



# Ohio Legislative Service Commission

## Bill Analysis

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### S.B. 268

131st General Assembly  
(As Introduced)

**Sens.** Seitz, Coley, Peterson, Eklund, Hite, Uecker

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## BILL SUMMARY

- Limits the definition of employer for purposes of the Ohio Civil Rights Law by excluding any person acting directly or indirectly in the interest of an employer.
- Restricts the definition of employer for private employers under the Ohio Civil Rights Law to individuals employing four or more people for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.
- Makes a separate procedure for charges filed with the Ohio Civil Rights Commission (OCRC) that allege an unlawful discriminatory practice relating to employment.
- Prohibits claimants from concurrently pursuing both lawsuits and OCRC charges relating to unlawful discriminatory practices relating to employment.
- Provides for tolling of those lawsuits under certain circumstances.
- Changes the time in which lawsuits related to discrimination in the workplace can be brought under Ohio law to 365 days from six years generally.
- Requires that lawsuits against an employer alleging a claim of breach of implied contract, intentional infliction of emotional distress, or promissory estoppel be commenced within one year after the action accrued.

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\* This version removes an erroneous statement that the bill eliminates the ability of the Ohio Civil Rights Commission (OCRC) to conduct a preliminary investigation relating to an unlawful discriminatory practice specifically related to employment upon its own initiative and independent of the filing of any charge. The bill does not eliminate the ability of the OCRC to make those investigations.

- Requires that lawsuits related to discrimination in the workplace brought under federal law be brought within two years, which appears to be no change when compared to current law.
- Prescribes, for employers, an affirmative defense to liability resulting from an alleged unlawful discriminatory practice related to employment.
- Limits the amounts that can be awarded to individuals for noneconomic loss subsequent to lawsuits related to discrimination brought under Ohio law, mirroring caps set in federal 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 individual.
- Consolidates age discrimination lawsuits under the Ohio Civil Rights Law, so that age is treated the same as other protected classes.

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## CONTENT AND OPERATION

### Definition of employer

The bill limits the application of the Ohio Civil Rights Law<sup>1</sup> or for purposes of bringing a lawsuit for discrimination and a qualified immunity relating to employees with HIV by revising the definition of "employer."<sup>2</sup>

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



## Agents of employer

The bill removes "any person acting directly or indirectly in the interest of an employer" from the definition of employer.<sup>3</sup> Furthermore, 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 individual is the employer.<sup>4</sup>

The bill indicates 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. Additionally, the bill indicates the intent to supersede an Ohio Supreme Court case which held that a supervisor can be held jointly, or individually, liable with the employer for discriminatory conduct under the Ohio Civil Rights Law.<sup>5</sup>

## Private employers

Current law subjects a private employer to the Ohio Civil Rights Law if the private employer employs four or more employees within Ohio. The bill further limits the application of the Ohio Civil Rights Law to private employers who employ four or more people for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.<sup>6</sup> This change would likely exclude small seasonal or part-time employers from being subject to the Ohio Civil Rights Law.

## 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>7</sup> The procedure set out

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

<sup>3</sup> R.C. 4112.01(A)(2).

<sup>4</sup> R.C. 4112.08(A).

<sup>5</sup> Section 3 of the bill; *Genaro v. Central Transport, Inc.*, 84 Ohio St.3d 293, 1999-Ohio-353.

<sup>6</sup> R.C. 4112.01(A)(2).

<sup>7</sup> R.C. 4112.051 and conforming changes in R.C. 4112.05, 4112.055, and 4112.056.

under the bill is largely similar to the current law requirements for all discrimination charges made under the Ohio Civil Rights Law. Under current law, charges go through the following general stages with OCRC:

- Initial mediation, attempting to bring both parties to agreement before investigation;
- Preliminary investigation, to determine if the charge meets all requirements and has merit;
- Determination whether to pursue or dismiss the charge based upon probable cause;
- Informal methods of conference, conciliation, and persuasion to eliminate the practice;
- Issuance of a complaint if the informal methods are unsuccessful;
- Administrative hearing;
- Issuance of orders or dismissal of complaint.<sup>8</sup>

The current procedure covers charges of discrimination related to employment, commerce (with the exception of housing, which is covered under a separate procedure), retribution for opposing a discriminatory practice, and aiding a discriminatory practice or obstructing a person from complying with the Ohio Civil Rights Law.<sup>9</sup>

Under the bill, the procedure for charges filed with the OCRC that allege an unlawful discriminatory practice relating to employment differs from current law in the following ways:

- A charge must be filed within 365 days after the alleged unlawful discriminatory practice was committed,<sup>10</sup> as opposed to six months after the alleged unlawful discriminatory practice was committed under current law.<sup>11</sup>

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<sup>8</sup> R.C. 4112.05.

