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BILL ANALYSIS

Senate Fiscal Agency

Lansing, Michigan 48909

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Senate Bills 780 and 781

Sponsor: Senator John M. Engler (Senate Bill 780)

Senator Doug Cruce (Senate Bill 781)

Committee: Human Resources and Senior Citizens

Date Completed: 4-19-88

SUMMARY OF SENATE BILLS 780 and 781 as introduced 3-17-88:

Senate Bill 780 would create the "Employment Contract Rights Act" to:

- Allow an employer to give an employee a written statement providing for contractual rights, and allow the employee to bring an action against the employer for breach of the contract.
- Abrogate any right of an employee to bring an action under common law or recover damages at common law for breach of an employment contract, and provide that, generally, the Act would provide an employee's exclusive remedy against an employer for a breach.
- Preserve the right of an employee to bring an action under a statute creating that privilege.
- Exempt from the Act employees covered by a collective bargaining agreement, classified civil servants, and employees protected by statutorily created tenure.
- Allow a court, in the event of an employer's breach, to order equitable relief, including reinstatement, back pay, and front pay.
- Allow an employer to establish a mandatory alternative dispute resolution procedure which, generally, would be an employee's exclusive remedy for an employment dispute.

Senate Bill 781 would amend the Revised Judicature Act to provide for a two-year statute of limitations for actions under the Employment Contract Rights Act, except as provided in the proposed Act.

The bills are tie-barred.

A more detailed description of Senate Bill 780 follows. The proposed Act would apply to all causes of action filed on or after its effective date.

Employment Contract

A written statement provided to an employee by an employer before or during the course of employment could provide a contractual right protected by the proposed Act. An employee could bring an action against an employer for a breach of employment contract as provided in the Act to enforce such a contractual right. "Written statement" would mean any type of written document that expressly details the terms of a condition of employment and that is provided to an employee, before or during the course of employment, by the employer or the employer's agent. "Condition of employment" would mean an attribute of an employment relationship, including a right regarding discharge or an employment termination standard; compensation or benefits; promotion, demotion, discipline,

transfer, assignment, or layoff; or the retention or dismissal of an employee if a reduction in force takes place. ("Employment termination standard" would mean the criterion by which an employer was permitted to terminate employment.)

A written statement relating to a condition of employment would supersede all prior or contemporaneous representations, whether oral or written, or subsequent oral representations relating to a condition of employment. Evidence of an oral statement made by the employer or the employer's agent or other evidence of course of dealings or course of performance would not be admissible, unless both of the following circumstances existed:

- The written statement was ambiguous as to the condition of employment allegedly violated and the oral statement, course of dealings, or course of performance offered as evidence explained or clarified the ambiguity.
- The oral statement, course of dealings, or course of performance did not qualify, control, contradict, enlarge, diminish, or vary the written statement.

The bill specifies that the inclusion of progressive discipline procedures in a written statement would not constitute or imply an employment termination standard other than at will. ("At will" employment commonly refers to employment that can be terminated at the will of the employer, with or without cause.)

An employer could change a condition of employment "without an express or implied reservation of the right by the employer to make the... change". The change would have to be made in a written statement signed by the employer or the employer's agent, and it would not be invalid because the employee was not given consideration. If a condition of employment were explicitly bargained for between the parties, however, and set forth in a written statement signed by them, the employer could not change that condition unless there were further explicitly bargained for consideration by the employee and the change were set forth in a written statement signed by the parties.

Right to Bring an Action

The bill specifies that it would abrogate any right of an employee to bring an action under common law or to recover damages at common law for the breach of an employment contract under any legal theory. The rights abrogated would include the right to bring an action for pain and suffering, emotional or mental distress, or any

other common law tort. Except as otherwise provided in the Act, the Act would provide the employee's exclusive remedy against the employer for a breach of an employment contract due to a violation of a condition of employment. An employment contract could provide for liquidated damages in the event of any alleged breach, and the specified liquidated damages would be the sole and exclusive remedy of an employee who brought an action under the Act. ("Liquidated damages" commonly refers to a specific sum of money that has been expressly stipulated by the parties to a contract to compensate a party for a breach of the contract.)

Despite the preceding provisions, an employee could still bring an action against or recover damages from an employer if permitted under a Federal or State statute that creates that privilege, including the Michigan Handicappers' Civil Rights Act, the Elliott-Larsen Civil Rights Act, the Whistleblowers' Protection Act, the Worker's Disability Compensation Act, the Michigan Employment Security Act, the Bullard-Plawecki Employee Right To Know Act, and Public Act 176 of 1939 (which governs the mediation of labor disputes).

Also, an employee could bring an action against or recover damages from an employer under the proposed Act if the employer discharged the employee because of his or her exercise of a statutory right or if the employer, because of the employee's exercise of a statutory right, violated a condition of employment that was contained in a written statement.

Employees who are covered by a collective bargaining agreement, who are classified civil servants of a Federal, State, or local unit of government, or who are protected by statutorily created tenure would not have a cause of action under the proposed Act.

