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Practice Group:

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Beyond the Bathroom: North Carolina's H.B. 2 Also Flushes Local Employee Protections

U.S. Labor, Employment and Workplace Safety Alert

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The recent enactment of North Carolina's H.B. 2, known as the "Public Facilities Privacy & Security Act" (the "Act") has received widespread attention for its controversial restrictions on the use of certain multiple-occupancy bathrooms by transgender individuals.[1] There has been less discussion of the law's sweeping changes to the power of local governments to regulate employment law in North Carolina by preempting existing local ordinances and prohibiting the enactment of any new local ordinances in the areas of discrimination and employment contracting. Perhaps most significantly, the Act eliminates the right of employees to file employment discrimination suits under North Carolina law.

In recent years, it has become increasingly common for cities and municipalities around the country to enact ordinances that regulate private employment, including issues such as minimum wage, paid sick leave, discrimination, and background checks of job applicants. This patchwork regulation has made it increasingly challenging for national employers to create and maintain unified policies governing all employees and has raised the costs associated with doing business in multiple locations, even within the same state. The preamble to the Act seeks to address this concern and makes clear that the state of North Carolina places high importance on the consistency of statewide laws related to commerce. As a result, the law prohibits the General Assembly from enacting local ordinances regulating labor, trade, mining, or manufacturing. Specifically, the law provides for consistency in laws related to (1) employment and contracting and (2) protection of rights in employment and accommodations.

Discrimination

The Act has two direct, substantial impacts on discrimination law in the state of North Carolina.

1. Limited Protected Classes

First, the Act supersedes any local ordinance regulating discrimination and limits the classes protected from discrimination under North Carolina law to "race, religion, color, national origin, age, biological sex, or handicap." That means that other classes like veteran status, pregnancy status, gender identity, and sexual orientation are not protected classes in North Carolina and an employer cannot be held liable under state law for discrimination on the basis of these characteristics. Local governments are now prohibited from providing any protections beyond those spelled out in the Act.

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[1] This part of the Act mandates that school districts and public agencies "require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex." N.C. Gen. Stat. §§ 143–760; 115C-521.2. It defines biological sex as "the physical condition of being male or female, which is stated on a person's birth certificate." *Id*. The Act does not regulate multiple-occupancy restrooms provided by private employers.

2. No Private Cause of Action for Discrimination under North Carolina Law

Second, the Act eliminates private causes of action for discrimination in employment under North Carolina law. As a result, North Carolina has a discrimination law without an enforcement mechanism, effectively making it advisory only. The North Carolina Equal Employment Practices Act ("NCEEPA") does not, by its terms, create a private cause of action for employees. Traditionally, courts have permitted individuals to bring discrimination claims for wrongful discharge in violation of public policy under the common law. According to the Act, individuals can no longer rely on the NCEEPA as the public policy basis for such wrongful termination claims. It specifically forecloses any future common law claims for discrimination:

> This Article does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein.

While it is true that the new law has no impact on individuals' rights to file discrimination claims under federal law, this change still is likely to have an impact on potential plaintiffs. First, the law may reduce the number of plaintiffs filing claims by restricting them to shorter time limits within which to file a claim. Individuals filing many federal discrimination claims are subject to a strict 180-day deadline from the day the discrimination took place. It is not uncommon for employees to miss the federal filing deadline because they are not fully informed of their rights, fail to timely consult with an attorney, or put off filing a claim while they are looking for a new job. Late filers' claims have frequently been saved by state law because wrongful discharge claims based on North Carolina's discrimination law were subject to a more lenient three-year statute of limitations.

Second, the Act may result in a reduction in some types of damages recoverable by plaintiffs alleging discrimination. For example, federal discrimination laws like Title VII of the Civil Rights Act of 1964 cap certain compensatory and punitive damages awarded for intentional discrimination based on employer size, up to a maximum of $300,000 (although other damages, like back pay and front pay, are not capped by the statute). For discrimination claims filed under North Carolina law, there traditionally has not been a comparable cap on the compensatory and punitive damages a plaintiff could recover.

Employment Contracting

The new law supersedes and preempts any ordinance, regulation, resolution, or policy adopted by any local governing body in the state that relates to compensation of employees including wage levels, hours of labor, payment of earned wages, benefits, leave, or well-being of minors in the workforce. Consequently, local governments are now precluded from raising the state's $7.25 minimum wage. There a few limited exceptions, and this provision does not apply to a local government regulating, compensating, or controlling its own employees. As a result, Wake County's $13.50 minimum wage for county employees will likely not be affected.

This provision of the Act preempting local governments from legislating in the area employment contracting is not unprecedented. On June 30, 2015, Michigan's legislature enacted a similar law, referred to as the "Local Government Labor Regulatory Limitation Act,"

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(Mich. Comp. Laws Ann. § 123.1381 *et seq.*), finding that "regulation of the employment relationship between a nonpublic employer and its employees is a matter of state concern and is outside the express or implied authority of local governmental bodies to regulate." Mich. Comp. Laws Ann. § 123.1382.

These two recently enacted state laws demonstrate the current conflict between state and local governments over the regulation of the terms and conditions of private employment. Employers will be watching to see whether other states follow this approach and whether these new laws could represent the beginning of a significant shift in the way the employment relationship is governed at the state and local level.

Conclusion

The Act was hastily passed at a special session, and little comment was allowed. There has been swift public backlash against the provisions of the law dealing with discrimination and multiple-occupancy bathrooms; however, discussion of the reduction of power of local governments has been limited. The Act became effective immediately upon passage but is now under attack by civil liberties groups whose primary focus has been on the new bathroom rules. While much uncertainty about the Act exists, one thing seems certain — H.B. 2 will have a significant impact on employment law in North Carolina beyond its regulation of multiple-occupancy bathrooms.

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