective October 1, 2018:

- Except as prohibited by federal law, any provision in an employment contract, policy, or agreement that waives any "substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment" is null and void.
- Employers may not discharge, suspend, demote, discriminate against, or otherwise retaliate against an employee who refuses or fails to enter into an agreement that contains a waiver that is void under the Act.
- An employer who enforces or attempts to enforce a provision that violates the Act will be liable for the employee's reasonable attorney's fees and costs.

Possible Preemption of the Act as it Relates to Arbitration Clauses

The Act raises many questions. The most significant may be regarding the Act's restrictions on waivers in employment agreements and the effect the Federal Arbitration Act (FAA) may have on it and an employer's ability to require mandatory arbitration of future sexual harassment and retaliation claims.

Although the Act prohibits agreements that waive substantive and procedural rights or remedies for future sexual harassment and retaliation claims (which would appear to include pre-dispute mandatory arbitration agreements), the Act includes a carve-out: "except as prohibited by federal law." In *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), and *Epic Systems Corp. v. Lewis,* 138 S.Ct. 1612 (2018), the U.S. Supreme Court held that the FAA strongly favors the enforcement of arbitration agreements. Thus, if an employee agreement contains a mandatory arbitration clause covered by the FAA, then the FAA may preempt the new Maryland statute. This means the arbitration clause would be in effect and would not be void.

In the event an arbitration clause is not preempted by the FAA and, therefore, is considered null and void under the Act as it relates to future sexual harassment claims, an employer faces the prospect of parallel proceedings in different forums. For example, assume, as is often the case, that an employee entered into an agreement that requires arbitration of all future claims, including sexual harassment claims, race discrimination claims, and sex discrimination claims. The Act purports to ban such an arbitration clause only as it applies to the future sexual harassment claims. Thus, if the employee later asserts claims of sexual harassment, race discrimination, and sex discrimination, the employer could not require arbitration of the sexual harassment claims, which would be litigated in court instead, but theoretically could require arbitration of the race and sex discrimination claims.

Other Implications of the Act's Restrictions on Waivers in Employment Agreements

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The Act likely prohibits other types of provisions commonly included in employee agreements, such as jury waivers, statute of limitations restrictions, and limitations on remedies. However, the Act imposes only restrictions on waivers relating to future claims of sexual harassment and retaliation and, therefore, does not prevent employers from settling sexual harassment or retaliation claims that have accrued as of the date of a settlement agreement. The Act also does not appear to invalidate past sexual harassment or retaliation settlement agreements.

Although the Act does not take effect until October 1, 2018, it applies to any agreement "executed, implicitly or explicitly extended, or renewed on or after" that date. It is unclear under what circumstances employment agreements for at-will employees that were entered into prior to October 1, 2018, will be considered to have been "implicitly" extended after that date. For example, it is unclear whether an at-will employment agreement will be considered to have been "implicitly extended" after October 1 simply by an employer continuing an at-will employment relationship with an employee beyond that date.

The Act also does not define "sexual harassment" and in some cases it may not be clear whether the Act applies.

Survey Requirements

The Act also requires employers with at least 50 employees to submit a survey to the Maryland Commission on Civil Rights (MCCR). The survey must contain:

1. The number of settlements made by or on behalf of the employer of an allegation of sexual harassment by an employee;
2. The number of times the employer paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and
3. The number of settlements made of an allegation of sexual harassment that included a confidentiality provision.

This information must be submitted on or before July 1, 2020, and again two years later (on or before July 1, 2022).

The MCCR will publish the aggregate results of the survey online. The MCCR will make available for public inspection, upon request, the results from a specific employer regarding the number of times the employer paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment.

Who is considered an "employee," for purposes of meeting the 50-employee threshold under the survey reporting requirements, is also an open issue under the Act.

Next

Employers should review their current policies and employment agreements carefully with labor and employment counsel to determine compliance with the Act. Employers also should consult with their labor and employment counsel regarding the various issues raised by the Act and obtain guidance regarding meeting the requirements of the statute.

Employers with at least 50 employees should create a system for tracking sexual harassment settlements in order to meet the Act's reporting requirements.

In addition, multistate employers should consider that other states (*e.g.,* New York and Washington) have enacted similar laws. Likewise, federal and state legislatures are considering similar measures.

Jackson Lewis attorneys are available to answer inquiries regarding this new law and assist employers in achieving compliance with its requirements.

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