



Recent Legislative Developments Affecting Washington, DC Employers

Part 1 – DC Human Rights Act

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Seyfarth Shaw LLP

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Speakers

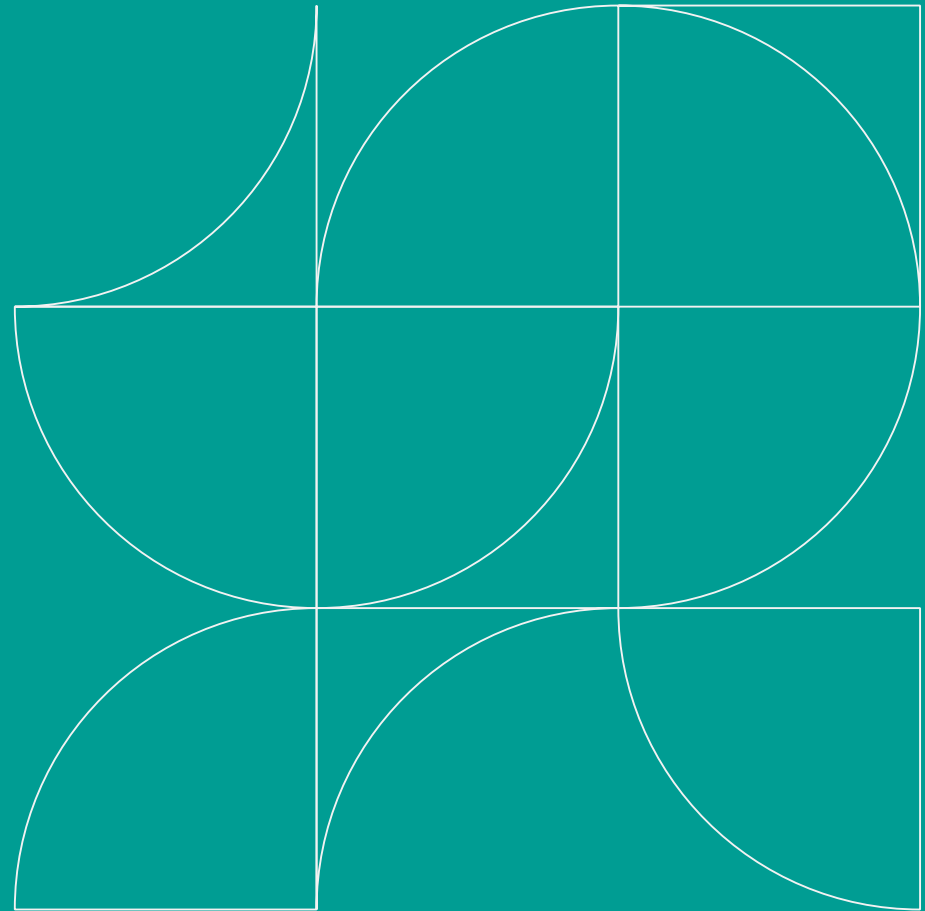


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Agenda

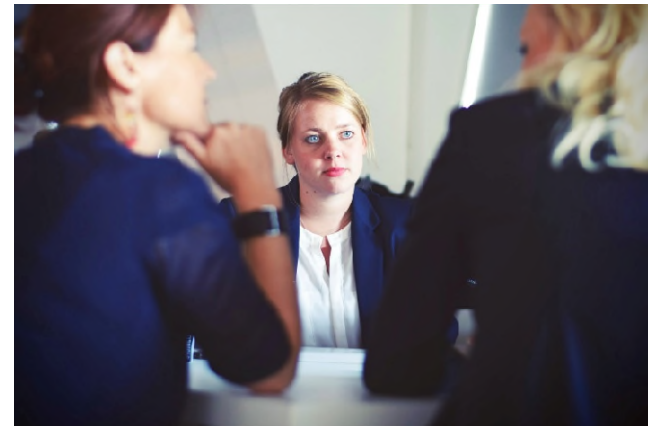
- 01** DCHRA Overview and Expanded Protections
- 02** Expanded Definition of Harassment
- 03** New Enforcement Mechanisms

