BEFORE THE HOUSE ECONOMIC DEVELOPMENT, COMMERCE, & LABOR COMMITTEE
PROPONENT TESTIMONY ON HB 2
Tuesday, March 7, 2017

Chairman Young, Vice Chairman DeVitis, Ranking Member Lepore-Hagan, and members of the House Economic Development, Commerce, and Labor committee, thank you for the opportunity to again provide proponent testimony on House Bill 2 (HB 2), the Employment Law Uniformity Act. My name is Don Boyd and I am the Director of Labor and Legal Affairs for the Ohio Chamber of Commerce.

The Ohio Chamber is the state's leading business advocate, and we represent nearly 8,000 companies that do business in Ohio. Our mission is to aggressively champion free enterprise, economic competitiveness and growth for the benefit of all Ohioans. The Ohio Chamber of Commerce is a champion for Ohio business so our state enjoys economic growth and prosperity.

Joining me today is Bill Nolan, a partner at Barnes & Thornburg LLP and member of the Ohio Chamber's Labor & Employment committee. He will be providing testimony from a practitioner's perspective on behalf of both the Ohio Chamber and the Ohio Management Lawyers Association.

Overview

I am here today to address some of the testimony that has been given regarding the substance of, motives for, and intent behind, this legislation. I will limit my testimony to the policy concerns as I know others will be testifying on many of the substantive legal issues including the statute of limitation and individual supervisor liability. As always, the Ohio Chamber would like to be a resource as you are examining this important issue.

Why Title VII?

Title VII is the federal statute most analogous to Ohio's employment discrimination laws contained in ORC 4112. Previously, some have stated other laws with differing requirements and interpretations such as Section 1981 and 1983 claims, the Equal Pay Act (EPA), the Family Medical Leave Act (FMLA), and others should be looked at instead of Title VII. Pointing to those other laws is simply misdirection rather than looking at the statute that makes the most sense, Title VII.

Title VII protects employees from discrimination on the basis of race, color, religion, sex, and national origin. The Age Discrimination in Employment Act (ADEA) augments Title VII by adding age as protected class. The Americans with Disabilities Act also enhances Title VII by prohibiting discrimination the basis of disability. Ohio law, under ORC 4112.02, protects employees on the basis of race, color,

religion, sex, military status, national origin, disability, age, or ancestry. As you can see, many of those protected classes overlap. Further, Title VII was enacted in 1964 and amended in 1991. The ADA was enacted in 1990 and significantly amended in 2008. The ADEA was enacted in 1967 and amended in 1991. All of these statutes are enforced by the Equal Employment Opportunity Commission (EEOC), the federal equivalent of the Ohio's Civil Rights Commission (OCRC). In fact, many of the cases handled by the OCRC are pursuant to work sharing agreements with the EEOC.

In contrast, Section 1981 and Section 1983 were enacted during the reconstruction era following the civil war and address only racial discrimination unlike Title VII that applies to a much broader number of protected classes, like Ohio law. Further, Section 1983 applies only to state actors under "color of state law" and generally does not apply to private entities, like the businesses we represent. The EPA similarly applies to a very narrow type of discrimination, that of pay discrimination, and FMLA deals only with issues of employee leave. Though these laws provide additional protections and causes of action to employees, Title VII is the much more applicable federal statute.

Both Title VII and the other laws mentioned above serve to compliment Ohio's discrimination laws and will continue to do so if this legislation is passed. The real question is why some would want to look at every statute except the one that is most analogous to Ohio's discrimination laws? The answer is, to simply to distract from the law that makes the most sense.

Federal Law

An additional comment you have heard is that this legislation "cherry picks" some aspects of federal law over others to the detriment of employees and potential employees. However, this could not be further from the truth. The items that remain in this bill present biggest problems for employers throughout this state when these claims are brought in court. This is why modeling certain aspects of Ohio law after the analogous federal law, Title VII, makes sense to provide predictability and a level of fairness to these lawsuits. Many of the items to be corrected by this bill are not based upon explicit items in the Ohio Revised Code. These were created by court cases where, we believe, the court overstepped and effectively wrote into the law items that were not there and which the legislature never intended. The main parts of this legislation are modeled after Title VII in that the statute of limitation in this bill is closer to that of Title VII and Title VII does not provide for individual liability.

