

**SB 268 GUTS OHIO'S LAWS PROHIBITING DISCRIMINATION
AGAINST WOMEN, OLDER WORKERS, EMPLOYEES WITH
DISABILITIES, MILITARY VETERANS, MINORITIES,
AND RELIGIOUS EMPLOYEES.**

AN ANALYSIS OF SENATE BILL 268
BY THE OHIO EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY OF SOME KEY PROVISIONS

The bill to amend Ohio's anti-discrimination laws is a transparent and cynical attempt to prevent employers and managers from being held accountable for even blatant harassment or discrimination directed at women, older workers, employees with disabilities, military veterans, minorities, or religious employees. In fact, the bill bans any lawsuits against individual managers, company officers, and even some entire companies for overt sexual harassment or intentional discrimination under the state's anti-discrimination laws, prevents all lawsuits against individual managers and officers who retaliate against employees for reporting discrimination, and, because of the way it strips key protective language out of the current law, even the largest corporate wrongdoers could use it to avoid *any* legal responsibility for illegal acts committed by their managers and other authorized agents.

The bill makes discrimination cheap for employers through severe limits on what employees can recover for intentional discrimination or harassment. If this bill becomes law, the recoveries available to women, employees with disabilities, older workers, religious employees, military veterans, and minorities for intentional discrimination and even the most vicious harassment will be different and far lower than those allowed in virtually all other types of lawsuits. The bill also imposes extremely short deadlines on employees to file suit in court, and in some cases, employees could have as little as one day to file suit after being notified of a finding by the Ohio Civil Rights Commission.

Worse, the bill applies its extremely short time limits and severe caps on compensation only to employees—not employers. In other words, while employees will face one of the shortest time limits in Ohio law for filing a legal claim and the most severe caps on compensation for proven wrongdoing, none of these draconian provisions would apply to lawsuits filed by employers—even when they sue their own employees.

SB 268 creates new limitations that do not exist under numerous federal civil rights laws or existing Ohio law. It eliminates remedies and protections that have been the law of Ohio for many years and are consistent with federal laws. The bill does not harmonize state anti-discrimination laws with federal civil rights laws, as has been claimed. Finally, it even tries to prevent the public and employees from having access to previously available information about allegations of employment discrimination by sealing many of the investigations of the Ohio Civil Rights Commission even after the Commission has issued its initial determination.

THE SPECIFIC PROVISIONS OF THE BILL

Protects company managers and officers from any legal responsibility for intentionally discriminating against or harassing employees based on sex, disability, age, race, religion, military status, or national origin **(Lines 72, 1592 of bill)**

The bill changes the definition of the word “Employer” in order to reverse the 1999 decision of the Ohio Supreme Court in the *Genaro* case, which held that individual company managers and officers who engage in intentional discrimination or sexual harassment could be sued personally, along with their employers. The current law’s definition of “Employer” includes not just companies employing four or more employees, but also “any person acting directly or indirectly in the interest of an employer.” The bill deletes these words entirely, and also states that “no person has a cause of action or claim based on unlawful discriminatory practices relating to employment against a supervisor, manager, or other employee of an employer unless that supervisor, manager, or other employee is the employer.”

If intentional discrimination and harassment in the workplace are to be prevented, as well as remedied, individual managers who harass and discriminate must be held accountable. In fact, the existence of such personal accountability can often help employers keep their own managers from violating the law. But the bill eliminates any personal legal responsibility of individual managers and officers for their proven acts of sexual harassment and other intentional discrimination. Under the bill, these individuals could not be sued personally for violating Ohio’s anti-discrimination laws by using their positions as managers and officers to discriminate against or harass employees based on age, sex, race, disability, military status or religion.

Even worse, the specific language the bill uses to let workplace predators off the hook could have tremendously harmful effects on the operation of the law. In a 2014 case, *Hauser v. Dayton Police Dept.*, a majority of the Ohio Supreme Court stated that the words “any person acting directly or indirectly in the interest of an employer,” which the bill eliminates, were originally intended to make it possible for employees to hold a company liable for the harm caused by supervisors or others acting in the company’s interest. Because of that recent opinion, the bill’s deletion of that key language would make it possible for major corporations to claim they cannot be held responsible for the actions of the managers they empowered to commit illegal acts of discrimination. Under this interpretation, employers could be sued only if they formally adopted official pro-discrimination policies (which almost never occurs). In other words, in their zeal to eliminate needed protections against the predatory acts of individual harassers, the bill’s sponsors are running the risk of making Ohio’s anti-discrimination law completely unenforceable.

