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# OHIO LEGISLATIVE SERVICE COMMISSION

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H.B. 352  
133<sup>rd</sup> General Assembly

## Bill Analysis

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**Version:** As Reported by House Civil Justice

**Primary Sponsors:** Reps. Cross and Lang

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### SUMMARY

- Excludes, for purposes of being an employer under the Ohio Civil Rights Law, any person acting directly or indirectly in an employer's interest and adds an employer's agent.
- Creates a separate procedure for charges filed with the Ohio Civil Rights Commission (OCRC) that allege an unlawful discriminatory practice relating to employment.
- Requires, except in specified circumstances, claimants to obtain a notice of right to sue from the OCRC before filing a lawsuit that alleges an unlawful discriminatory practice relating to employment.
- Shortens the time in which lawsuits related to employment discrimination can be brought under Ohio law to two years from six years generally.
- Codifies the requirements that lawsuits related to employment discrimination brought under federal law be brought within two years.
- Prescribes, for employers, an affirmative defense to vicarious liability resulting from alleged sexual harassment of an employee by the employee's supervisor.
- Reduces the number of age discrimination lawsuits available under the Ohio Civil Rights Law.
- Specifically includes lawsuits related to employment discrimination in the definition of a "tort action" in the Trial Procedure Law (appears to be current law).
- Specifies that the remedies for unlawful discriminatory practice in employment set in the Ohio Civil Rights Law are the sole remedies for an aggrieved person subject to the Law.

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## DETAILED ANALYSIS

### Definition of employer

The bill limits the application of the Ohio Civil Rights Law<sup>1</sup> and limits the application of a qualified immunity for employers relating to employees with HIV by revising the definition of “employer.”<sup>2</sup>

Currently, an employer includes the state, any political subdivision of the state, any person employing four or more persons within Ohio, and any person acting directly or indirectly in the interest of an employer. The bill removes “any person acting directly or indirectly in the interest of an employer” and adds an agent of the state, political subdivision, or person. The bill provides that no person has a cause of action or claim under the Ohio Civil Rights Law based on unlawful discriminatory practices relating to employment against a supervisor, manager, or other employee of an employer, unless that person is the employer or the claim is for one of the following:

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<sup>1</sup> R.C. Chapter 4112.

<sup>2</sup> R.C. 4112.01(A)(2) and R.C. 3701.249, not in the bill.

- Retaliation for opposing a discriminatory practice;
- Aiding a discriminatory practice;
- Obstructing a person from complying with the Ohio Civil Rights Law.<sup>3</sup>

The bill states that the intent of this change is to exclude managers, supervisors, and employees from personal liability under the Ohio Civil Rights Law for unlawful discriminatory practices relating to employment, unless the allegation is based on retaliation, aiding, or obstructing. Additionally, the bill states the intent to supersede an Ohio Supreme Court case that held that a supervisor can be held jointly or individually liable with the employer for discriminatory conduct under the Ohio Civil Rights Law.<sup>4</sup>

## Separate procedure for employment discrimination charges

The bill eliminates the ability to file a charge with the Ohio Civil Rights Commission (OCRC) alleging an unlawful discriminatory practice for any person seeking employment to publish or cause to be published any advertisement indicating the person’s membership in a protected class or expresses a limitation or preference as to a prospective employer’s status in a protected class. It also creates a separate procedure for charges filed with the OCRC that allege an unlawful discriminatory practice relating to employment (see “**Definitions**,” below).<sup>5</sup> The procedure set out under the bill is similar to the current law requirements for all discrimination charges made under the Ohio Civil Rights Law.

The table below compares the current law and bill procedures at each stage of a charge filed with the OCRC that alleges an unlawful discriminatory practice relating to employment (including claims that relate to employment and allege retaliation for opposing a discriminatory practice, aiding a discriminatory practice, or obstructing a person from complying with the Ohio Civil Rights Law):

| Stage of charge | Current law<br>(R.C. 4112.05)   | Employment discrimination<br>charge under the bill<br>(R.C. 4112.04 and 4112.051)   |
|-----------------|---|---|
| <b>Filing</b>   | Requires a charge to be filed within 6 months after the alleged unlawful discriminatory practice was committed. | Requires a charge to be filed within 2 years after an alleged unlawful discriminatory practice relating to employment was committed.<br><br>Requires the OCRC to notify a person who files a charge alleging employment discrimination that the person is |

<sup>3</sup> R.C. 4112.01(A) and 4112.08(A).

