

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 788
Judiciary

(Delegate Alston, *et al.*)

Human Relations - Protections Against Discrimination - Criminal Records

This bill generally prohibits discrimination based on an individual’s “criminal record” in places of public accommodation, the provision of services by persons licensed or regulated by the Maryland Department of Labor (MDL), the leasing of commercial property, employment, housing, and State personnel actions.

Fiscal Summary

State Effect: General fund expenditures increase, potentially significantly, for the Maryland Commission on Civil Rights (MCCR), as discussed below. The bill does not materially impact the workload of the Judiciary or the Office of Administrative Hearings (OAH). The bill is not anticipated to materially affect State revenues.

Local Effect: The bill is not anticipated to materially affect local finances or operations.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: In general, the bill incorporates “criminal record” into numerous provisions of statute that prohibit discrimination in various circumstances on the grounds of specified bases. “Criminal record” means (1) an arrest; (2) a plea or verdict of guilty; (3) a plea of *nolo contendere*; (4) the marking of a charge “stet” on the docket; (5) a disposition of probation before judgment; or (6) a disposition of not criminally responsible. This definition *does not* include (1) an arrest or disposition previously listed if the crime was committed against a minor or vulnerable adult or (2) the registration status of an individual on the Maryland Sex Offender Registry.

Employment Discrimination

The bill specifies that under Title 20, Subtitle 6 of the State Government Article, an employer is not prohibited from making an inquiry or taking other action regarding a criminal record that under applicable State or federal law the employer is (1) required or expressly authorized to take or (2) in the case of an inquiry or other action that is substantially related to the essential functions of a job applied for, authorized to take. Furthermore, the bill specifies that provisions regarding employment discrimination do not apply to an employer that provides programs, services, or direct care to minors or to vulnerable adults. Furthermore, the provisions may not be construed to preempt a local jurisdiction from enacting or enforcing a law that is more restrictive with respect to criminal record screening practices of employers in the local jurisdiction.

Housing Discrimination

The bill specifies that a housing provider is not prohibited from making an inquiry or taking other action that the provider is required to take or is expressly authorized to take by another applicable federal or State law regarding a criminal record. Furthermore, the bill specifies that provisions regarding housing discrimination do not apply to a housing provider that provides programs, services, or direct care to minors or vulnerable adults.

Current Law:

Place of Public Accommodation

An owner or operator of a place of public accommodation (or an agent or employee of the owner or operator) may not refuse, withhold from, or deny to any person any of the accommodations, advantages, facilities, or privileges of the place of public accommodation because of the person's race, sex, age, color, creed, national origin, marital status, sexual orientation, gender identity, or disability.

Licensed or Regulated Persons under § 2-108 of the Business Regulation Article

A person that is licensed or regulated by a unit in MDL listed in § 2-108 of the Business Regulation Article may not refuse, withhold from, or deny any person any of the accommodations, advantages, facilities, privileges, sales, or services of the licensed or regulated person or discriminate against any person because of the person's race, sex, creed, color, national origin, marital status, sexual orientation, age, gender identity, or disability.

Commercial Property

An owner or operator of commercial property, an agent or employee of the owner or operator of commercial property, or a person that is licensed or regulated by the State may not discriminate against an individual in the terms, conditions, or privileges of the leasing of property for commercial use, or in the provision of services or facilities in connection with the leasing of property for commercial use, because of the individual's race, color, religion, sex, age, disability, marital status, sexual orientation, gender identity, or national origin.

Employment Discrimination

Statute includes prohibitions against various types of employment discrimination, generally on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, genetic information, or disability (unrelated in nature and extent so as to reasonably preclude the performance of the employment).

However, statutory provisions do not apply to specified religious entities with respect to the employment of individuals of a particular religion, sexual orientation, or gender identity to perform work connected with the activities of the religious entity. (The bill incorporates "criminal record" into these exceptions.)

For additional information on employment discrimination, please see the **Appendix – Employment Discrimination**.

Housing Discrimination

In general, State law prohibits housing discrimination because of race, sex, color, religion, national origin, marital status, familial status, sexual orientation, gender identity, source of income, or disability.

Housing discrimination includes, among other things, taking the following actions based on a protected class: (1) refusing to sell or rent a dwelling after the making of a *bona fide* offer; (2) refusing to negotiate for the sale or rental of a dwelling; (3) making a dwelling otherwise unavailable; (4) discriminating in the terms, conditions, or privileges of the sale or rental of a dwelling; (5) discriminating in the provision of services or facilities in connection with the sale or rental of a dwelling; (6) making, printing, or publishing or causing to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates a preference, limitation, or discrimination based on a protected status; (7) representing to a person that a dwelling is not available for inspection, sale, or rental when it is available; and (8) for profit, inducing or attempting to induce a person to sell or rent a dwelling by representations regarding the

entry or prospective entry into the neighborhood of a person or persons of a particular protected status.