DCHRA Overview and Expanded Protections



DCHRA Overview

- All employers in the District of Columbia are prohibited from refusing to hire, terminating, or otherwise discriminating against or harassing any individual with respect to compensation, terms, conditions, or privileges of employment, on the basis of (now) 18 protected categories. D.C. Code § 2-1402.11.
- Special requirements and protections for pregnancy, childbirth, and related medical conditions, credit information, and victims of domestic violence, sexual offenses, and stalking



Covered Employer

- Any person who, for pay or other compensation, employs an individual, including any person acting in the interest of such employer, directly or indirectly; and any professional association. D.C. Code § 2-1401.02.
- The law applies to all employers, regardless of the number of employees.
- Individuals can be employers.



Covered Employees

- Any individual employed by or seeking employment from an employer, including unpaid interns and independent contractors. D.C. Code § 2-1401.02.
 - Definition of “employee” now includes independent contractor!
 - Protections for independent contractors as of October 1, 2022.
 - Consider how this impacts contracts with independent contractors, policies/handbooks distributed to independent contractors, and EEO/harassment training.



Protected Traits

The DCHRA prohibits discrimination or harassment in employment based on 18 protected categories.

1. Race
2. Color
3. Religion
4. National origin
5. Sex (which includes a person's gender, pregnancy, childbirth, related medical conditions, breastfeeding, and reproductive health decisions)
6. Age (18 years or older)
7. Marital status
8. Personal appearance
9. Sexual orientation
10. Gender identity or expression
11. Family responsibilities
12. Political affiliation
13. Disability
14. Matriculation
15. Genetic information
16. Credit information
17. Status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking
18. Homeless status (As of October 1, 2022.)

What is “Homeless Status”?

- “Homeless” has same meaning as provided in § 4-751.01(18) (*i.e.*, services for homeless individuals). D.C. Code § 2-1401.02.
- “Homeless” means:
 - (A) An individual or family that lacks a fixed, regular, and adequate nighttime residence, meaning:
 - (i) An individual or family with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, airport, or camping ground;
 - (ii) An individual or family living in a supervised publicly or privately operated housing facility designated to provide temporary living arrangements, including shelters, transitional housing, and hotels and motels paid for by charitable organizations or by federal, state, or local government programs for low-income individuals; or
 - (iii) An individual who is exiting an institution where he or she resided for 180 days or less and who resided in a shelter or place not meant for human habitation immediately before entering that institution;
 - (B) An individual or family who has lost or will imminently lose their primary nighttime residence, if:
 - (i) The primary nighttime residence will be lost within 14 days of the date of application for homeless assistance or has already been lost;
 - (ii) No subsequent residence has been identified; and
 - (iii) 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;

What is “Homeless Status”? Cont.

- (C) An unaccompanied youth, who:
 - (i) Has not had a lease, ownership interest, or occupancy agreement in permanent housing at any time during the 60 days immediately preceding the date of application for homeless assistance;
 - (ii) Has experienced persistent instability as measured by 2 moves of housing accommodations or more during the 60-day period immediately preceding the date of applying for homeless assistance; and
 - (iii) Can be expected to continue in such status for an extended period of time because of:
 - (I) Chronic disabilities, chronic physical health or mental health conditions, substance addiction, or a history of domestic violence or childhood abuse (including neglect);
 - (II) The presence, in the household, of a child or youth with a disability; or
 - (III) Two 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; or
- (D) Any individual or family who:
 - (i) Is fleeing, or is attempting to flee, domestic violence, dating violence, sexual assault, stalking, or other dangerous or life-threatening conditions that relate to violence against the individual or a family member, including a child, that has either taken place within the individual's or family's primary nighttime residence or has made the individual or family afraid to return to their primary nighttime residence;
 - (ii) Has no other residence; and
 - (iii) Lacks the resources or support networks, such as family, friends, and faith-based or other social networks, needed to obtain other permanent housing.

