Proskauer

Maryland Employers: Get Ready For A Host Of New Employment Laws

Law and the Workplace Blog on **May 26, 2020**

During the early days of the coronavirus pandemic, the Maryland legislature passed over 600 pieces of legislation, many of which relate to employment issues. Several of these bills, including ones that prohibit use of facial recognition technology, wage history inquires and hairstyle discrimination, and revise the state's mini-WARN act, recently became law when the deadline for their enactment passed without Governor Larry Hogan's veto. These laws, which are detailed below, will take effect on ***October 1, 2020***.

Prohibition Against Use of Facial Recognition Technology

- ***Quick Hit*:** Maryland now prohibits using facial recognition technology during the job interview process, absent an applicant's consent. Employers that use facial recognition services in the interview process should make sure they obtain the necessary consent from applicants beginning when the law goes into effect on October 1, 2020.
- ***More Detail*:** HB 1202 prohibits employers from "us[ing] a facial recognition service for the purpose of creating a facial template during an applicant's interview for employment," absent the applicant's consent. "Facial recognition service" is defined as "technology that analyzes facial features and is used for recognition or persistent tracking of individuals in still or video images." "Facial template" is defined as "the machine-interpretable pattern of facial features that is extracted from one or more images of an individual by a facial recognition service."

As noted above, such technology may be used where applicants "consent … by signing a waiver." The act provides that the waiver must set forth "in plain language" the following information: (1) "the applicant's name"; (2) "the date of the interview"; (3) "that the applicant consents to the use of facial recognition during the interview"; and (4) "whether the applicant consented to the waiver."

With employers increasingly using artificial intelligence to assess applicants, Maryland's new law is an effort to ensure that applicants are at least aware when facial recognition technology is in use.

Prohibition Against Hairstyle Discrimination

- ***Quick Hit***: The Maryland Fair Employment Practices Act's ("FEPA") prohibition against race discrimination will soon include discrimination on the basis of hairstyles. Employers in Maryland subject to FEPA, which applies to employers with 15 or more employees, should review their current appearance and grooming policies to ensure compliance with the new law.
- ***More Detail***: As we have previously reported, there is a growing trend of states enacting laws that prohibit discrimination on the basis of hairstyles. In enacting HB 1444/SB 531, Maryland has become the sixth state in the country to include hairstyle discrimination in its definition of race discrimination.

The act amends the FEPA to include in its prohibition against discrimination on the basis of race, discrimination based on "traits historically associated race, including hair texture, afro hairstyles, and protective hairstyles." The act provides that the definition of "'protective hairstyle' includes braids, twists and locks."

Revisions to Maryland's Mini-WARN Act

- ***Quick Hit***: Maryland's mini-WARN act, the Maryland Economic Stabilization Act, will soon require certain employers in the state to provide 60 days' written notice before implementing a reduction in force.
- ***More Detail***: HB 1018/SB 780 amends the Maryland Economic Stabilization Act, which previously set forth certain voluntary notification procedures for employers that planned to implement a reduction in operations. The revisions to the law require employers with at least 50 employees that "operate[] an industrial, commercial, or business enterprise in the State" and have been doing business in the State for at least one year, to provide 60 days' written notice before implementing a "reduction in operations." For the 50-employee threshold, employers may exclude employees who work less than 20 hours per week on average or who have worked less than 6 months out of the immediately preceding 12 months.

The statute defines a "reduction in operations" as either "(1) the relocation of a part of the employer's operation from 1 workplace from another existing or proposed site; or (2) the shutting down of a workplace or a portion of the operations of a workplace that reduces the number of employees by at least 25 percent or 15 employees, whichever is greater, over any 3-month period." The 60-day written notice required under the amended law must be given to:

- “all employees at the workplace that is subject to the reduction in operations;”
- “each exclusive representative or bargaining agency that represents employees at the workplace that is subject to the reduction in operations;”
- “individuals who work less than 20 hours on average each week or have worked for the employer for less than 6 months in the immediately preceding 12 months at the workplace that is subject to the reduction in operations;”
- “the [Maryland Division of Workforce Development and Adult Learning’s] Dislocated Worker Unit; and”
- “all elected officials in the jurisdiction where the workplace that is subject to the reduction in operations is located.”

The written notice must include the following:

- “the name and address of the workplace where the reduction in operations is expected to occur;”
- “the name, telephone number, and e-mail address of a workplace supervisory employee as a contact for seeking further information;”
- “a statement that explains whether the reduction in operations is expect to the permanent or temporary and whether the workplace is expected to shut down; and”
- “the expected date when the reduction in operations will begin.”

However, the act’s new mandatory notice requirements do not apply to certain reductions in operations, including those that:

- “result[] solely from labor disputes;”
- “occur[] at construction sites or other temporary workplaces;”
- “result[] from seasonal factors that are determined by the [Maryland Department of Labor] to be customary in the industry; or”
- “result[] when an employer files for bankruptcy under federal bankruptcy laws.”

Interestingly, the new law does not contain an exception for the consequences of a health pandemic. Under the revised law, if an employer is found to have violated its requirements, the Maryland Secretary of Labor, or the Secretary’s designee, will “issue an order compelling compliance.” Additionally, employers may be fined “up to $10,000 per day for each day that an employer violated [the statute].” The new law does not provide a private right of action.

Prohibition Against Wage History Inquiries

- ***Quick Hit:*** Maryland law will soon impose restrictions on employers' ability to inquire about job applicants' wage histories and will require employers to provide "wage range" information to applicants upon request. Employers in Maryland should assess their hiring processes to ensure they do not request wage history information from applicants once the new law goes into effect on October 1, 2020. Additionally, employers should ensure that applicants who request wage range information for the position to which they are applying are able to obtain such information once the new law is in effect.
- ***More Detail:*** In enacting HB123, Maryland has joined a growing number of states that prohibit employers from inquiring about job applicants' wage histories. Under the act, employers are prohibited from "seek[ing] the wage history for an applicant … orally, in writing, or through an employee or an agent or from a current or former employer." The law does not prohibit an applicant from voluntarily sharing their wage history with a prospective employer, but the law prohibits employers from "rely[ing] on the wage history of an applicant … in screening or considering the applicant for employment or in determining the wages for the applicant" (subject to one limited exception, discussed below).

Additionally, the act provides that "[o]n request, an employer shall provide an applicant … with the wage range from the position to which the applicant applied."

Employers may not "retaliate against or refuse to interview, hire, or employ an applicant" because the applicant failed to provide their wage history or requests the wage range for the position to which they are applying in accordance with the act's provisions. However, once an employer makes an offer of employment to an applicant, the employer may "rely on" or "seek to confirm" "the wage history voluntarily provided by the applicant … to support a wage offer higher than the initial wage offered by the employer." This exception is subject to the limitation that an employer may not rely upon an applicant's wage history if it would "create an unlawful pay differential based on protected characteristics."

The act provides that the Maryland Commissioner of Labor and Industry will order compliance by employers who violate the law. Additionally an employer may be fined up to $300 per applicant for the employer's second violation of the law and up to $600 per applicant for each subsequent violation that occurs "within 3 years after a previous determination that a violation had occurred."

View Original

Related Professionals

- **Guy Brenner**
  Partner