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Full Disclosure: Maryland's New #MeToo Law May Do Little to Expose Workplace Harassment

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In reaction to a litany of high-profile scandals, Maryland has joined a growing number of states in enacting legislation intended to prevent employers from sheltering perpetrators of sexual harassment. Approved by Governor Larry Hogan on May 15, 2018, the Disclosing Sexual Harassment in the Workplace Act of 2018 (DSHWA) purports to ban employment contracts requiring sexual harassment claims to be resolved through private arbitration. It also mandates that large employers report certain information about sexual harassment settlements to the Maryland Commission on Civil Rights, which in turn can make some of that information available to the public. Hampered by weak enforcement provisions and faced with a potential preemption challenge, however, DSHWA may not have a significant impact on current employer strategies for avoiding and managing sexual harassment claims.

Article By
Christopher E. Humber
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
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Maryland

Ban on Mandatory Arbitration of Sexual Harassment Claims

DSHWA declares that, except as prohibited by federal law, any provision of an employment contract, policy, or agreement that waives a substantive or procedural right or remedy to a claim for sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment shall be null and void as against public policy of Maryland. The law applies to contracts and policies executed, implicitly or explicitly extended, or renewed on or after October 1, 2018.

The new legislation prohibits employers from taking any adverse action against an employee because of his or her refusal to enter into an agreement containing an invalid waiver. Additionally, employers that attempt to enforce a prohibited contractual provision can be held liable for the employee's reasonable attorneys' fees and costs.

By its terms, DSHWA only applies to employment contracts and policies, so it should not impact arbitration agreements with independent contractors, vendors, customers, or other third parties. Likewise, the statute will not prevent employers from entering into settlement agreements because it applies only to contractual provisions that restrict an employee's rights or remedies with respect to claims accruing in the future.

Mandatory Disclosure of Sexual Harassment Settlements

DSHWA will require large employers (defined as those with 50 or more employees in the state of Maryland) to provide the Maryland Commission on Civil Rights with periodic reports regarding sexual harassment settlements. "On or before July 1, 2020, and on or before July 1, 2022," covered employers must report the following information to the commission:

a. "[T]he number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee"

b. "[T]he number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment" (The statute requires the Maryland Commission on Civil Rights to include on its survey form "a space for an employer to report whether the employer took personnel action against an employee who was the subject of a settlement," but it does not expressly require employers to provide this information.)

c. "[T]he number of settlements made after an allegation of sexual harassment that included a provision requiring both parties to keep the terms of the settlement confidential"

The reporting requirement will become effective on October 1, 2018, and will automatically expire on June 30, 2023, with no further action required by the Maryland General Assembly.

Employers may want to keep in mind that information in these reports may be disclosed to the public. In response to a request by any member of the public regarding a particular employer, the commission will disclose the number of times that employer has paid a settlement to resolve sexual harassment allegations against the same employee over the previous 10 years. The commission will also publish the aggregate number of responses from employers for each item in the survey and will prepare an executive summary of randomly selected surveys with employer-identifying information redacted.

A Toothless Tiger?

However well-intentioned, DSHWA ultimately may do little to advance the objectives it was designed to serve. Inasmuch as the statute purports to ban the mandatory arbitration of sexual harassment claims, it will likely draw a preemption challenge under the Federal Arbitration Act as interpreted by the Supreme Court of the United States in *AT&T Mobility LLC v. Concepcion*. Likewise, DSHWA does not impose any penalties on employers that fail to report sexual harassment settlement information or report inaccurate information to the Maryland Commission on Civil Rights. To the contrary, the reporting provision is sufficiently vague to create uncertainty about exactly what settlements are covered. Moreover, DSHWA does not expressly create a private right of action or administrative mechanism for challenging adverse employment actions, although it potentially could serve as the basis for claims of wrongful discharge in violation of public policy. Without robust and effective enforcement provisions, DSHWA may do little to change how Maryland employers deal with sexual harassment claims.

The legislation will go into effect on October 1, 2018.

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