TESTIMONY ON BEHALF OF COUNTY EXECUTIVE MARC ELRICH

Bill 32-21, Personnel - Employee Settlement Agreements with No-Rehire Clause - Prohibited

Before the Montgomery County Council

September 14, 2021

Good afternoon Councilmembers, my name is Darryl Gorman and I am the Senior Advisor in the Office of Human Resources. It is a pleasure for me to appear before this committee on behalf of the County Executive to discuss Bill 32-21, which amends Chapter 33 – Personnel and Human Resources of the Montgomery County Code.

This Bill prohibits adding a "no-rehire" clause to County employee settlement agreements. When an employee files an employment dispute or claim against the County,and a settlement agreement is reached between the parties, such an agreement typically contains a no-rehire clause. This clause is added to the agreement to prevent the employee from seeking future employment opportunities with the County.

This Bill would prohibit adding a no-rehire clause to a settlement agreement between the County and a County employee. However, it would not prohibit adding a no re-hire clause to a settlement agreement when the County and an employee mutually agree to do so; or if the employee was terminated "for cause" by the Chief Administrative Offer or the agency head.

Adding a no re-hire clause to a settlement agreement is not illegal. Operationally, adding a no re-hire clause may pose some administrative challenges for the County which are highlighted below.

First, the term "employment dispute" can be interpreted very broadly in the bill such that it covers non-employment related claims. The language in the bill should be focused on employment disputes where the employee is challenging their dismissal. Likewise, the bill should reference employee dismissals if it applies to cases where an employee is separated from County service "for cause". Terminations are non-disciplinary actions to end County employment and are not "for cause" actions in the County.

Second, the impact on the appeals process must be considered if a former employee appeals their dismissal to the Merit System ProtectionBoard (MSPB). It is not clear where the limits would be placed on the Board's jurisdiction. The standard for the Board's review and deciding where the burden of proof lies are issues that also should be considered.

Third, a provision in a similar 2020 California law (AB 749) provided that when an employer dismisses an employee, there needs to be a “legitimate non-retaliatory, non-discriminatory reason” for the dismissal, when the employee and the employer are allowed to enter into a no rehire agreement. There also needed to be a “good faith” finding that the employee “engaged in sexual harassment or sexual assault”. Adding a finding that the employee engaged in criminal conduct to show that the no rehire clause is justified may be advisable. But certain terms must be defined if such provisions are enacted. “Protected activity” would need to be defined so that there is a showing that the employee has a basis (i.e., the employee was engaging in a “protected activity”) to be eligible for re-hire. And it should be shown that the criminal conduct was related to the position that the employee held.

Finally, and to reiterate, the County believes that barring a no rehire provision in a settlement agreement is lawful and may be reasonable in certain circumstances. Such a prohibition does not impair the County’s ability to reach mutually agreeable settlement agreements.

We look forward to working with the Council on this legislation. Thank you and I am pleased to answer any questions you may have.