<sup>4</sup> Section 3; *Genaro v. Central Transport, Inc.*, 84 Ohio St.3d 293, 1999-Ohio-353.

<sup>5</sup> R.C. 4112.051 and conforming changes in R.C. 4112.05, 4112.055, and 4112.056.

| Stage of charge                               | Current law<br>(R.C. 4112.05)  | Employment discrimination<br>charge under the bill<br>(R.C. 4112.04 and 4112.051)   |
|---|--|---|
|   |  | prohibited from filing a lawsuit based on the alleged discrimination until the requirements described under <b>“Lawsuit relating to employment,”</b> below are satisfied or an exception applies.   |
| <b>Initial alternative dispute resolution</b> | Allows the OCRC to, at any time, attempt to resolve allegations of discrimination through the use of alternative dispute resolution.   | Same.   |
| <b>Investigation</b>                          | Allows, after a person files a charge, the OCRC to initiate a preliminary investigation to determine whether it is probable that discrimination occurred or is occurring.  | Allows preliminary investigation, but allows the complainant to make a written request that the OCRC cease the investigation and issue a notice of right to sue. Prohibits the OCRC from granting the request until at least 60 days after the charge was filed. Allows the OCRC to immediately grant the request if it is made more than 60 days after the charge was filed. Prohibits the complainant from refiling the charge with the OCRC. |
| <b>Probable cause determination</b>           | <p>If OCRC finds that it is not probable that discrimination has occurred, requires the OCRC to notify the complainant that it will not issue a complaint.</p> <p>If OCRC finds that it is probable that discrimination has occurred, requires the OCRC to engage in informal methods described below to eliminate the discrimination.</p> | <p>Requires the OCRC to include a notice of right to sue in the notice that it will not issue a complaint.</p> <p>Requires, before engaging in informal methods to eliminate probable discrimination, the OCRC to notify complainant that the complainant may withdraw the charge and file a lawsuit.</p>   |
| <b>Informal methods</b>                       | Requires the OCRC to endeavor to eliminate the discriminatory practice through informal alternative dispute resolution.  | Requires the OCRC to engage in alternative dispute resolution only if the complainant does not dismiss the charge.  |

| Stage of charge  | Current law<br>(R.C. 4112.05)  | Employment discrimination<br>charge under the bill<br>(R.C. 4112.04 and 4112.051)  |
|------------------|--|--|
| <b>Complaint</b> | <p>If informal methods are unsuccessful, requires the OCRC to issue and serve a complaint that notifies all parties that a hearing will be held not less than 30 days after service of the complaint. Requires the complaint to be issued not later than one year after the charge was filed.</p> <p>Allows a complaint to be amended by the OCRC, a member of OCRC, or the hearing examiner at any time below or during the hearing.</p>  | <p>Same, except allows the OCRC to take any of the following actions after serving the complaint:</p> <ul style="list-style-type: none"> <li>▪ Dismiss the complaint if the complainant requests a dismissal not later than 30 days before the date of the hearing;</li> <li>▪ Eliminate the alleged discrimination through alternative dispute resolution;</li> <li>▪ Continue the hearing process.</li> </ul> <p>Does not allow a complaint to be amended by a hearing officer but allows it to be amended by the OCRC's legal counsel if the respondent is given sufficient and reasonable notice. Does not allow a complaint to be amended during a hearing.</p> |
| <b>Hearing</b>   | <p>Requires the Attorney General to represent the OCRC at a hearing located in the county in which the alleged unlawful discriminatory practice has occurred or is occurring or in which the respondent resides or transacts business.</p> <p>Grants the respondent the right to file an answer or an amended answer to the original and amended complaints and to appear at the hearing in person, by attorney, or otherwise to examine and cross-examine witnesses.</p> <p>Requires the presiding officer, who is not bound by the Rules of Evidence, to take into account all reliable, probative, and substantial statistical or other evidence produced at the hearing.</p> | <p>Does not allow hearing to be held in the county in which the respondent resides.</p> <p>Same.</p> <p>Same.</p>  |

