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Governor Blagojevich signed into law an amendment to the Illinois Human Rights Act that gives complainants the right to pursue their claims in state court. This is a significant change, as alleged violations were previously addressed only through administrative proceedings.

Midwest Edition

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Amendment to the Illinois Human Rights Act Opens the Door to Civil Suits

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Overview

Governor Blagojevich recently signed into law H.B. 1509, an amendment to the Illinois Human Rights Act (IHRA). The amendment, which becomes effective on January 1, 2008, gives complainants the option to file a civil action in state circuit court rather than filing a complaint with the Illinois Human Rights Commission ("the Commission"), which is currently the only option. Proponents praise the amendment for bringing Illinois in line with both the federal system and the thirty-eight other states that have adopted similar procedures.¹ Opponents, however, believe that the changes will significantly increase the time and money spent on prosecuting and defending these claims, as well as place an added burden on the already over-worked courts.²

Changes in the Law

Under the current law, alleged violations of the IHRA are administrative matters addressed by the Illinois Department of Human Rights ("the Department") and the Commission. The Director of the Department first determines whether or not substantial evidence of a violation exists. If the Director does not find substantial evidence, the complainant has the right to file a request for review by the Chief Legal Counsel of the Department. If the Department determines that there was substantial evidence, either initially or upon a request for review, and the parties are unable to reach a settlement, then the Department files a formal complaint with the Commission on the complainant's behalf.

Once the amendment takes effect, complainants will have the added option of pursuing a civil

action in the circuit court in the county where the alleged violation occurred, rather than proceeding before the Commission. The key components of the amendment are as follows:

1. If the Director files a dismissal order based on a determination that there is **no** substantial evidence of a violation, the complainant will have the right to either seek review of the dismissal order with the Commission or file a civil action in circuit court, which will be conducted in accordance with the Illinois Code of Civil Procedure.
 - a. If the complainant chooses to seek review with the Commission, he or she must file such a request within **thirty days** after receipt of the Director's notice of dismissal.
 - b. If the complainant chooses to file a civil action, he or she must do so within **ninety days** after the receipt of the Director's notice of dismissal. If the complainant files a request for review with the Commission, he or she is **barred** from later commencing a civil action in the circuit court.
2. If the Director determines that there **is** substantial evidence of a violation, the complainant has the right to file a civil action in circuit court or request that the Department file a complaint with the Commission on his or her behalf.
 - a. Any circuit court complaint must be filed within **ninety days** after receipt of the Director's notice.
 - b. If the complainant chooses to have the Department file a complaint with the

¹ 1 2007 Legis. Bill Hist. IL H.B. 1509.

² *Id.*

Commission, he or she must request such in writing, within **fourteen days** after receipt of the Director's notice.

- c. If the complainant fails to timely request that the Department file the complaint, the complainant may *only* commence a **civil action** in circuit court.
- 3. If the Department does not issue its report determining whether there is substantial evidence of a civil rights violation within 365 days after the charge is filed (or any longer period agreed to in writing by all the parties), the complainant has ninety **days** to either file his or her own complaint with the Commission or commence a civil action in circuit court. However, a complainant who files a complaint with the Commission may **not** later commence a civil action in circuit court.
- 4. In a civil action in circuit court, either the plaintiff or defendant may demand a trial by jury.

Impact on Employers Defending IHRA Claims

More frivolous claims may be brought in circuit court. In 2006, only 7% of the Department's completed investigations resulted in a finding of substantial evidence.³ Under the current law, unless a complainant succeeds on a request for review, a finding of no substantial evidence ends the case. Under the new law, however, complainants who receive a finding of no substantial evidence can still go to court. This is sure to increase the number of frivolous IHRA complaints that employers must defend.