Overview of Other DCHRA Protections

- Pregnancy, Childbirth, and Related Medical Conditions
 - Requires employers to treat an employee affected by pregnancy, childbirth, a pregnancy-related or childbirth-related medical condition, breastfeeding, or a reproductive health decision, the same for all employment-related purposes (including receipt of benefits, like leave) as any other employee with a similar ability or inability to work.
 - Employer is required to treat an employee temporarily unable to perform the functions of the job because of pregnancy-related condition in the same manner it treats other employees with temporary disabilities.
 - Employer is not required to provide insurance coverage related to a reproductive health decision.

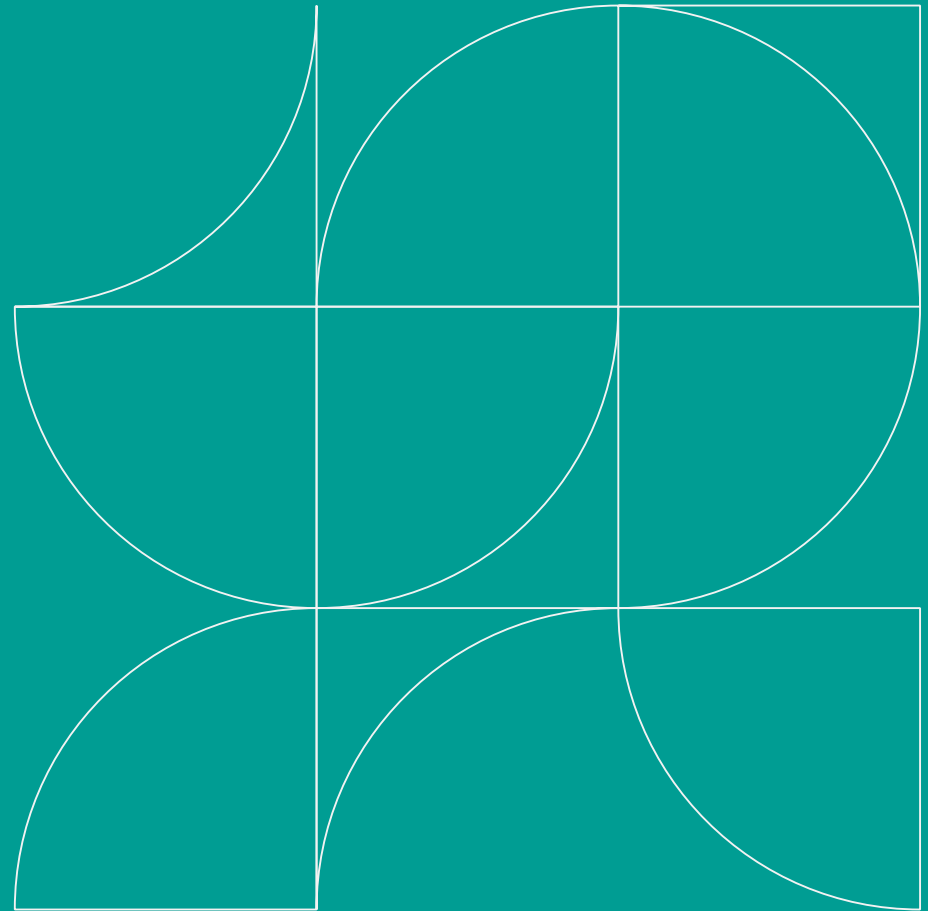
Overview of Other DCHRA Protections (Cont.)