Weakens important protections against retaliation (Lines 204, 1464, 1592)

Even before the *Genaro* case, there was never a question that an individual manager, officer, or other wrongdoer could be held liable for retaliating against an employee because he or she complained of discrimination or harassment, or for taking any action “to aid, abet, incite, compel, or coerce” others who discriminate against an employee. See divisions (I) and (J) of R.C. 4112.02. But the bill completely erases this accountability by preventing any lawsuit against anyone other than “the employer” (as the bill redefines that term), meaning that under the bill’s definition, no individual could ever be held responsible in court even if they commit blatant retaliation or force their subordinates to commit discriminatory acts.

The bill further exposes workers to retaliation by forcing them to file internal complaints of harassment even if they have a reasonable belief that they will be retaliated against for doing so. For instance, the bill would punish employees who fail to make an internal complaint because their harassers have threatened them and warned them not to complain, or because they know that others who complained in the past were immediately fired.

The bill does this by incorporating only part of a defense established by the U.S. Supreme Court in federal sexual harassment complaints, under which harassed employees must generally take advantage of internal complaint procedures. Under federal law, an employee does not have to follow the internal complaint procedure if he or she knows complaining will be futile or has a “reasonable belief” that following the employer’s policy will lead to retaliation. But the bill only includes the exception for futility and deliberately excludes the retaliation provision. As noted below, this is just one of many provisions in the bill that pretends to adopt provisions from federal law, but actually just weakens Ohio’s most vital protections for employees.

Makes discrimination cheap for employers by placing extreme and discriminatory caps on what victims of discrimination can recover (Line 1603)

The bill adopts limits on what employees can recover for proven discrimination and harassment based on sex, disability, race, religion, age, military status, or national origin. These limits are far lower than the limits adopted by the legislature for almost all other types of cases. Under the caps in the bill, which are applicable to almost all Ohio employers, a woman who is subjected to continuous, extreme, and blatant sexual harassment will be allowed to recover no more than \$50,000 for both noneconomic and punitive damages—combined. This is true no matter how virulent and personally damaging the harassment was. And the same limit applies to extreme harassment directed at employees because of their disability, age, race, religion, military status, or national origin. Keep in mind that in many harassment cases, especially sexual harassment cases, the employee may not have been fired, so there are no wage losses. Instead, the employee, in order to support her family and keep her job, must go to work every day knowing she will face frequent and extreme sexual humiliation and demands.

Similarly, in almost all cases in which an employee is fired because of disability, race, sex, religion, military status, or age, but false reasons are given to cover up the prejudice involved, the \$50,000 cap will apply – even in cases involving multimillion- or billion-dollar businesses, with wealthy owners. This extreme limit applies even if the employee's termination has caused his or her family great turmoil and disruption, and the employee's professional reputation and career path have been decimated.

Obviously, \$50,000 will not deter or punish the kind of prejudiced and unscrupulous employers and managers who engage in blatant harassment and discrimination, especially when many are extremely well off financially.

Worse, the bill actually discriminates against employees who are denied equal employment opportunity and subjected to discrimination based on sex, disability, race, age, religion, military status, or national origin. This is true because the caps the General Assembly has already adopted for virtually all other types of cases – whether they involve defamation, invasion of privacy, auto accidents, or professional negligence – are much, much higher. In fact, under the bill, someone who is adversely affected because of a mistake or accident can sue and recover far more than a woman who is intentionally subjected to continuous and extreme harassment and then fired by her employer for refusing and reporting a manager's demands for sexual favors.

Fails to provide for attorneys' fees for meritorious claims and weakens existing attorneys' fees provision for age discrimination claims (Lines 646, 1643)

The bill eliminates two separate statutory provisions that allowed older workers to sue their employers for age discrimination. While the bill still allows age discrimination actions under a different provision, employers who intentionally discriminate against or harass older workers (frequently to force them to retire early or quit) will no longer be required to pay automatic attorneys' fees and expenses of older workers who are forced to sue and prove discrimination—instead, attorneys' fees and expenses will be discretionary, meaning that unlike under existing Ohio and federal law, older workers who are thinking of filing suit and trying to find an attorney will have no way to predict whether their attorneys' fees will be paid for until after they have won in court. And, as discussed separately, older workers will be severely limited in what other money they can recover no matter how blatant or vicious the discrimination or harassment.

