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District of Columbia, Employment Law, State Developments

District of Columbia's New Human Rights Enhancement Amendment Act Changes Definitions of 'Harassment' and 'Employee'

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The District of Columbia recently amended the D.C. Human Rights Act (DCHRA) by adding a new protective status, broadening who is covered under the act. The District also modified the DCRHA to redefine how plaintiffs may prove harassment claims within the District. The new law, which took effect on October 1, 2022, is entitled the **Human Rights Enhancement Amendment Act** of 2022 (DCHREAA). D.C. courts typically look to federal case law when interpreting the District's antidiscrimination statute *except when there is a departure in similarity.* The redefinition of harassment will more likely than not make federal sexual harassment case law inapplicable or largely unpersuasive with respect to sexual harassment claims brought under the amended law within the District.

New Protections for Persons With "Homeless Status"

The DCHREAA adds "homeless status" as a new protected category to the already lengthy list of protected categories. Under the act, homeless status encompasses four separate categories:

- The first category includes "an individual or family that lacks a fixed, regular, and adequate nighttime residence." This includes an individual or family (1) living or sleeping in a "car, park, abandoned building, bus or train station, airport, or camping ground"; (2) living in a facility dedicated to providing temporary housing, "including shelters, transitional housing, and hotels and motels paid for by charitable organizations" or government programs; or (3) exiting an institution where the individual or family has lived for 180 days or less, and immediately preceding the stay at the institution lived "in a shelter or place not meant for human habitation."
- The second category includes "an individual or family who has lost or will imminently lose their primary nighttime residence" when all three elements are present: (1) the residence will be lost within fourteen days of the date of applying for homeless assistance (or the residence has already been lost); (2) no subsequent housing is identified; and (3) the individual or family "lacks the resources or support networks, such as family, friends, and faith-based or other social networks, needed to obtain other permanent housing."
- The third category includes an unaccompanied youth who meets all three of the following elements: (1) the individual has not secured "a lease, ownership interest, or occupancy agreement in permanent housing at any time during the 60 days" before applying for homeless assistance; (2) the individual "[h]as experienced persistent instability" (experienced two or more housing relocations) during the

60 days before applying for homeless assistance; *and* (3) the individual "[c]an be expected to continue in such status for an extended period of time because of":

- "[c]hronic disabilities, chronic physical health or mental health conditions, substance addiction, or a history of domestic violence or childhood abuse (including neglect)";
- "[t]he presence, in the household, of a child or youth with a disability"; or
- "[t]wo or more barriers to employment, which include the lack of a high school degree or General Education Development, illiteracy, low English proficiency, a history of incarceration or detention for criminal activity, and a history of unstable employment."

- The fourth category includes any individual or family who: (1) "is fleeing, or is attempting to flee, domestic violence, dating violence, sexual assault, stalking, or other dangerous or life-threatening conditions"; (2) "[h]as no other residence"; and (3) "[l]acks the resources or support networks, such as family, friends, and faith-based or other social networks, needed to obtain other permanent housing."

At this nascent stage, it is unclear what indicia will place employers on notice of a person's homeless status. Nevertheless, employers may want to update relevant handbook and equal employment opportunity literature to reflect this change. Employers may also want to assess what practices may directly or indirectly call into question an individual's homeless status.

Broader "Employee" Definition: Interns and Independent Contractors

The DCHREAA also broadens the DCHRA's definition of an employee. Previously, an employee was defined as "an individual employed by or seeking employment from an employer." The new definition specifies that "[t]he term 'employee' includes an unpaid intern and an individual working or seeking work as an independent contractor." This is a departure from Title VII of the Civil Rights Act of 1964, which explicitly excludes independent contractors from its coverage.

New Harassment Standard: "Totality of the Circumstances"

The DCHREAA appears to lessen the burden of proving harassment, potentially allowing employees to prevail on claims that might be dismissed under the *severe or pervasive* standard. This change closely mirrors the amendment to Maryland's harassment definition that **we discussed in a recent article.** The DCHREAA defines "harassment" as "conduct, whether direct or indirect, verbal or nonverbal, that unreasonably alters an individual's terms, conditions, or privileges of employment or has the purpose or effect of creating an intimidating, hostile, or offensive work environment." It also specifically incorporates sexual harassment within the definition of harassment. The DCHREAA defines "sexual harassment" as "[a]ny conduct of a sexual nature that constitutes harassment" under the general harassment definition, as well as "[s]exual advances, requests for sexual favors, or other conduct of a sexual nature where submission to the conduct is made either explicitly or implicitly a term or condition of employment or where submission to or rejection of the conduct is used as the basis for an employment decision affecting the individual's employment."

Until now, D.C. has applied the traditional *severe or pervasive* standard when evaluating harassment claims. Under this standard, which still applies in most jurisdictions, courts look for a pattern of misconduct in the workplace that is either severe or pervasive. D.C. will now join states such as Maryland in evaluating harassment claims based on the "totality of the circumstances," which opens the door for employees to prevail in instances where the alleged misconduct was less frequent or egregious. The

DCHREAA requires that the "totality of the circumstances" analysis consider the following factors, noting that the list is neither exhaustive nor any single factor determinative:

A. "The frequency of the conduct;

B. The duration of the conduct;

C. The location where the conduct occurred;

D. Whether the conduct involved threats, slurs, epithets, stereotypes, or humiliating or degrading conduct; and

E. Whether any party to the conduct held a position of formal authority over or informal power relative to another party."

Further, the DCHREAA specifies that the conduct may constitute unlawful harassment, regardless of the following circumstances:

A. "The conduct consisted of a single incident;

B. The conduct was directed toward a person other than the complainant;

C. The complainant submitted to or participated in the conduct;

D. The complainant was able to complete employment responsibilities despite the conduct;

E. The conduct did not cause tangible physical or psychological injury;

F. The conduct occurred outside the workplace; or

G. The conduct was not overtly directed toward a protected characteristic."

The totality-of-the-circumstances approach is nothing new in the harassment context, even under the heightened *severe or pervasive* standard. However, the DCHREAA appears to diverge from the totality-of-the-circumstances analysis in important ways. For instance, it explicitly discounts the fact that the alleged harassment might only have occurred once, the harassment was not directed at the complainant, or the alleged harassing behavior did not directly implicate a protected characteristic.

Could ordinary workplace gripes or tribulations now amount to harassment under the DCHREAA? Is the District's formal adoption of *National Railroad Passenger Corp. v. Morgan's* "all the circumstances" analysis in *Lively v. Flexible Packaging Association* now overruled by the DCHREAA? The Supreme Court of the United States' "all the circumstances" analysis in *Morgan* includes assessing "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." This test sought to remove from coverage trivial offenses within the workplace.

D.C.'s newly amended Human Rights Act might very well disrupt how the employment law community has come to understand and recognize harassment cases. Accordingly, employers may want to review their harassment training to see how they might adjust it to deal with the new provisions.

Ogletree Deakins' **Washington, D.C., office** will continue to monitor developments concerning the District's evolving employment legislation and will provide updates on the firm's **District of Columbia** and **Employment Law** blogs. The firm's **webinar** and **podcast** programs also offer important information for employers.