Provisions prohibiting housing discrimination do not require that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of another individual or result in substantial physical damage to the property of others, nor do they prohibit conduct against a person because the person has been convicted of the illegal manufacture or distribution of “controlled dangerous substances” or “controlled substances” as defined in State and federal law.

Personnel Actions

All personnel actions concerning a State employee or applicant for employment in State government must be made *without* regard to age; ancestry; color; creed; gender identity; marital status; mental or physical disability; national origin; race; religious affiliation, belief, or opinion; sex; or sexual orientation.

A personnel action may be taken with regard to age, sex, or disability to the extent that such factors are required by law or a *bona fide* occupational qualification. (The bill incorporates qualifications relating to a “criminal record” into these exceptions.)

Employment and Criminal Records

Statute includes numerous provisions regarding the extent to which an individual’s criminal record may be considered during the application/hiring process. For example, § 3-1503 of the Labor and Employment Article prohibits an employer with 15 or more full-time employees from, before the first in-person interview, requiring an applicant to disclose whether the applicant has a criminal record or has had criminal accusations brought against the applicant. The provisions do not apply to an employer that is expressly authorized to do so by another applicable federal or State law or if the employer provides programs, services, or direct care to minors or to vulnerable adults.

Section 2-203 of the State Personnel and Pensions Article (generally applicable to all employees in the Judicial, Legislative, and Executive branches of State government), subject to specified exceptions, prohibits the inquiry into the criminal record or criminal history of an applicant for employment until the applicant has been provided an opportunity for an interview.

Enforcement and Remedies – In General

MCCR is the independent State agency generally charged with the enforcement of laws prohibiting discrimination in employment, housing, public accommodations, and State contracting.

Procedures for alleging discrimination and available remedies are specified in statute and differ depending on the type of discrimination alleged.

For example, generally, a person claiming to have been injured by a discriminatory housing practice may file a complaint with MCCR. Statutory provisions specify the process and requirements for complaints of housing discrimination, including the responsibilities of MCCR in investigating a claim and attempting conciliation and the circumstances under which a complainant, respondent, or aggrieved person must have an opportunity for an administrative hearing conducted by OAH or may elect to file a civil action in circuit court. If an administrative law judge (ALJ) finds that the respondent has engaged in a discriminatory housing practice, the ALJ may order appropriate relief, including actual damages and injunctive or other relief, and may assess a civil penalty against the respondent. A court may award actual or punitive damages, grant injunctive relief, and allow reasonable attorney's fees and costs.

State Expenditures: General fund expenditures increase, potentially significantly, for MCCR. MCCR advises generally that the fiscal impact is indeterminate but anticipated to be significant, as adding individuals with criminal records as protected classes in statutory provisions governing multiple types of discrimination is expected to significantly increase MCCR's caseload. The Department of Legislative Services (DLS) agrees with this assessment and advises that at a minimum, MCCR is likely to incur expenditures associated with hiring additional staff to *investigate* complaints of discrimination based on an individual's criminal record. *For illustrative purposes only*, and based on information previously provided to DLS, for every additional investigator required, general fund expenditures increase by at least \$80,000 annually. Additional expenditures are also likely incurred for costs associated with training and education, among other potential expenses.

Any potential minimal increase in expenditures associated with increased cases referred to OAH or heard in the circuit courts is not anticipated to materially affect State finances.

Small Business Effect: Small businesses are prohibited from engaging in specified discriminatory practices based on an individual's criminal record (with certain exceptions) and subject to various penalties depending on the circumstances of the case (*e.g.*, actual or punitive damages, civil penalties, etc.) if found to be in violation.

Additional Information

Recent Prior Introductions: Similar legislation has been introduced within the last three years. See HB 1163 of 2023.

Designated Cross File: None.

Information Source(s): Maryland Commission on Civil Rights; Anne Arundel, Baltimore, Charles, Garrett, and Howard counties; Maryland Association of Counties; Maryland Municipal League; Judiciary (Administrative Office of the Courts); University System of Maryland; Department of Budget and Management; Department of Housing and Community Development; Maryland Department of Labor; Office of Administrative Hearings; Department of Legislative Services

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rh/jkb

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Appendix – Employment Discrimination

Discrimination in Employment – Generally

Under § 20-602 of the State Government Article, it is State policy to assure that all persons have equal opportunity in employment and in all labor management-union relations. As such, State law generally prohibits discrimination in employment on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, genetic information, or disability (unrelated in nature and extent so as to reasonably preclude the performance of the employment).

Subject to limited exceptions, on any of these bases or because of an individual's refusal to submit to or make available the results of a genetic test, an employer may not (1) fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions or privileges or (2) limit, segregate, or classify its employees or applicants for employment in any way that deprives or tends to deprive any individual of employment opportunities or otherwise adversely affect the individual's status as an employee. An employer is also prohibited from failing or refusing to make a reasonable accommodation for the known disability of an otherwise qualified employee or an applicant for employment; however, State law does not require an employer to reasonably accommodate a disability if the accommodation would cause undue hardship on the conduct of the employer's business. Furthermore, an employer may not (1) engage in the harassment (including sexual harassment) of an employee or (2) discriminate or retaliate against an employee or applicant because the employee/applicant has opposed any practice prohibited by State law relevant to employment discrimination or made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing related to such laws. Additional prohibitions – including those specific to interns, employment agencies, and labor organizations – are also specified in statute.

