



The GSH 60-Second Memo

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Wisconsin on Verge of Authorizing State Court Lawsuits for Recovery of Compensatory and Punitive Damages

By Gregory M. Wesley, Esq.

Wisconsin is a pen stroke away from passing legislation that will significantly expand the damages recoverable by employees and applicants found to have been subjected to discrimination and will affect private employers with fifteen (15) or more employees doing business in the State of Wisconsin. The proposed law will allow complainants who receive a determination finding discrimination at the state agency level to initiate a lawsuit in state circuit court for recovery of compensatory and punitive damages. The legislation was passed in the State Senate on April 28, 2009 by a vote of 18 to 15 and, on the following day, by the State Assembly by a vote of 51 to 47. There has been no indication that the bill will be vetoed by Governor Doyle.

Currently, recovery under the Wisconsin Fair Employment Act (WFEA) is limited to reinstatement of employment, back pay for up to two (2) years, and costs and attorney fees. The proposed legislation permits a person who receives a finding by a hearing

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examiner of the Equal Rights Division (ERD), after a hearing on the merits, that an employer has engaged in discrimination, unfair honesty testing, or unfair genetic testing to file suit in Wisconsin circuit court to recover compensatory and punitive damages. Available compensatory damages will include damages for future economic losses, pain and suffering, emotional distress, mental anguish, loss of enjoyment of life and other noneconomic losses. Under the bill, the circuit court *must* order the defendant to pay the employee compensatory and punitive damages "in an amount that the circuit court or jury finds appropriate, plus reasonable costs and attorney fees ..." A circuit court lawsuit must be commenced within sixty (60) days after the date on which the ERD's final decision is made or, if reviewed by the Labor and Industry Review Commission (Commission), which handles appeals of ERD decisions, when the Commission mails its final decision.

These changes will result in a state law that, in some ways, more closely tracks federal discrimination statutes, including Title VII, ADA and ADEA, under which compensatory and punitive damages are also available. It also appears that the bill will afford the ERD the ability to bring a lawsuit on behalf of the prevailing complainant, as it states that "[T]he department or a person discriminated against ... may bring an action ..." However, one major distinction between federal and state law is that the new legislation authorizes only those complainants who receive a favorable decision to proceed to state court. Also, the bill does not allow circuit court actions against the state, any state agency or local government unit.

The new legislation also provides for a surcharge of ten percent of any compensatory and punitive damage order to be paid by the employer to the clerk of the circuit court. This surcharge will ultimately be paid to the Wisconsin Department of Workforce Development (DWD) and used to cover administrative costs.

Some have described the bill as an equal pay law. However, the changes are not limited to equal pay or other gender-related claims and instead are applicable to all classes protected under Wisconsin state law, including but not limited to age, race, disability, sexual orientation and arrest or conviction record.

The bill caps the amount of damages that can be recovered, based upon the following sliding scale:

- 15 and 100 employees: \$50,000;
- 101 and 200 employees: \$100,000;
- 201 and 500 employees: \$200,000; and
- 500 employees or more: \$300,000.

The bill also provides for these caps to be adjusted on a yearly basis, beginning July 1, 2010, based upon a consumer price index formula.

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This calculation is based upon the number of employees who work on "each working day in each of 20 or more calendar weeks in the current or preceding year." This means that if an employer's workforce dips below a threshold amount on any applicable day, then the lower cap would apply. The provision is silent as to whether the calculation is based upon total number of employees company-wide or is limited to either the number of employees in Wisconsin or at the worksite of the complaining employee.

In light of the likely upcoming changes, it is important for employers doing business in Wisconsin who are currently without employment practices liability (EPL) insurance to consider obtaining it and for those already with EPL insurance to consider reviewing their coverage to ensure that it is adequate.

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