- Victims of Domestic Violence, Sexual Offenses, and Stalking
 - Employment Protections for Victims of Domestic Violence, Sexual Offenses, and Stalking (“DVSOS”) Amendment Act of 2018
 - employers, employment agencies and labor organizations may not discriminate against victims of stalking and their family members, including because (1) the employee participated in a criminal, civil, or other proceeding related to DVSOS; (2) the employee sought medical, mental health, or counseling related to DVSOS; or (3) an individual caused a disruption or made a threat to the employee’s employment or work place related to DVSOS.
 - Employers are also required to provide reasonable accommodations to victims of, or family members of victims of, DVSOS, when necessary to ensure the employee’s security and safety absent undue hardship.
 - Ex.: transfer or reassignment; a modified schedule or leave; changing a work station, phone number, or email address; installing a lock; assisting with documenting incidents of DVSOS that occur in the workplace; or implementing other safety procedures in response to actual or threatened DVSOS.
 - Employers may not disclose any information related to an employee’s status as a victim of, or family member of a victim of, DVSOS.
 - If a disclosure is made by the employer, it must notify the employee of the disclosure.

Overview of Other DCHRA Protections (Cont.)

- Credit Information
 - DC Fair Credit in Employment Amendment Act of 2016 (DCFCEAA)
 - prohibits employers, employment agencies, and labor organizations in DC, from discriminating against an employee or applicant based on credit information (including creditworthiness, credit standing, credit capacity or credit history), even if an applicant voluntarily discloses credit information.
 - Employers, unless excluded by the law, detailed below, may not directly or indirectly ask for or rely on, credit information of an employee or applicant in making employment decisions.
 - DCFCEAA does not apply in 7 situations:
 - 1. Where DC law requires an employer to obtain an employee's credit information;
 - 2. Where an individual applies for, or is employed as, a police officer with the Metropolitan Police Department, as a special police officer or campus police officer, or in a position with a law enforcement function;
 - 3. Where credit information must be provided to the Office of the Chief Financial Officer of DC;
 - 4. Where an employee must have a security clearance under DC law; however, in some instances federal law may preempt DC law;
 - 5. Where DC government employees have to provide disclosures to the Board of Ethics and Government Accountability, or to the Office of the Inspector General;
 - 6. Where the job or position would require the employee to access personal financial information, such as when employed by financial institutions; or
 - 7. Where an employer is following a lawful court order or cooperating with a law enforcement investigation.

Harassment



Broad Definition of Harassment

- DCHRA prohibits harassment on the basis of the 18 protected categories described above. D.C. Code § 2-1402.11.
- Broad definition of “Harassment”
 - “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”
 - Direct (ex. a comment made to an employee, a slur written on the employee’s door) v. indirect (ex. a comment overheard by an employee, a slur written on a bathroom stall)
 - Verbal (ex. spoken words) v. nonverbal (ex. gestures, objects, posters)
- Specifically incorporates “sexual harassment” within definition of “Harassment”
 - “Sexual harassment” means “any conduct of a sexual nature that constitutes harassment as defined [above], and sexual 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.”

New Harassment Standard: “Totality of the Circumstances”

- Historically, DC applied “severe or pervasive” standard when evaluating harassment claims
 - Still applies in most jurisdictions
 - Standard under Title VII
 - Courts look for pattern of misconduct in the workplace that is either severe or pervasive
- Now, “totality of the circumstances”
- Harassment under the DCHRA “need not be severe or pervasive to constitute harassment and no specific number of incidents or specific level of egregiousness is required.”
 - Direct contrast to requirement under Title VII that to be actionable harassment, the conduct complained of must be “severe or pervasive”

New Harassment Standard: “Totality of the Circumstances”

- Five factors to determine whether conduct constitutes unlawful harassment, including:
 - the frequency and duration of the conduct;
 - the location where the conduct occurred;
 - whether the conduct involved slurs, epithets, stereotypes, or humiliating or degrading conduct; and
 - whether a party to the conduct held a position of formal authority or informal power relative to another party.