In general, the above prohibitions are applicable to employers that have 15 or more employees (based on the number of employees working in each of 20 or more calendar weeks in the current or preceding calendar year). Provisions relating to harassment allegations apply to employers with one or more employees. Statute also specifically prohibits units, officers, or employees of the State, a county, or a municipal corporation from engaging in these discriminatory acts.

Employment Discrimination Complaints – Initial Process, Administrative Proceedings, and Civil Actions

Initial Process: The Maryland Commission on Civil Rights (MCCR) is the independent State agency charged with the enforcement of laws prohibiting discrimination in employment. An individual alleging employment discrimination may file an inquiry with MCCR, which initiates the intake process. Once a complaint has been properly filed, the case is assigned to an MCCR investigator to determine whether there is probable cause that discrimination has occurred. If at the conclusion of the investigatory stage, MCCR believes there is probable cause that discrimination occurred, MCCR issues a finding and attempts to resolve the matter through conciliation. If an agreement to remedy and eliminate the discrimination cannot be reached, the matter is certified for litigation and may proceed in a number of ways, including being heard before an administrative law judge.

A complaint alleging an unlawful employment practice other than harassment must be filed within 300 days after the alleged act (a complaint alleging harassment must be filed within two years). However, complaints filed with a federal human relations commission or a local human relations commission within specified timeframes are deemed to be in compliance with these requirements.

Administrative Proceedings: At an administrative hearing, MCCR's Office of the General Counsel presents the case on behalf of the complainant. Remedies available on a finding by an administrative law judge that the respondent (employer) is engaging or has engaged in an unlawful employment practice include (1) enjoining the respondent from engaging in the discriminatory act; (2) ordering appropriate affirmative relief (including the reinstatement or hiring of employees, with or without back pay); (3) awarding compensatory damages; and (4) ordering any other equitable relief that the judge considers appropriate.

Compensatory damages that are awarded (for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, or nonpecuniary losses) are in addition to back pay, interest on back pay, and any other equitable relief that the complainant may recover under any other provision of law. The maximum amounts of compensatory damages that may be awarded are as follows:

- \$50,000 for respondents with 15 to 100 employees;
- \$100,000 for respondents with 101 to 200 employees;
- \$200,000 for respondents with 201 to 500 employees; and
- \$300,000 for respondents with 501 or more employees.

If back pay is awarded, the award must be reduced by any interim earnings or amounts earnable with reasonable diligence by the person discriminated against. In addition to any other authorized relief, a complainant may recover back pay for up to two years preceding the filing of the complaint if the unlawful employment practice that has occurred during the complaint filing period is similar or related to an unlawful employment practice with regard to discrimination in compensation that occurred outside the time for filing a complaint.

Civil Actions: A complainant or a respondent may elect to have the claims asserted in a complaint alleging an unlawful employment practice determined in a civil action brought by MCCR on the complainant's behalf if (1) MCCR has found probable cause to believe the respondent has engaged or is engaging in an unlawful employment practice and (2) there is a failure to reach an agreement to remedy and eliminate the practice. MCCR may also elect to have the claims asserted within the complaint determined in a civil action brought on its own behalf under the same conditions. On a finding that discrimination occurred, the circuit court may provide the same remedies that an administrative law judge is authorized to provide (described above).

A complainant may also file a private civil action in circuit court against the respondent if (1) the complainant initially filed a timely administrative charge or a complaint under federal, State, or local law alleging an unlawful employment practice by the respondent and (2) at least 180 days have elapsed since the filing of the administrative charge or complaint. In addition, the civil action must be filed within two years after the alleged employment practice occurred (or within three years for a harassment allegation), however, these time limitations are tolled while an administrative charge or complaint is pending. The filing of a civil action automatically terminates any proceeding before MCCR based on the underlying administrative complaint.

In addition to the remedies described above, a circuit court may also award punitive damages in a private civil action if the respondent is not a governmental unit or political subdivision, and the court finds that the respondent is engaging or has engaged in an unlawful employment practice with actual malice. If the court awards punitive damages, the sum of the amount of compensatory damages and punitive damages may not exceed the applicable limitations on compensatory damages (as shown above). If a complainant seeks compensatory or punitive damages in a circuit court action, any party may demand a jury trial, and the court may not inform the jury of the statutory limitations on compensatory and punitive damages.

Pursuant to § 20-1015 of the State Government Article, a court may award the prevailing party reasonable attorney's fees, expert witness fees, and costs.

Employment Discrimination Caseloads

MCCR reports that since 2017, retaliation has been the primary employment-related inquiry received, followed by inquiries related to disability, harassment, and race. According to the most recent MCCR Annual Report, nearly 70% of the 661 overall cases ultimately referred for investigation in fiscal 2023 were for employment discrimination.