Covered Employer

One need only look at the definition of employers to see that many items that would have limited the applicability of Ohio's employment discrimination laws are not included in this legislation or have been removed. Title VII only covers employers with 15 or more employees for 20 or more weeks of the previous calendar year. While adopting this definition would have led to greater uniformity, we chose not to include this in the legislation. In fact, when looking at other federal laws outside of Title VII, many have even higher employee thresholds. The Age Discrimination in Employment Act (ADEA) covers employers with 20 or more workers. The Americans with Disabilities Act (ADA) covers employers with 15 or more employers in 20 or more weeks. The Family Medical Leave Act (FMLA) covers employers with 50 or more employees and employees must have worked for the employer for 12 months and at least 1250 hours to qualify. Ohio law on the other hand covers employers with four or more employees and language mirroring the counting mechanism under Title VII requiring an employer to have the specified number of employees for 20 or more weeks within the previous calendar year was removed in the substitute version of the bill. Thus, the employers covered under Ohio's employment discrimination statutes remains unchanged by this legislation.

Vicarious Liability

Looking deeper into the definition of employer, previous testimony stated that this bill would eliminate vicarious liability for corporations providing no recourse if discrimination were to occur. We disagree with this assessment as the bill clearly states in Section 3, lines 1997 through 2002 of the substitute bill, that "The General Assembly does not intend this act to abrogate the imposition at common law of vicarious liability on employers for the unlawful discriminatory practices of their employees or agents or to abrogate any other statutory claims that exist outside of Chapter 4112. of the Revised Code or claims existing at common law that may be made against an individual." This clearly shows that there was never intent to eliminate vicarious liability through this legislation. That being said, I believe there is an an amendment that was requested by those opposing the bill that would make this even more clear. Ironically enough, though these same opponents recommending the change point to many different federal statutes depending which issue is being discussed, the clarifying language recommended is from the definition of employer located in none other than Title VII.

Statute of Limitations

Under Title VII, the ADEA, and the ADA, claimants must exhaust administrative remedies prior to filing a civil action. This requires filing a charge with the EEOC within 300 days of the alleged discriminatory act. Yes, some other federal laws have longer statutes of limitation. However, the most analogous federal statute is actually shorter than that proposed in this legislation. With the tolling provision provided for in HB 2 and discussed in previous testimony, employees who file with the OCRC first could have up to two years to file a civil lawsuit.

Individual Liability

As stated in our previous testimony, Title VII does not provide for individual liability on the part of supervisors or managers. Though some other federal statutes do provide for individual liability, the federal statute that addresses employment discrimination and is most similar to Ohio law does not. Nothing in this legislation abrogates claims under those other federal statutes. Additionally, nothing in the bill provides immunity to managers or supervisors for tort actions such as assault, battery, intentional infliction of emotional distress, libel, slander, or others nor does it immunize against any possible criminal penalties. HB 2 also does not eliminate claims of negligent hiring and retention that could be brought against an employer who continues to employ someone who has a history of issues. Simply put, it is in an employer's interest to prevent discrimination before it occurs and eliminate it and take corrective action if it does. Eliminating individual supervisor liability does not change that fact and simply returns Ohio's law to what it was prior to the *Genaro* case. Further, it aligns private and public sectors employers.

Damages/Attorney Fees

It has been alleged that HB 2 cherry picks federal law by not allowing attorneys' fees whenever a party prevails, as is the case under Title VII. This is true, however it fails to mention the fact that Title VII also has significantly lower caps on non-economic and punitive damages than those in this bill, which simply codifies Ohio case law. The Title VII caps range from $50,000 for employers with less than 100 employees to $300,000 for employers with 500 or more employees. These caps were in previous versions of the bill but were removed as a concession last year. Further, though one of the goals of the legislation was to bring age discrimination protections in line with all other types of discrimination, another concession was made to keep the method of bringing an age discrimination claim that allows

attorneys' fees to be awarded in some cases. This compromise was done despite the fact it would keep age discrimination as a convoluted outlier compared to other types of discrimination.

A Practitioner's Perspective

Bill Nolan's remarks.

Conclusion

Opponents argue to not look at Title VII to mirror Ohio law and instead point to other unrelated statutes when it is more beneficial to them. However, they then turn around and point to Title VII when it is in their interest. The simple fact is that the changes contained in House Bill 2 will make Ohio's employment discrimination laws more like federal law than they currently are.

Shaping Ohio law to mirror federal law as much as possible will create greater predictability for both employers and employees in matters of alleged workplace discrimination. HB 2, seeks to maintain robust protection for Ohio employees from discrimination in the workplace while also increasing uniformity between state and federal discrimination laws and improving stability and efficiency for Ohio employers.

We urge you to support HB 2. Thank you for the opportunity to provide this testimony and we would be happy to answer any questions you may have at this time.