The elimination of automatic attorneys' fees (and the other changes in the bill) highlight the untruthfulness of the claims made by those behind the bill that the bill is only intended to make Ohio anti-discrimination law mirror federal anti-discrimination law. Under federal anti-discrimination laws, an employer who is proven to have discriminated must pay the fees and costs necessary for the employee to prove his or her case. By eliminating such automatic attorneys' fees even in age cases, the only Ohio anti-discrimination law that has such a provision, the bill will let employers who have been proven to have discriminated escape from having to pay fees in all discrimination cases, including all of those involving sex, race, disability, military status, and religion, and now,

many age cases as well. This means that unlike in federal cases, employees will not be fully compensated even after proving discrimination in court, since they will not recover the amounts they are required to pay to their attorneys.

The bill makes many OCRC investigations confidential, preventing the public and employees from obtaining information about employers who are alleged to discriminate (Line 1240)

The bill requires the OCRC and its employees to keep all of the material it collects in an investigation confidential if the investigation does not come out in favor of the employee, even after the investigation is over, unlike current law, which allows public access to all completed investigations. While the bill makes investigations public after a finding against an employer, the public would not have any access if the OCRC finds against the employee, if the case settles before the investigation concludes, or if the case is dismissed for a procedural reason, such as untimeliness. This means that in many cases, an employee who files a charge will unknowingly be consenting to a totally secret investigation, with no ability for the public, the media, or even the affected employee to access material obtained through an investigation that is performed by public employees, using taxpayer dollars.

This unprecedented secrecy provision defies common sense. Employers who prevail at the OCRC level should have nothing to hide, and the public has had full access to OCRC investigations for years without any harmful effects. In addition, an initial finding against an employee does not end a case. Employees often file lawsuits and win their case in both state and federal court even after the OCRC has found in favor of an employer. Reviewing the OCRC file is one of the best ways for an employee to make a decision about whether to file suit. Under this bill, though, even if a vital piece of information in the file would make a lawsuit fruitless, the employee will have no way to find that out before filing a lawsuit that could have been avoided under current law.

The bill shortens the time limit for an employee who has suffered discrimination to file a lawsuit from six years to 365 days (Lines 1373, 1400, 1639)

Under existing law, an employee who has been discriminated against on the basis of race, sex, disability, national origin, or religion has up to six years to file a state court lawsuit. The bill reduces this time limit to 365 days, an unreasonably short and arbitrary time limit that will prevent many employees from even finding a lawyer to advise them about their claims—especially employees who are too busy dealing with the many effects on themselves and their families from being fired (such as relocation, seeking unemployment compensation, and of course, looking for a new job). This provision will even hurt employers, by forcing employees and their lawyers to rush into court and file lawsuits that might have been avoided if there were sufficient time to investigate a potential claim before this deadline.

Unlike under federal law, where numerous causes of action give employees two years or more to file a lawsuit, there would be no alternative ways for an employee who

misses this short deadline to pursue any claim under Ohio law. In contrast, employers with claims against employees would continue to have much longer time limits for filing their claims—only employees, not employers, would have their time for filing reduced to one-sixth of the existing time limit.

As just one example, an employee who has been wrongfully fired because she complained about sexual harassment by her supervisor might reasonably decide not to pursue her claim because she quickly found a better job with a different company and wanted to put her terrible experience behind her. But if the employer decides to come after her a year later because that new job allegedly violates a non-compete agreement that the fired employee signed when she was hired, files a lawsuit against her for damages, and even bullies her new employers into firing her so that the former employer won't sue them, too (which is not at all unusual in Ohio, where non-compete agreements are routinely enforced even after a wrongful termination), the employee could not change her mind and file her discrimination claim, because the bill cuts her time limit short without doing the same for her employer.

Perhaps worst of all, the bill provides a combined 365-day limit for filing a charge with the Ohio Civil Rights Commission and filing a lawsuit in a way that will make it nearly impossible for many employees to file suit. Through a process the bill calls "tolling," an employee has 365 to file a charge with the Commission, and doing so "stops the clock" on the employee's deadline for filing a lawsuit. But then, once the Commission makes its finding, the clock starts running again. So an employee who files a timely charge 364 days after being wrongfully terminated will have only one day to file a lawsuit after the Commission makes its finding. This, once again, is far worse for employees than federal law, which provides that after an agency determination, the employee receives a formal letter providing 90 days in which to file suit. Since employees generally file their state and federal charges together, this will also put many employees in the impossible position of having their state-law filing deadlines expire while they wait for formal "right to sue" letters from the federal agency. This would never be part of the bill if it were truly aimed at making state and federal law consistent.

