Northwest Ohio Human Resource Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

September 2019

TOLEDO CITY COUNCIL PASSES CITY ORDINANCE TO BAN SALARY HISTORY

On June 26, 2019, Toledo City Council passed the Pay Equity Act; Mayor Wade Kapszukiewicz signed the law on July 5, 2019. The Pay Equity Act is a local ordinance which generally prohibits employers who employ more than 15 employees and are located within the City of Toledo from inquiring about, relying on, or requiring job applicants to disclose salary history as a condition of employment. The ordinance also precludes employers from screening job applicants based on their compensation history and from requiring that an applicant's salary history satisfy certain minimum or maximum criteria.

The ordinance endeavors to reduce pay inequity for all. Specifically, the City of Toledo's goal in passing the Pay Equity Act was to ensure that employee wages are based on job responsibilities and level of experience, rather than an applicant's prior salary.

The ordinance creates legal repercussions for employers within the City of Toledo who ask or require applicants to disclose their prior salary history. Although there is no violation if an applicant voluntarily discloses his or her previous salary history, an employer still may not rely on an applicant's salary history when determining whether to employ the applicant or determine the applicant's compensation. The Pay Equity Act also includes an anti-retaliation provision, making it unlawful for an employer within the city to refuse to hire an applicant who declines to disclose his/her prior salary history. The ordinance provides an exception for employers which engage in discussions with applicants about their expectations regarding salary, benefits, and other compensation. There are also exceptions for, among other things, current employee's internal transfers or promotions and employees who are rehired by the employer within five years of the date of the applicant's separation, if the employer maintained the former employee's pay history.

The ordinance will take effect on July 4, 2020 and encompasses a two-year statute of limitations. Toledo employers should reexamine job applications and hiring documentation, and remove any inquiries of previous salary history.

Toledo's ordinance is consistent with local, state and federal trends. Earlier this year, Cincinnati passed similar legislation which bans employers within the city of Cincinnati from requesting or relying on prior salary history. Other states, including California, Oregon, and Washington have introduced bans on prior salary history. Last year in *Rizo v. Yovino*, the Ninth Circuit Court of Appeals held an employer cannot justify a wage differential between men and women by relying on prior salary. Earlier this year, on February 25, 2019, the United States Supreme Court vacated and remanded the Ninth Circuit's decision on procedural grounds. The Ninth Circuit has not yet reissued its decision.

EEOC Update

SHARON FAST GUSTAFSON BECOMES GENERAL COUNSEL OF THE EEOC

On August 8, 2019, Sharon Fast Gustafson was sworn in as the General Counsel of the U.S. Equal Employment Opportunity Commission (EEOC). Serving a four-year term, Ms. Gustafson becomes the first woman to serve as General Counsel at the EEOC. Ms. Gustafson has practiced law in the labor and employment arena since she earned her J.D. from Georgetown University Law Center. Ms. Gustafson served as counsel for Peggy Young in the pregnancy discrimination case, *Young v. United Parcel Services*, where the U.S. Supreme Court held that employers should provide the same reasonable accommodations to pregnant employees as are offered to other employees with similar restrictions.

NLRB Seeks Feedback on Whether Profane and Offensive Language is Protected by Federal Labor Law

The National Labor Relations Board is inviting businesses to weigh in on the issue of whether federal labor law protects employee's who use profane outburst and offensive statements at work.

Earlier this month, the NLRB board voted 3-1 to invite amicus ("friend of the court") briefs in a matter involving General Motors, where the administrative law judge (ALJ) found the company violated the NLRA by suspending a worker who directed profanity and other offensive outbursts toward his supervisor during a meeting in which the worker allegedly was engaging in union activity. The ALJ found the worker's conduct was not so "threatening or so opprobrious as to lose the protection of the act." Historically, the NLRB has used a four factor test to determine whether misconduct in the course of otherwise protected activity loses protection under the NLRA. The NLRA bars employers from punishing workers for "engaging in concerted activities for the purpose of…mutual aid or protection." General Motors has asked the labor board to overrule NRLB precedent which "addressed circumstances in which extremely profane or racially offensive language was judged not to lose the protection of the Act."

The board's invitation for comment reads as follows: "the board's treatment of such language (as well as sexually offensive language) has been criticized as both morally unacceptable and inconsistent with other workplace laws by Federal judges as well as within the Board….Mindful of this criticism, the board now invites the parties and interested amici to file briefs to aid the Board in reconsidering the standards for determining whether profane outbursts and offensive statements of a racial or sexual nature, made in the course of otherwise protected activity, lose the employee who utters them the protection of the Act." The board will accept amicus briefs not exceeding 25 pages in length on the NLRB's website by November 4, 2019.

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