<sup>9</sup> R.C. 4112.02 and 4112.05(B).

<sup>10</sup> R.C. 4112.051(B).

<sup>11</sup> R.C. 4112.05(B)(1) and 4112.051(B).

- If the OCRC determines that it is probable that an unlawful discriminatory practice occurred, the OCRC may invite the parties to engage in mediation (before attempting to informally resolve the dispute of the conference, conciliation, and persuasion).<sup>12</sup>
- The complaint must be served on the respondent, the complainant, and any indispensable party; under current law, the complaint must be served on any person, including the respondent, the complainant, and any aggrieved person other than the complainant on whose behalf the complaint was issued.<sup>13</sup>
- The bill eliminates as a venue for the hearing the county in which the respondent resides.<sup>14</sup>
- The bill eliminates the ability of a hearing examiner conducting a hearing to amend a complaint and allows the OCRC's legal counsel to amend a complaint.<sup>15</sup>
- The bill limits the time in which a complaint may be amended to any time before the hearing if the respondent is given sufficient notice; current law allowed a complaint to be amended at any time before or during the hearing.<sup>16</sup>
- The bill eliminates the right of aggrieved persons who claim an interest in the subject of the hearing (but who have not been joined) to appear, present evidence, examine witnesses, and be represented by counsel.<sup>17</sup>
- If at the conclusion of the hearing, the OCRC determines that the respondent has not engaged in an unlawful discriminatory practice, the bill expressly requires that the order dismissing the complaint be served

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<sup>12</sup> R.C. 4112.051(E)(1) and (2).

<sup>13</sup> R.C. 4112.05(B)(5) and 4112.051(F).

<sup>14</sup> R.C. 4112.05(B)(5) and 4112.051(F)(1).

<sup>15</sup> R.C. 4112.05(C) and 4112.051(F)(3).

<sup>16</sup> R.C. 4112.05(C) and 4112.051(F)(3).

<sup>17</sup> R.C. 4112.05(D).

upon the respondent and any other affected party; current law only requires that it be served upon the complainant.<sup>18</sup>

- There is no deadline for complaints to be issued; under current law, a complaint must be issued by the OCRC within one year after the initial charge was filed.<sup>19</sup>

Similar to current law, before the commencement of informal methods of conference, conciliation, and persuasion to eliminate an alleged unlawful discriminatory practice relating to employment, the OCRC is required to keep all information obtained as a result of or that otherwise pertains to a preliminary investigation confidential. The bill differs from current law by requiring that such information remain confidential in situations where the OCRC determines that it is not probable that an unlawful discriminatory practice relating to employment occurred or is occurring. Additionally, the bill allows the OCRC to share such information with its legal counsel at any time.<sup>20</sup>

## **Charges and lawsuits relating to employment**

Under continuing 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.<sup>21</sup> The bill adds an additional avenue under which an individual alleging an unlawful discriminatory practice relating to employment may bring a lawsuit (the "employment specific" lawsuit). The employment specific lawsuit must be filed within 365 days after the alleged unlawful discriminatory practice was committed.<sup>22</sup>

The bill prohibits a person from filing a charge with the OCRC that alleges an unlawful discriminatory practice relating to employment if the person brought a general lawsuit or an employment specific lawsuit that is pending and that is based, in whole or in part, on the same allegations and practices.<sup>23</sup>

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<sup>18</sup> R.C. 4112.05(H) and 4112.051(I).

<sup>19</sup> R.C. 4112.05(B)(7).

<sup>20</sup> R.C. 4112.051(D) and 4112.05(B)(2).

<sup>21</sup> R.C. 4112.99 and 2305.07.

<sup>22</sup> R.C. 4112.052(A) and (B).

<sup>23</sup> R.C. 4112.053(A).

The bill prohibits a person from bringing a general lawsuit or an employment specific lawsuit if the person filed a charge with the OCRC that alleges an unlawful discriminatory practice relating to employment that is pending and that is based, in whole or in part, on the same allegations and practices.<sup>24</sup> The bill provides that the statute of limitations for bringing a general lawsuit or an employment specific lawsuit that alleges, in whole or in part, the same allegations and practices as a charge filed with the OCRC is tolled and ends on the date of any of the following events:

- The OCRC notifies the complainant that it will not issue a complaint.
- The OCRC enters a disposition that the matter has been resolved.
- The OCRC issues a declaratory order stating that the respondent has ceased to engage in the unlawful discriminatory practices that were the subject of the complaint.
- The OCRC issues an order dismissing the complaint.

