

MEMORANDUM

To: Ancel Glink Clients and Friends
From: Lucy B. Bednarek
Robert K. Bush
Subject: Illinois Human Rights Act amendment
Date: January 4, 2008

New Changes in the Illinois Human Rights Act Give Employees Access to the Circuit Court

Beginning January 1, 2008, employees bringing discrimination or harassment claims under the Illinois Human Rights Act (“IHRA”) will have access to the Illinois circuit courts. This is a major change for employment disputes in Illinois, and will affect both employees and employers. For the first time, employers will be defending employment cases in state circuit court jury trials. This process affects private employers, and all units of local government and school districts.

What is the Current Process?

Before January 1, 2008, any charge filed under the IHRA was investigated exclusively by the Illinois Department of Human Rights (“IDHR”). The IDHR decided whether there was substantial evidence to support the charge or no substantial evidence. If the IDHR made a finding of substantial evidence, the IDHR filed a formal complaint on the complainant’s behalf with the Illinois Human Rights Commission (“IHRC”). In the IHRC, the complaint was heard by an administrative law judge, in a process similar to litigation in the courts but without a jury. If the IDHR made a finding of no substantial evidence, the charge was dismissed. The complainant could appeal the dismissal decision to the IDHR’s Chief Legal Counsel. If the appeal to the Chief Legal Counsel was unsuccessful, the complainant could appeal to the Illinois Appellate Court, a cumbersome and rarely used process.

If the charge was cross-filed with the Federal Equal Employment Opportunity Commission (“EEOC”), a right to sue notice was issued, closing the administrative case and giving the complainant 90 days to file a lawsuit in federal court. In addition, if the charge was cross-filed with the EEOC, the complainant could request a right to sue letter 180 days after the charge was first filed with the Commission, and bring suit in federal court within 90 days after receiving this notice.

How does the New Law Change the Current Process?

The new law, Public Act 95-0243, which became effective January 1, 2008, permits employees to avoid the finality of an IHRC decision and file claims directly in state court. Specifically, employees can file their claims in state court if any of the following happen: (1) the IDHR does not issue a decision on the charge within 365 days of the charge filing date (or within an extended period of time agreed to by all of the parties); (2) the IDHR makes a finding of substantial evidence or (3) the IDHR makes a finding of no substantial evidence. Complainants have 90 days to file their claims in state court after any of these things occur.

In other words, if the IDHR makes a finding of no substantial evidence and dismisses the charge, the complainant may either appeal to the IDHR's Chief Legal Counsel or immediately file a lawsuit in state court. If the IDHR makes a finding of substantial evidence, the complainant may proceed before the IHRC or file a lawsuit in state court. This new process is similar to that for cases filed before the EEOC – which gives all complainants the right to independently sue at their own expense in federal court no matter what happens before the EEOC.

How Does the New Law Affect You?

Although it is too early to tell how the change will affect employment law claims, we anticipate employees will avoid the IHRC for a number of reasons – all of which mean a higher cost to employers. First, plaintiffs choosing to file in state court do not lose any of the remedies available under the IHRA, including actual damages, reinstatement, back pay, interest, attorneys' fees and costs. As a result, plaintiffs' attorneys may file suit in state court because they believe a jury will award greater damages than will an IHRC administrative law judge. This may be more troublesome for employers in counties where juries are inclined to be plaintiff-friendly and higher dollar awards may be made.

Second, because state court judges do not have the experience with employment discrimination claims that federal judges have, state court judges may be reluctant to grant summary judgment – resulting in more claims going to trial. Many employment cases that were cross-filed in the EEOC, and would have normally gone to federal court, may now end up in state court and before juries.

Third, employers may face more types of employment discrimination claims. Because federal law does not recognize claims for marital status or sexual orientation discrimination, plaintiffs may choose state court to bring these types of lawsuits. 775 ILCS 5/1-102.

Fourth, there is more discovery in the state court. In the IHRC, the parties serve each other with certain types of written discovery. However, depositions are not usually allowed. In contrast, depositions are allowed in the state court. This type of discovery takes more time and resources.

Fifth, the new law gives complainants more time to address findings of no substantial evidence. Under the new law, if the IDHR makes a finding of no substantial evidence, complainants only have 30 days to seek review with the IHRC (the previous procedure required complainants to seek review with the IDHR Chief Legal Counsel). In contrast, complainants have 90 days to file a claim in state court after the IDHR makes a finding of no substantial evidence. As a result, many more employment claims may end up in state court, simply because complainants who do not act within the shorter 30 days will have no choice but to file suit within the longer period of time.

Finally, while it may seem like employment cases may be decided more quickly in state court, due to the complicated and lengthy process in the IDHR and IHRC, it is unclear how state courts will handle the greater number of employment cases. Many Illinois courts are already overburdened with too many cases. As a result, the overall time for an employment case to be resolved may be longer than before the IDHR or IHRC. However, it is still too early to tell how state courts will deal with the increase caseload.

Is There Anything You Can Do to Prepare for the Changes?

The new law affects both public and private employers. While it is true that in most cases plaintiffs will need to find lawyers to file cases in state courts, the lure of damages plus attorneys' fees combined with the deep pockets of government is likely, at least for some time, to make this a growth industry.

The new law may, inadvertently, be a moderate financial benefit to local governments. Many coverage documents, whether conventional insurance policies or self-insurance plans, currently exclude claims pending before administrative agencies. The new law permits an administrative complaint to, very quickly, become a state law complaint. The lawsuit will likely trigger insurance (or self-insured) protection in matters for which coverage was previously denied thereby transferring the costs of litigation, including damages and attorneys fees, to an insurance carrier or self-insurance pool.

Employers should take an even more proactive role in preparing themselves for the changes in employment cases created by the new law. We recommend that employers review their employment practices and policies and conduct discrimination training to try to prevent or lessen the frequency of such lawsuits – filed either in the IHRC, EEOC, federal court, and now state court.

Finally, because of the dramatic change in state law, governmental bodies should be prepared to contact their attorneys as soon as it appears that a complaint is likely to be made. Early intervention may dissuade the complainants or help the governmental body in defending against an inevitable claim.

Please contact us if you have any questions.