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Ohio Employment Discrimination Complaints on the Rise

By Lisa A. Kainec*

The Ohio Civil Rights Commission's ("OCRC") 2018 annual report revealed the number of discrimination complaints (aka Charges of Discrimination) before the OCRC increased by 4.4 percent from the previous year. This report covers the fiscal year from July 1, 2017 to June 30, 2018. In this time period, individuals filed 6,098 charges with the OCRC compared to 5,840 charges filed the previous fiscal year. Of these, the OCRC closed 3,674 cases. Notably, investigators found no probable cause in 2,181. The OCRC closed the remaining 1,493 cases for a number of other reasons, including party settlement, complainants' withdrawal of their charges, and failure of complainants to return their notarized Charge of Discrimination.

Race discrimination claims account for the largest number of charges followed by retaliation, disability, and sex, respectively – all of which increased from the previous year. An OCRC representative explained that, while they can make educated guesses when looking at data over a decade, it is difficult to understand changes in filings and closures from year-to-year. For example, employment discrimination complaints can increase during recessions due to economic factors influencing employees' work environments. However, it is much more difficult to analyze trends when "it's so fresh."

DISCRIMINATION COMPLAINTS UP 4.4% FROM THE PREVIOUS YEAR

Given this recent increase in discrimination complaints, it is important that employers ensure their supervisors and employees receive effective training to prevent workplace discrimination, retaliation, and other illegal conduct. The attorneys at Zashin & Rich regularly provide workplace training. Employers also should consult with counsel to assess whether their workplace policies and procedures provide them sufficient protection.

***Lisa A. Kainec**, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor and employment law. If you have questions regarding responding to a Charge of Discrimination, please contact Lisa (lak@zrlaw.com) at (216) 696-4441.

Say What You Mean and Mean What You Say: U.S. Supreme Court Rejects Class Arbitration in Ambiguous Agreement

By Stephen S. Zashin*

On April 24, 2019, the U.S. Supreme Court held an ambiguous arbitration agreement could not mean that the parties agreed to class arbitration. In doing so, the Court held that shifting from individual to class arbitration is a fundamental change that sacrifices the principal advantage of arbitration and greatly increases risks to defendants. *See Lamps Plus, Inc. v. Varela*, No. 17-988, 203 L. Ed. 636, 2019 U.S. LEXIS 2943 (Apr. 24, 2019). The Supreme Court overturned the Ninth Circuit's decision compelling an employer to arbitrate claims on a classwide rather than an individual basis. Because of the Supreme Court's decision, employees may not seek class arbitration unless the arbitration agreement explicitly authorizes class arbitration. This is a major win for employers but also a cautionary tale regarding the importance of ensuring that arbitration agreements clearly and completely express the intent of the parties.

In *Lamps Plus*, a hacker gained access to information of approximately 1,300 employees. After one employee learned about a fraudulent income tax return filed in his name, he filed a class action against his employer due to the data breach. Relying on an arbitration agreement, the employer sought arbitration on an individual rather than a classwide basis. The arbitration agreement provided: "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." The District Court rejected the employer's request for individual arbitration and authorized class arbitration. The Ninth Circuit affirmed the District Court's ruling on the basis of state contract law, which provides any ambiguity in a contract should be construed against the drafter. However, the Supreme Court found this rule unavailing.

The Supreme Court's decision to overrule class arbitration aligns with prior cases involving class arbitration. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding mandatory employment arbitration agreements that require employees to waive the right to class litigation do not violate the National Labor Relations Act); *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333 (2011) (finding class arbitration sacrifices arbitration's informality and convenience); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U. S. 662 (2010) (holding parties may not compel class arbitration when an agreement is silent on the matter).

Emphasizing the difference between individual and class arbitration, the Supreme Court described the need for strict consent to class arbitration and giving effect to the parties' intent. The Supreme Court explained class arbitration makes the process slower, more costly, introduces new risks and costs, and raises due process concerns by deciding absent class members' rights. On the other hand, individual arbitration allows parties to avoid litigation with the speed, simplicity, and inexpensiveness of arbitration. The Supreme Court further noted that these crucial differences are the "reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration."