An employee could not bring an action against an employer under the Act unless the condition of employment were delineated in a written statement, and the employee justifiably relied upon the written statement.

Except as provided in the bill for mandatory alternative dispute resolution procedures, an employee could not bring an action under the Act more than two years after the cause of action accrued, i.e., on the date that the alleged breach due to a violation of a condition of employment occurred. The parties to an employment contract could agree to a reduced period of limitations that was for a reasonable time period and was delineated in a written statement.

The employee would have the burden of proof to show a prima facie case of a breach of an employment contract under the Act. ("Prima facie case" commonly refers to a case that is established by sufficient evidence and can be overturned only by rebutting evidence produced by the other side.) If the employee met that burden, the employer would have the burden of producing evidence to refute the prima facie case. Upon the production of that evidence, the employee would have the burden of proving by a preponderance of the evidence that the employer breached the employment contract.

If an employee occupied a supervisory, confidential, managerial, executive, or professional position, the court, in determining whether the employer breached the employment contract and in determining when the employee would have been laid off or discharged, could not interfere with the legitimate exercise of managerial discretion by the employer and would have to allow substantial deference for the exercise of the employer's subjective judgment.

Relief

If a court found that the employer had breached an employment contract under the Act, the court could issue equitable relief, including specific performance or the reinstatement of the employee, with or without back pay, and with or without interest. The back or front pay otherwise allowable would have to be reduced by unemployment compensation or worker's disability compensation due to wage loss, interim earnings, or "amounts earnable with reasonable diligence by the employee". ("Front pay" would mean a continuation of all or part of the employee's earnings before the discharge or before the alleged violation for up to one year from the date the employee secured or should have secured reasonable alternative employment.)

The bill states that reinstatement of the employee would be the preferred remedy for a discharge that violated an employment termination standard or a constructive discharge that resulted from a violation of a condition of employment. ("Constructive discharge" would mean the resignation, retirement, or quitting of an employee resulting from an employer's violation of a condition of employment that would induce a reasonable individual employed by that employer to resign, retire, or quit.) Reinstatement could be ordered by the court, however, only if the employer consented. An employee's unreasonable refusal to accept an offer of reinstatement or an offer of reasonable alternative employment would terminate any back pay or front pay otherwise allowable. A court could not order any back pay or front pay beyond the date, if any, that the employee would have been laid off, dismissed, or otherwise separated from employment due to layoff or lack of work, plant shutdown, position elimination or consolidation, or any other cutback in the number of employees for a business reason.

If reinstatement were not ordered, the court could order additional relief, including front pay. Such relief could not include compensatory damages, punitive damages, or any other form of damages not set forth in the Act.

Mandatory Alternative Dispute Resolution

Unilaterally or by agreement with an employee, an employer could establish in a written statement a mandatory alternative dispute resolution procedure for the determination of employment disputes that otherwise would come under the proposed Act. Except as provided below, such a determination would be final and binding on the parties and would be the employee's exclusive remedy for a dispute. A mandatory alternative dispute resolution procedure would have to be instituted by the parties and proceed on a reasonably timely basis. The procedure would have to include a hearing before one or more impartial individuals, after reasonable notice of the time and place of the hearing. The parties would have to be given an opportunity to present evidence and argument at the hearing and could be represented by counsel.

If an employee believed prior to or during participation in an alternative dispute resolution procedure that the procedure did not meet the bill's requirements, the employee could bring an action under the Act. If the court found that the procedure did not [sic] meet the requirements, the court would have to order the parties to implement or continue the procedure. If the procedure were not found to meet the requirements, the court would have to determine the employee's cause of action.

If an alternative procedure provided that a judgment of the circuit court could be rendered upon the determination made under the procedure, the court would have

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jurisdiction to enforce the procedure and to render judgment on the determination. The court would have to enforce the procedure or render judgment only if the party seeking enforcement or judgment took that action within a reasonable time from the date of the determination. The court could render judgment on the determination although the relief given, if any, was such that it could not or would not be granted by a court of law or equity in an ordinary civil suit. Nothing in the determination, however, could expand the remedies provided in the bill.

A mandatory alternative dispute resolution procedure would be presumed to meet the bill's requirements if it complied with the rules and regulations of the American Arbitration Association for labor disputes.

After a determination was made pursuant to an alternative dispute resolution procedure, an employee could bring an action only to allege fraud in the procedure. If the court determined that the procedure was fraudulent, the period of limitations specified in the bill would begin to run from the date of the alternative dispute resolution determination.

MCL 600.5807 (Senate Bill 781)

Legislative Analyst: S. Margules

FISCAL IMPACT

Senate Bill 780 would have an indeterminate fiscal impact on State and local government. The impact would depend on the extent to which the bill would increase or decrease the number of court actions, resulting in either increased or decreased court expenditures. Because the bill would exempt State and local employees, it should not directly affect their wages or working conditions.

Senate Bill 781 would have no fiscal impact on State or local government.

Fiscal Analyst: R. Klein

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.