Employers Beware – Potential Change to the Scope of Vicarious Liability Under Federal Antidiscrimination Statutes

Insights
6.09.14

Senator Bernard "Bernie" Sanders (I – VT) recently joined fourteen (14) other Senators as cosponsors of the Fair Employment Protection Act of 2014. The intent of this legislation, which was introduced in the Senate on March 13, 2014, is to change the standard for holding employers vicariously liable for claims brought under federal antidiscrimination statues; an identical piece of legislation was introduced in the House of Representatives on March 13, 2014 as well. Under federal antidiscrimination statutes, an employer may be held vicariously liable for the discriminatory conduct of a supervisory employee. According to the Act, however, a 2013 Supreme Court decision severely limits the scope of who qualifies as a supervisor to those individuals possessing "authority to take tangible employment actions." The authors of the Act believe this definition of a supervisory employee places form over substance and ignores the realities of the modern work environment particularly "in industries [such as] retail, restaurant, health care, housekeeping, and personal care, which may pay low wages and employ a large number of female workers. . . ."

The Act, if enacted, would significantly broaden the definition of a supervisory employee for purposes of vicarious liability under federal antidiscrimination statutes. A supervisor would not only be an individual with the ability "to take or recommend tangible employment actions," but also those "with the authority to direct the . . . daily work activities" of the victim of the allegedly discriminatory conduct. This definition of a supervisor would apply across the spectrum of federal antidiscrimination statutes including "title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, section 1977 of the Revised Statutes, the Genetic Information Nondiscrimination Act of 2008, the Government Employee Rights Act of 1991, the Congressional Accountability Act of 1995, and title III of the United States Code. . . ." The Act has garnered significant democratic support in both the House and Senate, and some believe it may get out of committee at least in the Senate.

The Act is yet another example of legislative activity employers should monitor before and potentially after the 2014 midterm elections. In addition to the Fair Employment Protection Act of 2014, there is a vast array of other legislative activity employers need to be aware of such as:

· The trend towards raising the minimum wage in many jurisdictions;
· Equal pay laws;
· Legislation protecting activities on social media;

· Pregnancy accommodation legislation;
· Changes to the Affordable Care Act; and
· Federal trade secret legislation.

If passed, the Act would seriously impact the landscape of an employer's potential liability under federal antidiscrimination statutes. While few bills right now are finding their way through Congress and onto President Obama's desk, the Fair Employment Act of 2014 has found some traction in the Senate. At a minimum, the Act could become one of many talking points during the midterm elections and influence legislative agendas at the state and local levels of government. Employers must keep a close eye not only on Congress, but also state and local governments for any further legislative activity over the issue of an employer's liability for the actions of supervisory employees under federal, state and local antidiscrimination laws.