Complainants have more time to pursue their claims in circuit court. If the Department finds substantial evidence of an IHRA violation, complainants

have only fourteen days after receiving the notice to advise the Department of their wish to proceed before the Commission. If the Department finds no substantial evidence of an IHRA violation, the complainant has only thirty days after receipt of the Department's notice to seek review by the Commission. To exercise the option of proceeding in circuit court, on the other hand, complainants have much longer to file a complaint - ninety days after receiving the Department's determination on substantial evidence. Thus, many IHRA matters may wind up in circuit court if complainants delay in responding to the Department's notice of its substantial evidence finding. While legislators expect that only a small percentage of the 300 to 500 cases filed each year will go to circuit court,⁴ the fact that circuit court will be the only available option for dilatory complainants may substantially increase that percentage.

Litigating in circuit court places IHRA claims before juries and judges who are unfamiliar with employment law. Juries are unpredictable; therefore, few employers relish the prospect of defending employment claims before a jury. However, complainants who choose to pursue their IHRA claims in circuit court will have the right to request a jury,⁵ whereas Commission cases are decided by a hearing officer.⁶ Furthermore, circuit court judges' experience with employment claims is likely limited to the rare Title VII claims that are filed in circuit court and not removed to federal court. Thus, compared to hearing officers in the Commission, circuit court judges are relatively unfamiliar with employment law.

More extensive discovery is permitted in circuit court. When IHRA claims are before the Commission, the parties can propound interrogatories (with no set limit on the number) and requests for production.⁷ However, depositions are allowed only by agreement of the parties or upon leave of the hearing officer

for good cause shown,⁸ and requests for discovery depositions are "rarely granted."⁹ When IHRA claims are filed in state court, the standard Illinois rules of discovery will apply, thus limiting the number of interrogatories to thirty¹⁰ and allowing depositions.¹¹ Employers are likely to be pleased to have a limit on the number of interrogatories and to have the opportunity to depose the complainant and his or her witnesses. However, employers and their witnesses will likewise be subject to depositions, and this, of course, will require additional time and resources.

Litigating in circuit court presents the opportunity for removal in some cases. If an IHRA claim is filed in circuit court and if complete diversity exists, employers can remove the case to federal court, where the judges are more familiar with employment law. Complainants, on the other hand, may believe that they will fare better before a circuit court. Thus, in an effort to keep the case in circuit court, they may attempt to destroy complete diversity by naming individuals, such as supervisors, as defendants. The good news is that this strategy is available only in sexual harassment cases,¹² which constitute a mere 4% of all IHRA claims filed.¹³

These amendments are sure to increase the number of IHRA claims that employers must defend beyond the charge stage, and this defense will surely be more costly in circuit court than it is currently before the Commission.

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³ IL Department of Human Rights Annual Report (2006), <http://www.state.il.us/dhr/Publications/Annual%20Report%20FY2006.pdf>.

⁴ 2007 Legis. Bill Hist. IL H.B. 1509.

⁵ H.B. 1509, 95th Gen. Assem. (Ill. 2007); 735 Ill. Comp. Stat. 5/2-1105 (Supp. 2007).

⁶ 775 Ill. Comp. Stat. 5/8-103(B) (Supp. 2007).

⁷ Ill. Admin. Code tit. 56, § 5300.720(a)(1) and (a)(2) (2006).

⁸ *Id.* § 5300.720(a)(3)(B); 775 Ill. Comp. Stat. 5/8A-102(F) (Supp. 2007).

⁹ IHRC Frequently Asked Questions, http://www.state.il.us/ihrc/FAQ_03.htm.

¹⁰ Ill. Sup. Ct. R. 213(c).

¹¹ Ill. Sup. Ct. R. 206 and 212.

¹² *In re Tammy Langa & Senator Richard Kelly*, No. 1991SN0215, 1995 WL 716781 (Ill. H.R.C. May 26, 1995). Note that while the IHRA also prohibits individuals from retaliating against those involved in a claim and aiding and abetting a violation, the Commission has ruled that if the corporation is guilty of such a violation, the claimant cannot name the individuals responsible. *In re Thaddeus Taylor & Dave Ahlers*, No. 1990SN0252, 1992 WL 721996 (Ill. H.R.C. Apr. 6, 1992).

¹³ IL Department of Human Rights Annual Report (2006), <http://www.state.il.us/dhr/Publications/Annual%20Report%20FY2006.pdf>.