The statute of limitations is not tolled if the person voluntarily dismissed a lawsuit brought under the Civil Rights Law based, in whole or in part, on the same allegations and practices as the charge.<sup>25</sup>

Under the bill, the OCRC is required to notify an individual who files a charge alleging an unlawful discriminatory practice relating to employment of both of the following:

- That the person is barred from bringing either a general lawsuit alleging an unlawful discriminatory practice relating to employment or an employment specific lawsuit if the person filed a charge with the OCRC that is pending and is based, in whole or in part, on the same allegations and practices;
- That the statute of limitations for bringing such a lawsuit is tolled as provided above.<sup>26</sup>

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<sup>24</sup> R.C. 4112.053(B).

<sup>25</sup> R.C. 4112.053(C).

<sup>26</sup> R.C. 4112.04(A)(11).



## General lawsuit

The bill prohibits a person from bringing a general lawsuit if the person brought an employment specific lawsuit or a housing specific lawsuit<sup>27</sup> that is based, in whole or in part, on the same allegations and practices. Furthermore, the bill prohibits a person from bringing an employment specific lawsuit or a housing specific lawsuit if the person brought a general lawsuit that is based, in whole or in part, on the same allegations and practices.<sup>28</sup>

The bill reduces the statute of limitations for general lawsuits to 365 days after the alleged violation was committed. Under current law a general lawsuit must be brought within six years after the alleged violation was committed.<sup>29</sup>

## Changes to statutes of limitations

### Actions brought under state law

The bill requires that lawsuits against an employer subject to the Ohio Civil Rights Law alleging a claim of breach of implied contract, intentional infliction of emotional distress, or promissory estoppel be commenced within one year after the cause accrued.<sup>30</sup> These claims have a statute of limitations of six years under current law. "Promissory estoppel" is a method to enforce a promise that fails to meet the requirements of a contract. It is the principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment.<sup>31</sup> The bill specifies that the one-year limitation is not to be interpreted as prohibiting or limiting an employee's use of evidence of promissory estoppel, breach of implied contract, or intentional infliction of emotional distress on the part of the employer as an affirmative defense against an action brought by an employer against the employee.<sup>32</sup>

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<sup>27</sup> R.C. 4112.055.

<sup>28</sup> R.C. 4112.99(B).

<sup>29</sup> R.C. 4112.99(C) and 2305.07, and *Cosgrove v. Williamsburg of Cincinnati Management Company, Inc.*, 70 Ohio St.3d 281, 1994-Ohio-295.

<sup>30</sup> R.C. 2305.07 and 2305.071, with a conforming change in R.C. 2305.09.

<sup>31</sup> *Black's Law Dictionary* 629 (9th Ed. 2009).

<sup>32</sup> R.C. 2305.071(C).





## **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>33</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>34</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>35</sup> Thus, for claims of this type, the bill would have no impact.

## **Affirmative defense**

The bill prescribes what an employer must prove, by a preponderance of the evidence, to raise an affirmative defense to liability resulting from an unlawful discriminatory practice relating to employment. The affirmative defense has two basic elements. First, the employer must show that the employer exercised reasonable care to prevent or promptly correct the unlawful discriminatory practice or harassing behavior. This portion of the affirmative defense may be satisfied by demonstrating that the employer promulgated an applicable, reasonable anti-discrimination or anti-harassment policy that includes a complaint procedure. This first prong of the defense is dependent upon the employer having done all of the following:

- Publishing and distributing the policy to its employees and managers;
- Informing employees of the prohibited conduct and complaint procedure;
- Publishing and enforcing a reasonable policy prohibiting retaliation for reporting, participating in investigations, or opposing harassment or discrimination;
- Acting upon internal complaints concerning discrimination, harassment, or hostile work environments in a prompt and reasonable manner;
- Enabling an employee alleging discrimination, harassment, or a hostile work environment to pursue the complaint through those individuals who are not alleged to have engaged in such conduct.

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<sup>33</sup> R.C. 4112.052(D).

<sup>34</sup> *Vodila v. Clelland*, 836 F.2d 231 (6th Cir. 1987).

<sup>35</sup> *Owens v. Okure*, 488 U.S. 235 (1989); *Durante v. Ohio Civil Rights Commission*, 902 F.2d 1568 (6th Cir. 1990).



