Department of Legislative Services

Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
Third Reader

Senate Bill 449 (Senator Smith, *et al.*)
Judicial Proceedings Economic Matters

Unlawful Employment Practices - Remedies

This bill increases the limitations on the amount of compensatory and punitive damages that may be awarded to a plaintiff in cases of unlawful employment practices. The bill also increases, from two years to three years, the amount of back pay that may be awarded in such a case.

Fiscal Summary

State Effect: Potential significant increase in general and special fund expenditures for payments of awards in cases involving unlawful employment practices. Revenues are not affected.

Local Effect: Potential significant increase in local government expenditures to pay judgment awards and increased insurance premiums for liability coverage. Revenues are not affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: The sum of the amount of compensatory damages that may be awarded to a complainant, which are capped according to the number of employees that the respondent has working 20 or more weeks in the current or preceding calendar year, are increased as follows:

- from $50,000 to $65,000 for respondents with 15 to 100 employees;
- from $100,000 to $130,000 for respondents with 101 to 200 employees;

- from $200,000 to $260,000 for respondents with 201 to 500 employees; and
- from $300,000 to $385,000 for respondents with 501 or more employees.

The limitations on compensatory damages as shown above increase by 5% annually, as specified.

Current Law:

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, discrimination in employment is prohibited on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, or disability (unrelated in nature and extent so as to reasonably preclude the performance of the employment).

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. Additional prohibitions are also specified in statute.

Employment Discrimination Actions – Initial Process and Remedies

The Maryland Commission on Civil Rights (MCCR) is the State agency charged with the enforcement of laws prohibiting discrimination in employment, housing, public accommodations, and State contracting. An individual alleging employment discrimination may file a complaint with MCCR within specified timeframes. If a complaint is filed with MCCR and an agreement to remedy and eliminate the discrimination cannot be reached, the matter may be heard before an administrative law judge. Remedies available on a finding by an administrative law judge that the respondent 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; (3) awarding compensatory damages; and (4) ordering any other equitable relief that the administrative law 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.

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, where 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 court may provide the same remedies that an administrative law judge is authorized to provide (described above).

A complainant may also file in circuit court a private civil action 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; (2) at least 180 days have elapsed since the filing of the administrative charge or complaint; and (3) the civil action is filed within two years after the alleged employment practice occurred (or within three years for a harassment allegation). 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 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. Additionally, pursuant to § 20-1015 of the State Government Article, a court may award the prevailing party in a civil action reasonable attorney's fees, expert witness fees, and costs.

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.

State Fiscal Effect: State expenditures may increase, *potentially* significantly, to pay for any higher judgment awards that may result from the bill's increased back pay made recoverable to employees and increased caps on compensatory damages. Under the bill, punitive damages may still not be awarded against a governmental unit or political subdivision.

The magnitude of any impact depends in part on the number and nature of employment discrimination claims filed, which cannot be reliably predicted beforehand. Additionally, it is unclear how employment discrimination claims that may fall under the purview of the Maryland Tort Claims Act (MTCA) are impacted, given MTCA's general $400,000 cap on damages. According to the State Treasurer's Office (STO), if an employment discrimination claim against the State is filed in circuit court, once STO receives the suit, it is subject to review by the Office of the Attorney General to determine if there are torts involved and whether the claim remains under MTCA/STO or with the State agency involved in the claim. If the claim falls under MTCA, special funds from the State Insurance Trust Fund may be used to pay for subsequent litigation costs and judgment awards. If claims do not involve a tort, any resulting costs are generally paid by the impacted agency or as otherwise directed by the Board of Public Works.

The bill is not anticipated to materially affect the operations or finances of MCCR, the Judiciary, or the Office of Administrative Hearings (OAH). OAH advises that the number of employment discrimination cases it adjudicates has historically been low; in the past three fiscal years, for example, OAH has heard a total of six employment discrimination claims.

Local Fiscal Effect: According to the Local Government Insurance Trust (LGIT), local government expenditures may increase, *potentially* significantly, to pay for increased judgment awards arising from the bill. LGIT also advises that insurance premiums for liability coverage may increase due to the bill's increased caps on compensatory damages. It is also unclear how in some cases, the increased damages caps may interact with caps generally applicable under the Local Government Tort Claims Act.

The bill is not anticipated to materially affect the operations or finances of the circuit courts.

Small Business Effect: Small businesses face *potentiall*y significant costs associated with the increase in damages caps and the increase in years for which a claimant can claim back pay.

Additional Information

Prior Introductions: SB 911 of 2021, a similar bill as amended, passed the Senate and received a favorable with amendments report from the House Economic Matters Committee. No final action was taken on the bill before the conclusion of the legislative session.

Designated Cross File: None.

Information Source(s): Maryland Commission on Civil Rights; Maryland Association of Counties; Maryland Municipal League; Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Department of Budget and Management; Board of Public Works; Maryland Department of Transportation; Office of Administrative Hearings; Department of Legislative Services

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