| Stage of charge | Current law<br>(R.C. 4112.05)  | Employment discrimination<br>charge under the bill<br>(R.C. 4112.04 and 4112.051)   |
|-----------------|--|---|
|                 | Requires testimony to be made under oath and reduced to writing and filed with OCRC.   | Same.   |
| <b>Orders</b>   | <p>If, after a hearing, OCRC determines that the respondent has engaged in, or is engaging in, an unlawful discriminatory practice, requires the OCRC to issue an opinion that states its findings of fact and conclusions of law and to serve the respondent an order requiring the respondent to do all of the following:</p> <ul style="list-style-type: none"> <li>▪ Cease and desist from the unlawful discriminatory practice;</li> <li>▪ Take any further affirmative or other action that will effectuate the purposes of the Civil Rights Law;</li> <li>▪ Report to the OCRC the manner of compliance.</li> </ul> <p>On the submission of a compliance report, allows the OCRC to issue an order stating that the respondent has ceased to engage in a particular unlawful discriminatory practice.</p> <p>If, after a hearing, OCRC determines that the respondent has not engaged in, or is not engaging in, an unlawful discriminatory practice, requires the OCRC to issue an opinion that states its findings of fact and conclusions of law and to serve the complainant an order dismissing the complaint.</p> | <p>Same.</p> <p>Same.</p> <p>Requires the order dismissing the complaint to be served on the complainant, respondent, and any other affected party.</p> |

| Stage of charge | Current law<br>(R.C. 4112.05)  | Employment discrimination<br>charge under the bill<br>(R.C. 4112.04 and 4112.051) |
|-----------------|--|---|
|                 | Allows the OCRC, until the time period for an appeal under continuing law expires and on reasonable notice, to modify or set aside any finding or order. | Same.   |

## Lawsuit relating to employment

Under current law, a person may bring a lawsuit alleging any violation of the Civil Rights Law (the “general” lawsuit) within six years after the alleged discriminatory act occurred. The bill creates an avenue under which a person alleging an unlawful discriminatory practice relating to employment may bring a lawsuit (the “employment specific” lawsuit) and prohibits a person from bringing a general lawsuit alleging employment discrimination.<sup>6</sup>

### Exhaustion of OCRC procedures

Subject to two exceptions described below, the bill prohibits a person from filing an employment specific lawsuit unless the person has filed a charge with the OCRC and one of the following applies:

- The person has received a notice of right to sue from the OCRC;
- The person has requested a notice of right to sue from the OCRC, and the OCRC fails to issue the notice of right to sue within 45 days after the date that the OCRC may grant the request;
- The OCRC, after a preliminary investigation, informs the person that it is probable that an unlawful discriminatory practice relating to employment has occurred or is occurring and the person elects to file a lawsuit and notifies the OCRC of that fact.<sup>7</sup>

### Exceptions to exhaustion

Under the bill, a person may file an employment specific lawsuit without requesting a notice of right to sue from the OCRC and without a finding of probable cause by the OCRC if one of the following exceptions applies:

- The person seeks only injunctive relief;
- The person timely filed a charge with both the OCRC and the Equal Employment Opportunity Commission (EEOC) – the agency that enforces federal employment

<sup>6</sup> R.C. 4112.052(A) and 4112.99(B) and R.C. 2305.07, not in the bill.

