



# OHIO LEGISLATIVE SERVICE COMMISSION

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## Bill Analysis

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### H.B. 2

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(As Introduced)

Rep. Seitz

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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 an employer's interest.
- Restricts the definition of employer for private employers under the Ohio Civil Rights Law to persons 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 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 vicarious liability resulting from alleged sexual harassment of an employee by the employee's supervisor.

- Adds lawsuits related to unlawful discriminatory practices in employment to the definition of a "tort action" in the Trial Procedure Law, which 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.
- 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>

### Agents of employer

The bill removes "any person acting directly or indirectly in the interest of an employer" from the definition of employer. Furthermore, the bill provides that no person has a cause of action or claim under the Ohio Civil Rights Law based on

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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.



unlawful discriminatory practices relating to employment against a supervisor, manager, or other employee of an employer, unless that person is the employer.<sup>3</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 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>

### **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 this application 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>5</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>6</sup> The procedure set out 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 alternative dispute resolution, attempting to bring both parties to agreement before investigation;

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<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. 4112.01(A)(2).

<sup>6</sup> R.C. 4112.051 and conforming changes in R.C. 4112.05, 4112.055, and 4112.056.



- 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>7</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>8</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, as opposed to six months after the alleged unlawful discriminatory practice was committed under current law.<sup>9</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>10</sup>

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<sup>7</sup> R.C. 4112.05.

<sup>8</sup> R.C. 4112.02 and 4112.05(B).

<sup>9</sup> R.C. 4112.05(B)(1) and 4112.051(C).

<sup>10</sup> R.C. 4112.05(B)(5) and 4112.051(G).

- The bill eliminates as a venue for the hearing the county in which the respondent resides.<sup>11</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>12</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 allows a complaint to be amended at any time before or during the hearing.<sup>13</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>14</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 upon the complainant, respondent, and any other affected party; current law only requires that it be served upon the complainant.<sup>15</sup>

## **Charges and lawsuits 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.<sup>16</sup> The bill adds an avenue under which a person 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 or within 60

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<sup>11</sup> R.C. 4112.05(B)(5) and 4112.051(G)(1).

<sup>12</sup> R.C. 4112.05(C) and 4112.051(G)(4).

<sup>13</sup> R.C. 4112.05(C) and 4112.051(G)(4).

<sup>14</sup> R.C. 4112.05(D).

<sup>15</sup> R.C. 4112.05(H) and 4112.051(I).

<sup>16</sup> R.C. 4112.99 and R.C. 2305.07, not in the bill.



days after a charge filed with the OCRC that is based, in whole or in part, on the same allegations and practices is no longer pending, whichever is longer.<sup>17</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>18</sup>

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>19</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 person voluntarily dismisses a charge filed with or a complaint issued by the OCRC.

The statute of limitations is not tolled if either of the following apply:

- The person voluntarily dismissed a charge filed with the OCRC or a complaint issued by the OCRC more than 30 days after the date the charge was filed.

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<sup>17</sup> R.C. 4112.052(A) and (B).

<sup>18</sup> R.C. 4112.053(A).

<sup>19</sup> R.C. 4112.053(B).



- 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>20</sup>

Under the bill, the OCRC is required to notify a person 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>21</sup>

## 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>22</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>23</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>24</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

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<sup>20</sup> R.C. 4112.053(C).

<sup>21</sup> R.C. 4112.04(A)(11).

<sup>22</sup> R.C. 4112.055.

<sup>23</sup> R.C. 4112.99(B).

<sup>24</sup> R.C. 4112.99(C) 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.

cause of action accrues, but this period of limitations does not apply to causes of action based on 42 U.S.C. 1981.<sup>25</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>26</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>27</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 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 material economic detriment to the employee, such as failure to hire or promote, firing, or demoting the employee.<sup>28</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>29</sup>

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<sup>25</sup> R.C. 4112.052(C).

<sup>26</sup> *Vodila v. Clelland*, 836 F.2d 231 (6th Cir. 1987).

<sup>27</sup> *Owens v. Okure*, 488 U.S. 235 (1989); *Durante v. Ohio Civil Rights Commission*, 902 F.2d 1568 (6th Cir. 1990).

<sup>28</sup> R.C. 4112.054.

<sup>29</sup> Section 3.





## Tort actions

The bill adds lawsuits based on an unlawful discriminatory practice relating to employment brought under the general lawsuit or the employment specific lawsuit to the definition of "tort actions" in the Trial Procedure Law.<sup>30</sup> The addition appears to be current law.<sup>31</sup> Both 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.

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.<sup>32</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>33</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 that results from an injury or loss to

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<sup>30</sup> R.C. Chapter 2315.

<sup>31</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.

<sup>32</sup> R.C. 2315.18(B).

<sup>33</sup> R.C. 2315.18(C).



person or property. It includes intangible losses such as pain and suffering, loss of consortium, and mental anguish.<sup>34</sup>

The Trial Procedure Law specifies procedural requirements with respect to awarding damages.<sup>35</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>36</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.<sup>37</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>38</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>39</sup>

## **Age discrimination actions consolidated**

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>34</sup> R.C. 2315.18(A).

<sup>35</sup> R.C. 2315.18(D).

<sup>36</sup> R.C. 2315.19, not in the bill.

<sup>37</sup> R.C. 4112.08(B).

<sup>38</sup> Section 3.

<sup>39</sup> *Helmick v. Cincinnati Word Processing, Inc.*, 45 Ohio St.3d 131 (1989).

(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>40</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>41</sup>

(3) The general lawsuit alleging any violation of the Civil Rights Law, which is subject to a six-year statute of limitations.<sup>42</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>43</sup> Under the bill, all age discrimination claims related to employment are subject to the 365-day limitation described above.

## 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>44</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

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<sup>40</sup> R.C. 4112.02(L).

<sup>41</sup> R.C. 4112.14 (repealed by the bill) and *Howe v. City of Akron*, 789 F.Supp.2d 786, 804 (N.D. Ohio 2010).

<sup>42</sup> R.C. 4112.99 and 2305.07, not in the bill, and *Cosgrove v. Williamsburg of Cincinnati Management Company, Inc.*, 70 Ohio St.3d 281, 1994-Ohio-295.

<sup>43</sup> R.C. 4112.14 (repealed) and R.C. 4112.02(L) and (M) and 4112.08.

<sup>44</sup> R.C. 4112.01(A)(14).



protected class or has preferences regarding an employer's protected class status.<sup>45</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>46</sup>

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## HISTORY

ACTION	DATE
Introduced	02-01-17

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<sup>45</sup> R.C. 4112.01(A)(24)(a), by reference to R.C. 4112.02(A), (B), (C), (D), (E), and (F).

<sup>46</sup> R.C. 4112.01(A)(24)(b), by reference to R.C. 4112.02(I) and (J).