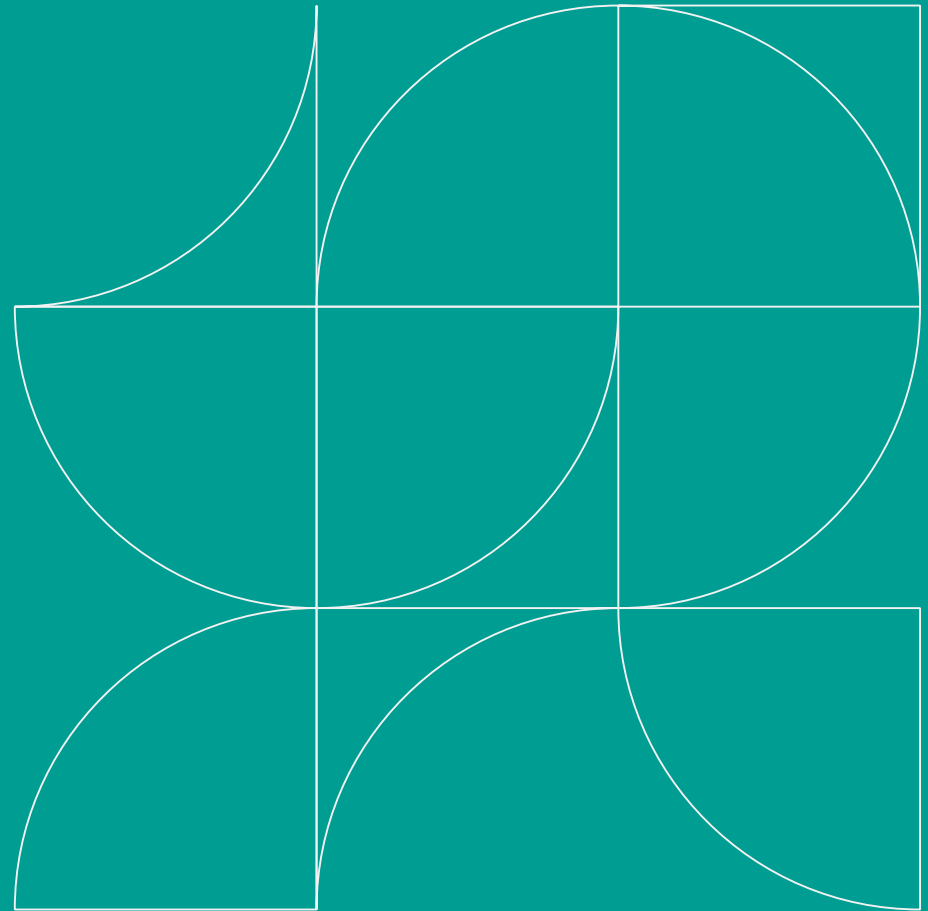
New Harassment Standard: “Totality of the Circumstances”

- Conduct may constitute unlawful harassment, regardless of the following circumstances:
 - The conduct consisted of a single incident;
 - The conduct was directed toward a person other than the complainant;
 - The complainant submitted to or participated in the conduct;
 - The complainant was able to complete employment responsibilities despite the conduct;
 - The conduct did not cause tangible physical or psychological injury;
 - The conduct occurred outside the workplace; or
 - The conduct was not overtly directed toward a protected characteristic.