<sup>7</sup> R.C. 4112.052(B)(1).

discrimination laws – based on the same facts, and the person has received a notice from the EEOC that states the person may file a lawsuit based on the EEOC charge.<sup>8</sup>

With respect to a person who seeks only injunctive relief, the person may amend the complaint to include damages, but the amendment will not relate back to the time the complaint was filed until the person satisfies one of the conditions listed above in “**Exhaustion of OCRC procedures.**”<sup>9</sup>

### **Lawsuit for retaliation, aiding, or abetting**

The bill permits a person to file a lawsuit alleging that a person other than an employer retaliated against the person for exercising legal protections against unlawful discriminatory practices relating to employment or aided and abetted an unlawful discriminatory practice relating to employment, provided the person has satisfied the exhaustion requirement above or an exception applies.<sup>10</sup>

### **Statute of limitations**

The bill requires, if a person pursues an employment specific lawsuit after exhaustion of OCRC procedures, that the person file the suit within two years after the alleged employment discrimination occurred. The statute of limitations is tolled while a charge based on the same allegations is pending with the OCRC. If the OCRC charge is filed less than 60 days before the time to file with the OCRC expires, the statute of limitations for the lawsuit is tolled for an additional 60 days after the charge is no longer pending with the OCRC.<sup>11</sup>

### **OCRC continuing role**

Under the bill, the OCRC may continue offering assistance to a person after issuing a notice of right to sue to the person. The bill also permits the OCRC to intervene in a lawsuit alleging an unlawful discriminatory practice relating to employment if the OCRC determines that the case is of public importance.<sup>12</sup>

### **Age discrimination lawsuits**

Under current law, a person who feels that the person has been discriminated against because of age in an employment decision has the following three avenues under which to file a lawsuit:

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<sup>8</sup> R.C. 4112.052(B)(2).

<sup>9</sup> R.C. 4112.052(B)(3).

<sup>10</sup> R.C. 4112.052(B)(4).

<sup>11</sup> R.C. 4112.052(C).

<sup>12</sup> R.C. 4112.051(M) and 4112.052(E).



1. A lawsuit based on the general prohibition against unlawful discriminatory practices based on age, which must be filed within 180 days after the alleged unlawful discriminatory practice occurred;<sup>13</sup>
2. A lawsuit based on the specific prohibition against employment discrimination based on age, which is subject to a six-year statute of limitations;<sup>14</sup>
3. The general lawsuit alleging any violation of the Civil Rights Law, which is subject to a six-year statute of limitations.<sup>15</sup>

The bill eliminates avenues (1) and (3) above.<sup>16</sup> Thus, under the bill, a person claiming age discrimination in the context of employment may file an employment specific lawsuit or a lawsuit claiming a violation of the prohibition against age discrimination in employment. Both lawsuits are subject to the requirements and exceptions described in “**Exhaustion of OCRC procedures,**” and both have a two year statute of limitations that is tolled as described under “**Statute of limitations,**” above. A person may not pursue one of these lawsuits if the person previously pursued the other based on the same allegations and practices. A lawsuit claiming a violation of the prohibition against age discrimination in employment is not available if either of the following applies:

- An employee has the opportunity to arbitrate a discharge;
- A discharge has been arbitrated and been found to be for just cause.<sup>17</sup>

### **Actions brought under federal law**

The bill requires that lawsuit based on certain federal anti-discrimination laws – 42 U.S.C. 1981a, 42 U.S.C. 1983, or 42 U.S.C. 1985 – be brought within two years after the cause of action accrues, but this period of limitations does not apply to causes of action based on 42 U.S.C. 1981.<sup>18</sup> There is no statute of limitations for these violations set in federal law. As such, the courts have used state law as a guide.<sup>19</sup> Claims made under these sections of federal law are deemed general personal injuries and the courts have applied the Ohio two-year statute of limitation.<sup>20</sup> Thus, for claims of this type, the bill would have no impact.

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<sup>13</sup> R.C. 4112.02(L), repealed.

<sup>14</sup> R.C. 4112.14 and *Howe v. City of Akron*, 789 F.Supp.2d 786, 804 (N.D. Ohio 2010).

<sup>15</sup> R.C. 4112.99 and R.C. 2305.07, not in the bill, and *Cosgrove v. Williamsburg of Cincinnati Management Company, Inc.*, 70 Ohio St.3d 281, 1994-Ohio-295.

