Employer friendly changes to Missouri employment laws: what you should know

MISSOURI LEGISLATURE PASSES EMPLOYER FRIENDLY REFORMS TO MISSOURI EMPLOYMENT DISCRIMINATION AND RETALIATION LAWS On May 8, 2017, lawmakers passed sweeping changes to Missouri's employment discrimination and retaliation laws. Almost all of these changes are employer-friendly, most notably amendments to the Missouri Human Rights Act ("MHRA"), the state's primary anti-discrimination statutes. Among other things, these amendments raise the burden of proof for employees asserting discrimination and retaliation claims against their employer under state law, and limit who employees can sue and the amount of damages they can recover in such lawsuits. This bulletin provides a breakdown of this dramatic overhaul of Missouri employment law and the effect it will have on future, and possibly pending, discrimination and retaliation lawsuits against the state's employers. Governor Eric Greitens, who strongly supports making Missouri laws more business friendly, is expected to sign the bill into law in the coming weeks. **Replacing Contributing Factor Standard to Motivating Factor in MHRA Cases** The most important change to state employment law is contained in Senate Bill 43, which replaces what was essentially a judicially created "contributing factor" burden of proof in MHRA cases with the stricter "motivating factor" standard applied to similar discrimination claims brought under federal law. "The motivating factor" is defined in the statute to mean that "the employee's protected classification actually played a role in the adverse action or decision and had a determinative influence on the adverse decision or action" (emphasis added). This is significant because employees will need to convince a jury that discrimination was the determining reason for an employer's termination or other adverse decision, rather than being able to prevail in court by convincing a jury that discrimination contributed in any way (even 1 percent) to the adverse decision. Further, as addressed below, this higher burden of proof will make it harder for employees to survive summary judgment and bring their case to trial. In other words, it will now be far easier for employers to defeat MHRA claims brought by their employees by submitting evidence that its challenged employment decision was made for one or more legitimate, non-discriminatory reasons that had nothing to do with the employee's protected status. **Caps on Damages** Currently, there is no cap for actual damages under the MHRA such as back-pay, lost future earnings, and emotional distress, and punitive damages can be awarded up to five times the sum amount of such damages and attorney's fees awarded the plaintiff. Employers have been hit with sizable jury verdicts (some well over a million dollars) even in cases where the employee offered little evidence of actual damages in the form of "lost wages" or emotional distress. SB 43 will impose caps on total damages under the MHRA going forward, such that the sum of actual damages and punitive damages cannot exceed back-pay and interest, plus the following amounts depending on the size of the employer:

- $50,000 for employers with between 5 and 100 employees;
- $100,000 for employers with between 100 and 200 employees;
- $200,000 for employers with between 200 and 500 employees;
- $500,000 for employers with more than 500 employees.

Some argue these caps may prove to be the most significant amendment imposed by SB 43, since they negate the prospect of unlimited damages at trial. However, employees will still be able to recover attorneys' fees and court costs if they prevail at trial. While these fee awards must be reasonable and approved by the judge, they are otherwise not subject to the new damage caps. **No Individual Liability** Previous court decisions interpreted the definition of "employer" under the MHRA to include supervisors and other "decision-makers" of the employer in their individual capacities. The SB 43 amendments however, will now specifically exclude from the definition any "individual employed by an employer." This

means that employees will no longer be able to sue individual supervisors, managers, and human resources employees personally in MHRA cases. It also means more MHRA cases brought against out-of-state businesses may be removed to federal court. **Same Summary Judgment Analysis as Federal Law** Not only does SB 43 establish the same motivating factor standard applicable in anti-discrimination cases under federal law to the MHRA, but the amendments unequivocally state that Missouri courts should apply the same burden shifting analysis used by federal courts in determining whether the case should be thrown out before it even goes to trial. The burden shifting analysis permits an employer to articulate a legitimate, nondiscriminatory reason for its disputed employment decision. Once the employer does so, the burden shifts to the employee to submit evidence that the reason expressed was merely a "pretext", and the employer's decision was actually "motivated" by intent to discriminate based on the employee's race, sex, age, etc. As noted above, this means that employers have a much better chance to have the judge throw the case out without even having a trial if the employee lacks evidence that the employer's decision was a pretext for discrimination. **Business Judgment Rule Jury Instruction Now Available** The amendments in SB 43 now require trial judges to issue the "business judgment rule" instruction in every MHRA case, abrogating past Missouri court decisions that barred giving such an instruction to the jury. We expect that employers will now be able to get a jury instruction similar to the following: You may not return a verdict for the plaintiff just because you might disagree with the defendant's decision or believe it to be harsh or unreasonable. This instruction prevents employees from arguing liability at trial merely because an employer's decision was unfair or unreasonable – *i.e.,* for reasons other than unlawful discrimination or retaliation. **Whistleblower Protection Act** SB 43 also enacts the Whistleblower's Protection Act ("WPA"). The WPA codifies what had been a common-law claim against employers for retaliating against employees reporting unlawful acts or serious misconduct by the employer, and makes it more difficult for employees to prevail on such claims. Like the MHRA amendments, the WPA implements a "motivating factor" burden of proof in whistleblower claims rather than the contributing factor standard previously adopted by Missouri courts. It also eliminates individual supervisor and manager liability, limits damages available in such cases to double the total of back-pay and medical bills incurred for mental distress, bars recovery of punitive damages, and prevents the state of Missouri and its political subdivisions from being sued at all under the act. **Motivating Factor Standard in Missouri Workers Compensation Retaliation Claims** The legislature also amended the Missouri workers compensation statutes in Senate Bill 66 to change the burden of proof for an employee claiming he or she was terminated or disciplined for exercising rights under the Missouri Workers Compensation Laws (such as filing a workers compensation claim) from the judicially created "contributing factor" standard to the "motivating factor" standard. This is significant because employees asserting such claims will now have to prove that the employee's exercise of his or her rights under the worker's compensation laws actually played a role in the discharge or discrimination and had a determinative influence on the discharge or discrimination. Like MHRA cases, this higher burden of proof will make it far easier for employers to defend such claims by submitting evidence the decision was made for legitimate, non-discriminatory reasons that had nothing to do with the employee's past exercise of workers compensation rights. Likewise, employers will be more likely to defeat such claims before trial if the employee lacks evidence that the employer's decision was a pretext for discrimination. **Effect on Future and Pending Lawsuits** If signed into law by Governor Greitens as expected, SB 43's and SB 66's amendments will become effective on August 28, 2017. Their provisions will absolutely apply to all MHRA causes of action and action for retaliation for exercising worker's compensation rights that "accrue" after that date. A claim accrues once the event giving rise to the claim occurs. Whether and to what extent the amendments will apply to pending cases or causes of action that have already accrued but not yet been filed is less clear, and will likely be hotly contested over the next several years. **Chris Tillery is an attorney at Seigfreid Bingham, P.C. practicing employment and business law in the firm's Litigation practice group. You may contact him at ctillery@sb-kc.com or 816-265-4157. *This article is general in nature and does not constitute legal advice. Readers with legal questions about this article or about how this change in the law will affect your business should feel free to contact Mr. Tillery, other members of the employment law section at Seigfreid**

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