THIS IS A MAJOR WIN FOR EMPLOYERS BUT ALSO A CAUTIONARY TALE

In light of very favorable decisions from the Supreme Court, employers should consider whether to implement mandatory arbitration programs. Any such program should clearly communicate the exclusion of class arbitration. Employers with an arbitration agreement currently in place should review those agreements to verify that the agreements explicitly express their intent as to class action claims.

***Stephen S. Zashin,** an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor and employment law and is the head of the firm's Employment and Labor Groups. Stephen has drafted and litigated the enforcement of arbitration agreements for over 20 years. If you have questions regarding developing an arbitration program, class arbitration, or any other arbitration issues, please contact Stephen (ssz@zrlaw.com) at (216) 696-4441.

City of Cincinnati Passes Salary History Ban

By Drew C. Piersall*

On March 13, 2019, the City of Cincinnati passed Ordinance No. 83-2019, which generally prohibits Cincinnati employers with at least fifteen employees from seeking an applicant's prior salary information. Cincinnati joins a growing number of states and municipalities that have enacted similar bans. Accordingly, Cincinnati employers should determine whether they are subject to the law and, if so, implement necessary changes to existing practices to ensure compliance when it becomes effective on March 13, 2020.

"Prohibited Salary History Inquiry and Use"

The ordinance specifically prohibits employers from undertaking any of the following actions:

(1) Inquiring about the salary history of an applicant for employment;

(2) Screening job applicants based on their current or prior wages, benefits, other compensation, or salary histories, including requiring that an applicant's prior wages, benefits, other compensation or salary history satisfy minimum or maximum criteria;

(3) Relying on the salary history of an applicant in deciding whether to offer employment to an applicant, or in determining the salary, benefits, or other compensation for such applicant during the hiring process, including the negotiation of an employment contract; or

(4) Refusing to hire or otherwise disfavoring, injuring, or retaliating against an applicant for not disclosing his or her salary history to an employer.

See Ord. 804-03(a)(1)-(4).

Essentially, effective March 13, 2020, Cincinnati employers will be unable to seek, use, or otherwise rely upon an applicant's salary history during the hiring process. Notably, the ordinance also requires an employer, "upon reasonable request," to provide an applicant the pay scale applicable to the position for which the applicant is applying once the employer has made an offer of employment. However, the ordinance makes no reference to inquiring into an applicant's salary expectations. Regardless, this ordinance will have a significant impact on the typical hiring and salary negotiation process.

Exceptions to the Ordinance

The ordinance includes various exceptions that may apply to permit an employer to seek, use, or otherwise rely upon an applicant's salary history during the hiring process. *See* Ord. 804-03(d)(1)-(8). For example, the ordinance does not apply to internal transfers and promotions, an applicant's voluntary disclosure of salary history, "salary, benefits, or other compensation... determined pursuant to procedures established by collective bargaining," and certain other limited circumstances.

Remedies and Statute of Limitations

In the event the ordinance is violated, the applicant can enforce the ordinance and seek "compensatory damages, reasonable attorney's fees, the costs of the action, and such legal and equitable relief as the court deems just and proper." A plaintiff must initiate such action within two years.

CINCINNATI JOINS GROWING NUMBER OF JURISDICTIONS OUTLAWING INQUIRY INTO APPLICANTS' SALARY HISTORY

Conclusion

Cincinnati has joined a growing number of jurisdictions outlawing inquiry into an applicant's salary history. Cincinnati's new law also requires employers to provide the applicable pay scale in certain circumstances. Cincinnati employers should begin preparations and implement necessary changes to existing practices to ensure compliance with the ordinance when it becomes effective.

***Drew C. Piersall**, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor and employment law. If you have questions about this ordinance or inquiries into an applicant's salary history, please contact Drew (dcp@zrlaw.com) at (614) 224-4411.

Not Enough Time? Federal Court Reinstates EEO-1 Pay Data Requirements with a September 30, 2019 Deadline

By Jzinae N. Jackson*

The U.S. Equal Employment Opportunity Commission ("EEOC") requires certain private employers (see below) to report demographic information about their workforces on an Employer Information Report, commonly referred to as an EEO-1 form. Following a revision to the EEO-1, employers now must report employee compensation, categorized by sex, race, ethnicity, and other demographics. Covered employers must provide this pay-related information for calendar years 2017 and 2018 to the EEOC by September 30, 2019.