<sup>16</sup> R.C. 4112.02(L) and (M), 4112.08, and 4112.99(B).

<sup>17</sup> R.C. 4112.052(B) and (C) and 4112.14(C), (D), and (E).

<sup>18</sup> R.C. 4112.052(D).

<sup>19</sup> *Vodila v. Clelland*, 836 F.2d 231 (6th Cir. 1987).

<sup>20</sup> *Owens v. Okure*, 488 U.S. 235 (1989); *Durante v. Ohio Civil Rights Commission*, 902 F.2d 1568 (6th Cir. 1990).

## Affirmative defense

The bill prescribes what an employer must prove, by a preponderance of the evidence, to raise an affirmative defense to a claim for vicarious liability in which an employee alleges that a supervisor with immediate or successively higher authority over the employee created a hostile work environment through sexually harassing behavior. The affirmative defense has two basic elements. First, the employer must show that the employer exercised reasonable care to prevent or promptly correct any sexually harassing behavior.

Second, the employer must show that the employee alleging the hostile work environment unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. This affirmative defense is unavailable if the supervisor's harassment resulted in a tangible employment action against the employee making the allegation. A "tangible employment action" is an action that results in significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.<sup>21</sup>

The bill states that the General Assembly intends to encourage implementation of meaningful anti-discrimination policies and foster a work environment that is fair and tolerant. Additionally, the bill states that human resource professionals should have the first opportunity to resolve issues in the workplace before issues related to personnel complaints and workplace behavior result in costly litigation.<sup>22</sup>

## Tort actions

The bill adds the employment specific lawsuit and the lawsuit based on a specific prohibition against employment discrimination based on age to the definition of "tort actions" in the Trial Procedure Law.<sup>23</sup> The addition appears to be current law.<sup>24</sup> All of the following apply to tort actions:

- Compensatory damages for the plaintiff's economic loss are not limited;
- Compensatory damages for the plaintiff's noneconomic loss cannot exceed the greater of \$250,000 or an amount that is equal to three times the plaintiff's economic loss, as determined by the trier of fact (a jury or a judge in a nonjury trial), to a maximum of \$350,000 for each plaintiff or a maximum of \$500,000 for each occurrence that forms the basis of the tort action;

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<sup>21</sup> R.C. 4112.054.

<sup>22</sup> Section 3.

<sup>23</sup> R.C. Chapter 2315.

<sup>24</sup> *Luri v. Republic Servs.*, 193 Ohio App.3d 682, 2011-Ohio-2389 (8th Dist.), *judgment rev'd on other grounds*, 132 Ohio St.3d 216, 2012-Ohio-2914.

- Punitive or exemplary damages cannot exceed two times the amount of the compensatory damages awarded to the plaintiff or 10% of a small employer's or individual's net worth when the tort was committed, to a maximum of \$350,000.

The limitation on damages for noneconomic loss does not apply in a tort action if the plaintiff suffers permanent and substantial physical deformity, loss of use of a limb, loss of a bodily organ system, or a permanent physical injury that permanently prevents the plaintiff from being able to independently care for themselves or perform life-sustaining activities. The limitation on punitive or exemplary damages does not apply if the defendant committed the tort action "purposely" or "knowingly" as those terms are defined in the Criminal Code<sup>25</sup> or if the tort action is based on conduct by the defendant that resulted in the defendant being convicted of or pleading guilty to a felony that has as an element of the offense a culpable mental state of "purposely" or "knowingly."<sup>26</sup>

In determining an award of compensatory damages for noneconomic loss in a tort action, the trier of fact is prohibited from considering any of the following:

- Evidence of a defendant's alleged wrongdoing, misconduct, or guilt;
- Evidence of the defendant's wealth or financial resources;
- Any evidence offered for the purpose of punishing the defendant.<sup>27</sup>

