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Civil LITIGATION

What employers, employees should know about the city's anti-discrimination law

What is the Rochester Human Rights Law?

Rochester's Human Rights Law, Chapter 63 of the Municipal Code of the City of Rochester (the "RHR Law"), was enacted in 2001. It prohibits discrimination based on "age, race, creed, color, national origin, gender, gender identity or expression, sexual orientation, disability or marital status" in employment, as well as in places of public accommodation, the sale or lease of residential or commercial property, financing, and the provision of city services.

This article focuses on the employment discrimination provisions in the RHR Law and how the procedural aspects of the RHR Law differ from the state statute (the New York State Human Rights Law, under Article 15 of the New York Executive Law) and federal law (Title VII of the Civil Rights Act of 1964, 42 USC 2000e, *et seq.*)

How is the RHR law enforced?

The RHR Law allows a private right of action in any court of appropriate jurisdiction for injunctive relief, compensatory damages, and punitive damages, with no cap as to the amount of compensatory or punitive damages recoverable. This is different than the New York State Human Rights Law, which does not allow punitive damages in actions for employment discrimination, and from federal law (Title VII), which allows both compensatory and punitive damages but caps all damages on a sliding scale based upon the size of the employer, ranging from \$50,000 for employers with 15 to 100 employees, to \$300,000 for employers with more than 500 employees.

The RHR Law also contains a mechanism allowing for voluntary mediation at



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the Center for Dispute Settlement. The Code provides that such mediation is voluntary and is not a prerequisite to the commencement of a legal action.

Note that an action may not be brought under the RHR Law where the aggrieved party has initiated a civil action in any court based on the same grievance, or where the party has filed a complaint with the New York State Division of Human Rights based on the same grievance, unless the claimant has voluntarily withdrawn the civil action or complaint.

What is the statute of limitations?

The statute of limitations under the RHR Law is one year "after the alleged discriminatory practice." This is shorter than the statute of limitations under the State Human Rights Law, which is three years pursuant to CPLR 214(2), and longer than the statute of limitations under Title VII, which requires the claimant to file a charge with the EEOC either 180 or 300 days from the date of the discriminatory act.

Which employers are subject to liability?

The RHR Law applies to employers with four or more employees. The State Human Rights Law contains the same limitation (except for actions for workplace sexual harassment, which apply to all employers); on the other hand, the federal law

generally only applies to employers with fifteen or more employees (or in the case of age discrimination, 20 or more employees) who worked for the employer for at least 20 calendar weeks (in the current or preceding calendar year).

What Actions Are Prohibited?

The RHR Law defines discrimination as "[a]ny direct or indirect act, policy or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference based on, or the perception of, age, race, creed, color, national origin, gender, gender identity or expression, sexual orientation, disability or marital status; or the aiding, abetting, inciting, coercing or compelling thereof." (Rochester City Code § 63-2.) The terms age, creed (*i.e. religion*), national origin, gender, gender identity or expression, sexual orientation, marital status, and disability are further defined in the Code. *Id.*

Of note, "age" is defined to include persons eighteen years of age or older, which is the same age limitation as that contained in the State Human Rights Law, but different than the age limitation of 40 years or older in the federal statute.

The RHR Law specifically prohibits discrimination in employment, providing that it is unlawful for an employer, due to discrimination, to refuse to hire or employ, discharge suspend, demote, or discriminate in compensation, terms, conditions, or privileges of employment. It also prohibits discrimination by employment agencies, labor organizations, and in occupation training or retraining programs.

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There are a number of exemptions to the RHR law listed under Section 63-9 of the City Code. For example, a religious institution is permitted to restrict employment to persons of the same denomination and to take “such action as is calculated by such organization to promote the religious principles for which it is established or maintained.”

A “distinctly private club” is also permitted to “apply such selective criteria as it chooses in the selection of its members without being in violation of this chapter.” Of additional note, the Code states that it is not a violation of this chapter to maintain separate bathrooms, locker rooms, and bathing facilities for males and females, or to maintain employment dress and appearance requirements based on business considerations.

Fair Employment Screening – Criminal Background Inquiries

In 2014, the City enacted Article II of the Human Rights Law, entitled “Fair Employment Screening.” This Article prohibits the City, its vendors, and any employer located within the City or Rochester (with four or more employees) from making any inquiry with respect to an applicant’s prior criminal convictions during the application process.

An employer covered by this Article may not ask an applicant to disclose a criminal conviction or conduct a search of criminal convictions until it has either: (1) conducted an initial interview of the applicant; or (2) made a conditional offer of employment to the prospective employee (meaning an offer of employment conditioned upon a subsequent inquiry into the applicant’s history of criminal convictions). (In a previous article, titled “When employers can use ‘the Box’, published on Nov. 19, 2015, I explained, in detail, restrictions on the use of criminal background information under federal and state laws, which should likewise be taken into account by Rochester employers and employees.)

As with other claims under the RHR Law, any person may bring an action to enforce Article II seeking injunctive relief or damages (without limitation). In addition to the private right of action, the City’s Corporation Counsel may bring an action to restrain or prevent a violation of Article II, and may seek penalties in the amount of \$500 for the first violation and \$1,000 for each subsequent violation.

Attorney’s Fees

The RHR does not provide for the award of attorney’s fees generally. In an action to enforce Article II related to criminal conviction inquiries only, a court “may allow the party commencing

such action or proceeding, if such party prevails, costs and reasonable attorney’s fees as part of the relief granted.” The State Human Rights Law historically did not permit the award of attorney’s fees in connection with employment discrimination claims; however, effective Jan. 19, 2016, attorney’s fees may be awarded in cases of employment discrimination based on sex and sexual harassment only. Title VII provides that the court, in its discretion, may award attorney’s fees to the prevailing party.

It is good practice for a practitioner representing an employee/claimant who wishes to pursue an employment discrimination claim to consider the Rochester Human Rights Law, depending upon the size of the employer and the nature of the claim. For practitioners representing Rochester employers, it is likewise good practice to tailor employment policies and procedures to comply with the City Code in addition to applicable state and federal laws.

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