Time limits for "unwritten contracts" – promissory estoppel and breach of implied contract – reduced to one year, but only for employees, not for employers or anyone else (Line 27)

The bill reduces the time limit for an employee to sue an employer who breaks a promise to the employee that the employer was legally obligated to keep. These cases – called "promissory estoppel" or "implied contract" actions – often involve the employee giving up something important (such as another job opportunity) based on the employer's promise. For decades, the time limit for these cases has been six years, without any problems as a result. But the bill would reduce the time for employees to file such cases against employers to one year. This shortened time limit will be especially harmful for employees who may be deterred from suing their employers while they are still working for those employers, even if those employers have violated important, legally enforceable promises.

Inexplicably, the bill only applies this one-year time limit to employees: everyone else—even employers suing their employees based on the exact same legal theory—would still have six years to file their claims.

Time limits for Intentional Infliction of Emotional Distress reduced to one year for employees only (Line 27)

The bill also reduces the time limit for employees to sue employers who intentionally engage in outrageous and illegal conduct designed to cause the employee severe emotional distress from four years to one year. Once again, the change in time limits only applies to employees suing employers. Employers and others would still have four years to sue for the same type of claim. So if the owner of a company fires an employee in a particularly cruel and humiliating way, causing the employee severe emotional distress, and the employee and the owner then get into a major confrontation, causing the owner distress, the owner (who usually already has an attorney and can afford to file a lawsuit) will have four years to file suit, while the fired employee (who typically has neither) will have only one year to file exactly the same claim.

Prohibits the Ohio Supreme Court from using its power to remedy proven discrimination or harassment that is not directly covered by a state law, but is against the law's general policy against discrimination (Line 1596)

The bill bars any common law cause of action for employment discrimination. Ohio law currently allows the Supreme Court to provide judicial remedies using its independent authority under the constitution if the remedy is based on important public policies reflected in state statutes (like the policies for equal employment opportunity and against discrimination). This judicial remedy is critical, as it provides relief for employees who are subjected to plainly wrongful treatment that would otherwise not have a remedy because of some loophole or gap in the statute. For instance, without this remedy, small but wealthy and influential employers such as realtors, attorneys, physicians, accountants, brokers and others would have a license to discriminate against and harass their employees, who will have no remedy at all. This is especially true because the bill, as discussed above, bans any discrimination or harassment actions against individual managers or owners.

Sexual harassment and other forms of discrimination committed by employers who have fewer than 4 employees are currently illegal in Ohio only because of an existing Ohio Supreme Court case, *Collins v. Rizkana*, which relied primarily on the policy in Ohio's anti-discrimination law to reach this conclusion. In *Collins*, a female employee of a male veterinarian sued him for repeatedly groping her and then dropping her pay and forced her to quit when she complained about it. The veterinarian had less than 4 employees, so Ms. Collins could not sue him under Ohio's anti-discrimination law. But the Ohio Supreme Court held that because the policy of the law supported her claims, she had a common-law claim for wrongful discharge in violation of public policy. The bill eliminates any such claims based on the policies in the current law.

The bill's sponsors, in a statement at the end of the bill, claim they do not intend to overrule the *Collins* case, but the unequivocal language of the bill does just that by eliminating public-policy claims and liability for those who are not included in the new, narrower definition of "Employer." The plain language of a statute controls, not the empty promises a bill's sponsors tack on to the end of a bill—and in this case, that would mean open season for unscrupulous small employers to harass and discriminate against their employees.

Oppose this unjust and unneeded legislation

Please oppose employment discrimination legislation that weakens or eliminates Ohio's laws guaranteeing equal employment opportunity and prohibiting discrimination based on sex, disability, race, age, military status, national origin or religion. SB 268 should be rejected, as similar proposals have been in the past, because it defeats the very purpose of Ohio's anti-discrimination laws by eliminating protections that are important to all Ohio workers. Equal opportunity is good legislative policy, good for the public, and good for the economy. Individuals and employers who discriminate against or harass Ohio workers should be fully responsible for their illegal conduct, and those who suffer discrimination should have access to full and equal remedies under state law.

Contact Information:

Fred Gittes, Legislative Counsel, OELA

614-222-4735

fgittes@gitteslaw.com

Connie Nolder, Legislative Representative

614/329-6100

connie@crnconsulting.org