In a tort action, "economic loss" includes lost wages, salaries, or compensation and all expenditures for medical care or treatment, rehabilitation services, and any other expenditure incurred as a result of an injury or loss to person or property. "Noneconomic loss" means nonpecuniary harm resulting from an injury or loss to person or property. It includes intangible losses such as pain and suffering, loss of consortium, and mental anguish.<sup>28</sup>

The Trial Procedure Law specifies procedural requirements with respect to awarding damages.<sup>29</sup> The Law also governs how a trial court in a tort action must review the evidence supporting an award of compensatory damages for noneconomic loss when a defendant challenges the award as excessive.<sup>30</sup>

## Prohibited claims

The bill specifies that the procedures and remedies for unlawful discriminatory practices relating to employment set forth in the Ohio Civil Rights Law are the sole and exclusive

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<sup>25</sup> R.C. 2901.22, not in the bill.

<sup>26</sup> R.C. 2315.18(B) and 2315.21(D).

<sup>27</sup> R.C. 2315.18(C).

<sup>28</sup> R.C. 2315.18(A).

<sup>29</sup> R.C. 2315.18(D) and 2315.21(B).

<sup>30</sup> R.C. 2315.19, not in the bill.

procedures and remedies for such a practice actionable under the Law.<sup>31</sup> The bill specifies that the intent of this change is that common law claims for wrongful discharge are not to be available for actions arising out of an unlawful discriminatory practice relating to employment.<sup>32</sup>

To provide some context, common law is the term used to describe nonlegislative law determined by court decisions. Previous court decisions have held that the intent of the legislature in enacting the Ohio Civil Rights Law was to provide a range of remedies by which an employee could combat discrimination, and have allowed lawsuits related to workplace discrimination under common law, meaning that different limitations and restrictions apply to these actions than to actions brought under the Ohio Civil Rights Law.<sup>33</sup>

## Definitions

### Age

The bill changes the definition of “age” as it relates to discrimination claims. Under current law, the definition of age is at least 40 years old. Under the bill, “age” means an individual aged 40 years or older. The inclusion of the word “individual” to define a characteristic of an individual may be problematic because it is circular.<sup>34</sup>

### Unlawful discriminatory practice relating to employment

The bill defines “unlawful discriminatory practice relating to employment” as the following:

- Those practices specifically related to employment that are defined as unlawful discriminatory practices under continuing law involving actions taken by employers, unions, or employment agencies, administering apprenticeship programs, obtaining information about a person for employment purposes, and advertising that a person is a member of a protected class or has preferences regarding an employer’s protected class status.<sup>35</sup>
- The following practices, which are defined as unlawful discriminatory practices under continuing law, if they are related to employment:
  - Retaliatory practices;
  - Assisting or compelling someone to commit an unlawful discriminatory practice;
  - Obstructing or preventing compliance with the Ohio Civil Rights Law;

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<sup>31</sup> R.C. 4112.08(B).

<sup>32</sup> Section 3.

<sup>33</sup> *Helmick v. Cincinnati Word Processing, Inc.*, 45 Ohio St.3d 131 (1989).

<sup>34</sup> R.C. 4112.01(A)(14).

<sup>35</sup> R.C. 4112.01(A)(24)(a), by reference to R.C. 4112.02(A), (B), (C), (D), (E), and (F).

- Attempting to commit an unlawful discriminatory practice.<sup>36</sup>

### Notice of right to sue

The bill defines “notice of right to sue” as a notice sent by the OCRC to a person who filed a charge with the OCRC alleging an unlawful discriminatory practice relating to employment that states that the person who filed the charge may bring an employment specific lawsuit or, in the case of age discrimination, a lawsuit based on the specific prohibition against age discrimination in the workplace that is related to the charge filed with the OCRC.<sup>37</sup>

## HISTORY

| Action                     | Date     |
|----------------------------|----------|
| Introduced                 | 10-09-19 |
| Reported, H. Civil Justice | 05-13-20 |

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<sup>36</sup> R.C. 4112.01(A)(24)(b), by reference to R.C. 4112.02(I) and (J).

<sup>37</sup> R.C. 4112.01(A)(25), by reference to R.C. 4112.051, 4112.052, and 4112.014.