Second, the employer must show that the employee alleging the unlawful discriminatory practice failed to take advantage of any preventive or corrective opportunities provided, including failure on the part of the employee to use a complaint procedure provided by the employer. An employer does not satisfy the second prong if the employee alleging discrimination can demonstrate that use of the preventive or corrective opportunities provided would have been futile. Additionally, this affirmative defense is unavailable to those employers where the alleged unlawful discriminatory practice resulted in an adverse, tangible employment action against the employee making the allegation. An "adverse, tangible, employment action" is an action that results in material economic detriment to the employee, such as failure to hire or promote, firing or demoting the employee.<sup>36</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>37</sup>

### **Limitations on damages**

The bill places limitations on the amounts that can be awarded to individuals for noneconomic losses and punitive damages in a lawsuit based on an unlawful discriminatory practice relating to employment brought under the general lawsuit or the employment specific lawsuit, dependent upon the size of the employer in question. These limitations largely mirror the caps set forth in federal law in the "Civil Rights Act of 1991"<sup>38</sup> with the only difference being that, under federal law, the lowest tier applies to employers employing between 14 and 100 employees, as opposed to between 4 and 100 under the bill. This difference reflects Ohio's definition of "employer" under the Ohio Civil Rights Law. The bill states that mirroring the federal act in this respect is the intent of the General Assembly.<sup>39</sup> The award limitations are shown in the table below.

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<sup>36</sup> R.C. 4112.054.

<sup>37</sup> Section 3 of the bill.

<sup>38</sup> 42 U.S.C. 1981a(b)(3).

<sup>39</sup> Section 3 of the bill.

Award Limitations Based on Number of Employees	
Number of employees	Noneconomic and punitive damages cap
4 to 100	\$50,000
101 to 200	\$100,000
201 to 500	\$200,000
501 +	\$300,000

When determining which cap applies, to be counted, employees must be employed in each of 20 or more calendar weeks in the current or preceding calendar year.<sup>40</sup>

"Noneconomic loss" means nonpecuniary harm that results 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>41</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 procedures and remedies for such a practice. Causes of action based on public policies embodied in that law or in state, federal, or local fair employment laws are specifically barred.<sup>42</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.<sup>43</sup>

To provide some context, common law is the term used to describe non-legislative 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

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<sup>40</sup> R.C. 4112.14.

<sup>41</sup> R.C. 2315.18, not in the bill.

<sup>42</sup> R.C. 4112.08(B).

<sup>43</sup> Section 3 of the bill.

different limitations and restrictions apply to these actions than to actions brought under the Ohio Civil Rights Law.<sup>44</sup>

### **Age discrimination actions consolidated**

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

(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>45</sup>

(2) A lawsuit based on the specific prohibition against discrimination based on age in employment, which is subject to a six-year statute of limitations;<sup>46</sup>

(3) The general lawsuit alleging any violation of the Civil Rights Law, which is subject to a six-year statute of limitations.<sup>47</sup>

The bill eliminates avenues (1) and (2), thus treating discrimination based on age the same as it treats discrimination based on any other protected class under the Civil Rights Law.<sup>48</sup> Under the bill, all age discrimination claims are subject to the 365-day limitation described above. However, the bill specifies that arbitration is the sole remedy available to a person who is discharged and who alleges age discrimination, in those situations where arbitration is available. This provision appears to expand a current law provision which bars an individual from bringing a lawsuit under avenue (2) in the case of discharges if arbitration is available to the individual.<sup>49</sup>

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<sup>44</sup> *Helmick v. Cincinnati Word Processing, Inc.*, 45 Ohio St.3d 131 (1989).

<sup>45</sup> R.C. 4112.02(N).

<sup>46</sup> R.C. 4112.14 (repealed by the bill) and *Howe v. City of Akron*, 789 F.Supp.2d 786, 802 (N.D. Ohio 2010).

<sup>47</sup> R.C. 4112.99 and 2305.07, and *Cosgrove v. Williamsburg of Cincinnati Management Company, Inc.*, 70 Ohio St.3d 281, 1994-Ohio-295.

<sup>48</sup> R.C. 4112.14 (repealed) and R.C. 4112.02(N) and (O) and 4112.08.

<sup>49</sup> R.C. 4112.052(C) and R.C. 4112.14(C) (repealed by the bill).



## 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>50</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>51</sup>
- The following practices, which are defined as unlawful discriminatory practices under continuing law, if they are related to a practice described above:
  - Retaliatory practices;
  - Assisting or compelling someone to commit an unlawful discriminatory practice;
  - Obstructing or preventing compliance with the Ohio Civil Rights Law;
  - Attempting to commit an unlawful discriminatory practice.<sup>52</sup>

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<sup>50</sup> R.C. 4112.01(A)(14).

<sup>51</sup> R.C. 4112.01(A)(24)(a), by reference to R.C. 4112.02(A), (B), (C), (D), (E), and (F).

<sup>52</sup> R.C. 4112.01(A)(24)(b), by reference to R.C. 4112.02(I) and (J).



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## HISTORY

ACTION

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