

DELAWARE SHRM JOINT LEGISLATIVE INITIATIVE (DELAWARE STATE COUNCIL, DELMARVA SHRM & DE SHRM CHAPTERS)

LEGISLATIVE UPDATE FEBRUARY 1, 2018

1. FEATURED LEGISLATION – STATE OF DELAWARE – HOUSE BILL NO. 299 (HB 299) AN ACT PROPOSING AN AMENDMENT TO ARTICLE 1 OF THE DELAWARE CONSTITUTION RELATING TO EQUAL PROTECTION

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On January 16, 2018, House Bill 299 was introduced and assigned to the Administrative Committee in the House. Committee Hearings are to begin in twelve Legislative days. The Bill sets forth:

§21, Equal Protection

Section 21. Equality of rights under the law shall not be denied or abridged on account of the sex of the individual.

This is the first leg of an amendment to the Delaware Constitution to provide equal rights on the basis of sex.

As background, the 14th Amendment to the U.S. Constitution provides that no state may “deny any person within its jurisdiction the equal protection of the laws.” The federal “equal protection” clause has been invoked by courts to prohibit discrimination against individuals of protected classes.

The Delaware Discrimination in Employment Act, 19 Delaware Code Chapter 7, makes it illegal to discriminate on the basis of a protected class in any aspect of employment, including but not limited to: hiring and firing, compensation, assignment, or classification of employees, transfer, promotion, layoff or recall,

job advertisements, recruitment, testing, use of company facilities, training and apprenticeship programs, fringe benefits and other terms and conditions of employment. The proposed Constitutional Amendment would make it much harder to overturn, limit or narrowly interpret Delaware’s Anti-Discrimination Laws. Most importantly, the Amendment would require judges to apply “strict scrutiny, the highest level of judicial review in which the government must show that the challenged classification serves a compelling state interest and that the classification is necessary to serve that interest. This will significantly reduce Plaintiff’s burden of proof and more easily allow for findings of discrimination. Specifically, presently, in analyzing Delaware Employment Discrimination Law, Delaware courts have adopted the standards used in federal discrimination claims under Title VII. Title VII discrimination claims follow the *McDonnell Douglas* framework, which is a three-step burden-shifting analysis. First, Plaintiff must demonstrate a *prima facie* case of discrimination by “presenting sufficient evidence to allow a fact finder to conclude that the employer is treating some employees less favorably than others based on a trait that is protected under Title VII.” Specifically, evidence to allow a fact finder to conclude that the employer is treating some employees less favorably than others based on a trait that is protected under Title VII.” Once the plaintiff has made a *prima facie* showing of discrimination, the burden shifts to the defendant to present a legitimate, non-discriminatory reason for its decision. This is a “relatively light burden.” Once the employer has met its burden, the burden shifts back to the plaintiff, who must ultimately satisfy the heavy burden of establishing discrimination as the motivating cause of the adverse action.

The passage of this Amendment requires a 2/3 vote in successive General Assemblies.

2. STATE OF DELAWARE LEGISLATION OF INTEREST

House Bills

HB 96 – Wage Bargaining for State Employees <http://legis.delaware.gov/BillDetail?LegislationId=25541>

HB 110 – Recreational Use of Marijuana <http://legis.delaware.gov/BillDetail?LegislationId=25571>

HB 172 – Limited Recovery of Overpayment by Insurance Companies to 24 Months

<http://legis.delaware.gov/BillDetail?LegislationId=25773>

HB 244 – Exempting Delaware Department of Transportation from the Prevailing Wage Act for 3 years.

<https://legis.delaware.gov/BillDetail?LegislationId=25995>

HB 293 – Replaces Current Prevailing Wage Survey Methodology, With Methodology Based on Payroll Information Currently Being Provided to the Department of Labor

<https://legis.delaware.gov/BillDetail?LegislationId=26235>

HB 299 – An Act Proposing an Amendment to Article 1 of the Delaware Constitution Relating to Equal Protection

<https://legis.delaware.gov/BillDetail?LegislationId=26248>

Senate Bills

SB 10 – Minimum Wage Increase <http://legis.delaware.gov/BillDetail?LegislationId=25378>

SB 41 – Coverage for Serious Mental Illness and Drug and Alcohol Dependency

<http://legis.delaware.gov/BillDetail?LegislationId=25773>

SB 132 – Insurance Coverage for Fertility Care Services <https://legis.delaware.gov/BillDetail?LegislationId=25632>

SB 139 – Insurance Coverage for Obstetrical and Gynecological Services

<https://legis.delaware.gov/BillDetail?LegislationId=26219>

3. FEDERAL LEGISLATION/REGULATIONS OF INTEREST

HB 4219 – WorkFlex in the 21st Century Act <https://www.congress.gov/115/bills/hr4219/BILLS-115hr4219ih.pdf>

4. LOCAL GOVERNMENT LEGISLATION OF INTEREST

Sussex County Council – Right-to-Work Ordinance <https://sussexcountyde.gov/labor-union-ordinance>

- Delaware Department of Justice Issues Opinion – Sussex County Not Empowered to Pass Right to Work <http://www.capegazette.com/article/ag-sussex-not-empowered-pass-right-work/146720>
- Sussex County Council voted to defeat the proposed Ordinance <http://www.capegazette.com/article/sussex-county-council-defeats-right-work-ordinance/149065>

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