Major Changes Proposed for Wisconsin Employment Discrimination Claim Process

Apr 08 2009

Posted By: Daniel T. Dennehy

Practice Area: Health Industry Labor, Employment and Immigration

Currently, a Wisconsin employee brings an employment discrimination claim by filing his or her claim with the Department of Workforce Development's Equal Rights Division (the "ERD") and a claim is then investigated by an Equal Rights officer who makes a decision after each side has filed written statements as to whether there is "probable cause" to believe a violation of the discrimination laws may have occurred. If probable cause is found, the matter is set for an administrative hearing on the merits. After a probable cause hearing, the administrative law judge determines whether a violation has occurred, and, if so, he or she awards damages. These damages can include back pay, reinstatement or front pay, attorney's fees and injunctive relief. Compensatory and punitive damages cannot be awarded. The hearing party can generally appeal the ALJ's decision through four appellate steps.

If the Equal Rights officer finds no probable cause to believe a violation has occurred, the claim is dismissed. But the claimant can appeal that decision, and the ERD conducts a hearing to determine whether there is reason to believe unlawful discrimination has occurred. While there is a lesser standard of proof at this type of hearing, employers generally put their entire case on at this hearing, so the matter can remain dismissed. Recently, the Labor Industry Revision Commission has advised its administrative law judges ("ALJs") not to grant a dismissal at the end of the claimant's case, but to make the employer put on his case before dismissing a case. [This adds to the cost of the hearing even where the claimant has no claim.] If the ALJ determines that the initial decision was in error, then he or she sets the matter over for a hearing on the merits. Only once in my 30 years of handling ERD claims has this happened. When a claimant disagrees with an LIRC decision, he or she can generally appeal through four appellate steps.

To save money, Governor Doyle is proposing that the ERD no longer hear appeals of no probable cause decisions. This would be good except that instead of the current process, the claimant would now be allowed to file his or her claim in a circuit court. That would allow disgruntled employees access to the circuit courts which they now do not have. This would make those claims more expensive to defend as more serious discovery will now have to occur than is presently the case where at a noprobable cause hearing all the employee can win is another hearing. Also, the informality of an administrative hearing would be lost, and the employer's witnesses will now be faced with testifying in a courtroom in front of a jury – a much more intimidating situation.

The proposed process is similar to the federal discrimination process. There, an employee whose claim is dismissed can bring a federal lawsuit within 90 days of the dismissal. Very few employees file such lawsuits after the Equal Employment Opportunity Commission has dismissed the claim. But when they do, this requires an employer to defend itself at a high cost. One of the values of this system is that the claimant has to pay the substantial fee for filing the lawsuit.

Further complicating the ERD process is that there is pending legislation to allow compensatory and punitive damages for violation of Wisconsin's employment laws. This would make Wisconsin an even less friendly place to do business. This proposal has been introduced before, but it has not been adopted. However, with the Democrats in control of both the Wisconsin Assembly and the Senate as well as the governorship, it may now have a better chance to be adopted.

You may want to contact your legislator to explain the downside of these proposals. Certainly human resource employers need to monitor whether these proposals become law.

---

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.