In early 2016, the EEOC announced the revised EEO-1 form with the pay-data requirements. A detailed discussion of the revised EEO-1 form can be found here. After initially approving the new EEO-1 form, the Office of Management and Budget ("OMB") announced a stay and review of the revised EEO-1 form. However, on March 4, 2019, a federal court vacated the OMB's stay and reinstated the revised EEO-1 form, including the new pay-data requirements.

The following types of employers must complete and submit the revised EEO-1 form:

- Employers who are subject to Title VII of the Civil Rights Act ("Title VII") and employ 100 or more employees;
- Employers who are subject to Title VII and employ less than 100 employees, but who are owned or affiliated with another company such that they constitute a single enterprise, and the entire enterprise employs 100 or more employees; and
- Certain federal contractors, including those with 50 or more employees and at least $50,000 in government contracts.

Covered employers must submit the non-pay-related information covered in the EEO-1 form by May 31, 2019. Currently, employers cannot submit the pay-related information. The EEOC anticipates that it will begin to accept 2017 and 2018 pay data in July and will notify employers of the date that the pay survey will open. However, covered employers should begin preparing this information now, as they will only have until September 30, 2019 to submit the pay data once the full survey opens. Employers should contact counsel with any questions about the revised EEO-1 form and the information they are required to submit.

***Jzinae N. Jackson** practices in all areas of labor and employment law. If you have questions regarding the EEO-1 form, please contact Jzinae (jnj@zrlaw.com) at (216) 696-4441.

Please join Z&R in welcoming Jzinae Jackson to its Employment and Labor Groups

Jzinae Jackson's practice encompasses all areas of labor and employment law. Jzinae graduated *cum laude* from Capital University. She earned her law degree from Cleveland Marshall College of Law, where she was selected as the Dean's Learn Law. Live Justice. Award Recipient. As a law student, Jzinae participated in an externship with Cleveland Marshall's Civil Litigation Clinic, where she advised clients on civil protection orders and unemployment claims, and counseled consumers and businesses through the dispute resolution process. Outside the clinic, Jzinae was a member of Cleveland Marshall's Trial Advocacy Team, where she competed in a number of competitions. Independently, Jzinae competed in the 2017 Ohio Attorney General's Public Service Mock Trial Competition, where she was awarded Best Advocate. Additionally, she served as the 2017 Midwest Regional Director of Thurgood Marshall Mock Trial Competition of the National Black Law Students Association.

Z&R SHORTS

Upcoming Speaking Engagements

Tuesday, June 4, 2019

Jonathan J. Downes presents *"Collective Bargaining for Public Employers"* at the Ohio Association of Chiefs of Police meeting at the Hilliard Police Department Training Facility in Hilliard, Ohio.

Thursday, June 6, 2019

Jonathan J. Downes presents at the SERB Advanced Negotiations Seminar at State Library in Columbus, Ohio.

Friday, June 14, 2019

George S. Crisci presents *"Independent Worker: A Legal Concept Whose Time Has Come?"* at the 71st Annual Meeting of the Labor and Employment Relations Association (LERA) at the Westin Cleveland Downtown in Cleveland, Ohio.

Friday, June 21, 2019

Scott H. DeHart presents *"FLSA Legal Update"* at the Ohio Public Employer Labor Relations Association's (OHPELRA) Summer Workshop at the Liberty Center in Lancaster, Ohio.

CONGRATULATIONS

Ohio Super Lawyers Top 50 List | 2019

CLEVELAND: Andrew Zashin
COLUMBUS: Jonathan Downes

Super Lawyers List | 2019

Brad Bennett, George Crisci, Jon Dileno, Deanna DiPetta, Jonathan Downes, Michele Jakubs, Christopher Reynolds, Jonathan Rich, Jeffrey Wedel, Andrew Zashin, Stephen Zashin

Rising Stars List | 2019

Christopher Caspary, Amy Keating, Ami Patel, Drew Piersall, David Vance, Kyleigh Weinfurtner

Best Lawyers | 2019

Brad Bennett, George Crisci, Jon Dileno, Deanna DiPetta, Jonathan Downes, Christopher Reynolds, Jonathan Rich, Jeffrey Wedel, Kyleigh Weinfurtner, Andrew Zashin, Stephen Zashin
FAMILY LAW LAWYER OF THE YEAR: Amy Keating