Employer Takeaways

- Potential for employees to prevail on claims that might be dismissed under the severe or pervasive standard
- Potential for employees to prevail in instances where alleged misconduct was less frequent or egregious
- Even after work hours or weekend conduct by an employee could be the subject of harassment complaints
- Overall change in how employers have come to understand and recognize harassment cases
 - Consider reviewing anti-harassment policies and harassment training to see how might adjust to deal with the new provisions

Enforcement Mechanisms



Attorney General Enforcement of Human Rights Act

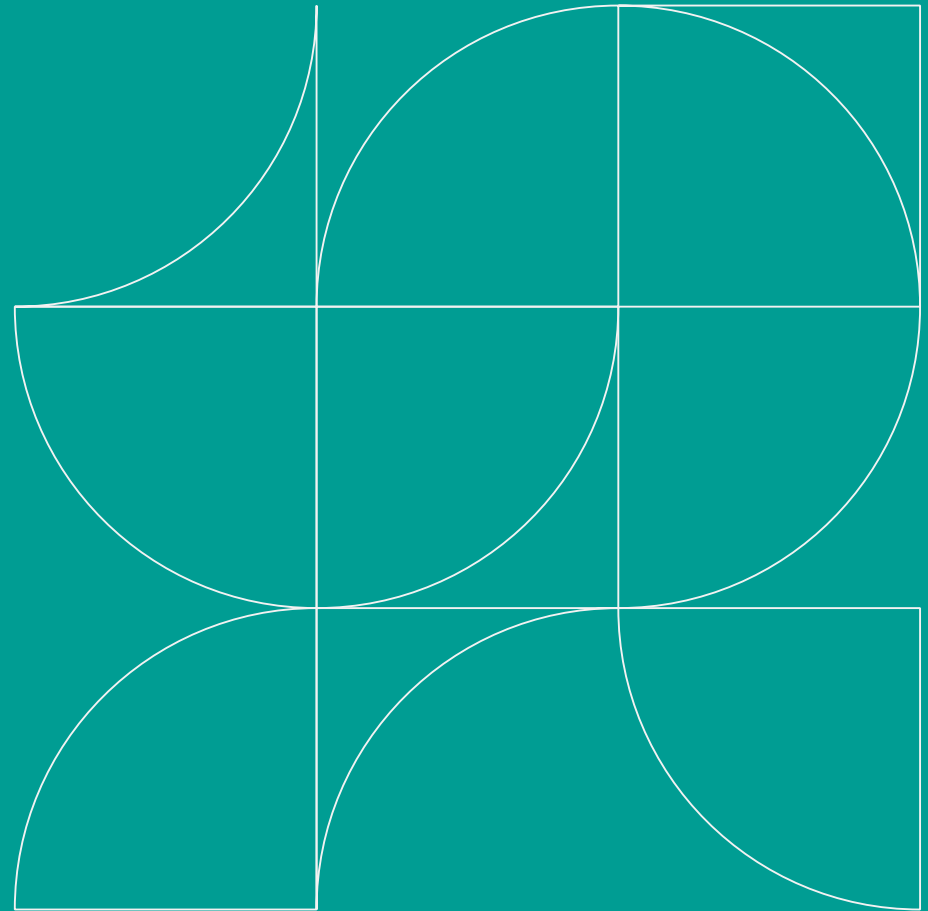
- Clarifies the authority of the Office of the Attorney General (OAG) to bring civil actions under the DCHRA in the name of the District of Columbia for violations of the DCHRA
 - provides the OAG with investigative and enforcement tools
- In a civil action, the OAG may obtain
 - injunctive relief;
 - civil penalties;
 - the hiring, reinstatement or upgrading of employees, with or without back pay;
 - the restoration to the membership in any respondent labor organization, admission to or participation in a program, apprenticeship training program, on-the-job training program or other occupational training or retraining program;
 - the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons;
 - the payment of compensatory damages to the person aggrieved by such practice;
 - the payment of reasonable attorney fees.

Attorney General Enforcement of Human Rights Act

- OAG may seek subpoenas for production of documents/materials and testimony of witnesses *before* commencing suit to determine whether to sue
 - subpoena witnesses
 - administer oaths
 - examine an individual under oath
 - require sworn answers in writing to interrogatories
 - compel production of documents
- Reference:
 - § 2–1403.16a. Civil actions by the Attorney General.



Questions?



Thank You

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