



Wisconsin Fair Employment Act Amended to Allow Recovery of Punitive and Compensatory Damages in State Court

Wisconsin Governor Jim Doyle has signed into law Senate Bill 20 (the Amendment), amending the Wisconsin Fair Employment Act (WFEA) to permit an employee or the Department of Workforce Development (DWD) to recover punitive and compensatory damages in employment discrimination, unfair genetic testing and unfair honesty testing cases. The Amendment went into effect July 1, 2009.

Discrimination Under the WFEA. The WFEA prohibits discrimination based on race, color, creed, age, gender, disability, marital status, sexual orientation, military service, national origin, ancestry, arrest and conviction record and the use (or non-use) of lawful products, in addition to unfair honesty testing and genetic testing.

Expansion of Complainant Remedies. Prior to the Amendment, the WFEA limited remedies to the recovery of potential front pay, back pay, reinstatement, costs and attorneys' fees. The Amendment expands the potential remedies available to complainants. More specifically, the Amendment permits complainants to seek punitive and compensatory damages in addition to the other remedies or amounts previously available under the WFEA.

Compensatory damages include noneconomic losses such as pain and suffering, emotional distress, mental anguish and loss of enjoyment of life.

Punitive damages are subject to Wisconsin statutory law, which makes such damages available only where the complainant can show that the employer acted maliciously or with an intentional disregard for the complainant's rights. Wis. Stat. § 895.043(3).

Obtaining Additional Damages. In order for a complainant to pursue compensatory and punitive damages under the Amendment, the complainant must first obtain a determination that discrimination occurred. At the conclusion of the administrative process, a prevailing complainant has 60 days from the date of the mailing of the final decision of the Equal Rights Division to bring an action

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in Wisconsin state court to recover compensatory and punitive damages. Either a circuit court judge or a jury will determine the amount of damages, costs and attorneys' fees that should be awarded, if any.

Punitive and Compensatory Damage Cap. The Amendment places a cap on the amount of punitive and compensatory damages that can be awarded based on the size of the employer:

- \$0 if the business employs fewer than 15 employees for each of 20 or more calendar weeks in the current or preceding year
- Up to \$50,000 if the business employs 15 to 100 employees for each of 20 or more calendar weeks in the current or preceding year
- Up to \$100,000 if the business employs 101 to 200 employees for each of 20 or more calendar weeks in the current or preceding year
- Up to \$200,000 if the business employs 201 to 500 employees for each of 20 or more calendar weeks in the current or preceding year
- Up to \$300,000 if the business employs 501 or more employees for each of 20 or more calendar weeks in the current or preceding year The Amendment authorizes the DWD to adjust the caps in the future to reflect changes in the Consumer Price Index.

Retroactive Effect of the Amendment. The Amendment cannot be applied retroactively or to pending claims. Punitive and compensatory damages will only be available for WFEA violations committed on or after the effective date of the Amendment.

The Amendment Signifies a Significant Change in Wisconsin Employment Law. The Amendment will likely increase the number of claims pursued under the WFEA. The Amendment also provides employees with greater leverage in negotiating settlements of WFEA claims. Further, employees are more likely to pursue their claims in state forums, where the substantive law is more favorable towards employees than is federal law. Accordingly, it is likely that employers will see an increase in the costs of defending and settling these types of claims.

If you have any questions regarding the Amendment and how to minimize your liability under the WFEA, please contact an attorney in Reinhart's Labor and Employment Practice.



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