

May 16, 2014

Minnesota Women's Economic Security Act Becomes Law

By Shirley Lerner and David Goldstein

This week, Minnesota passed the Women's Economic Security Act (WESA), a nine-part law intended to break down barriers for women in the workplace. Of direct interest to employers, the law protects employees' discussion about wages, requires certain state government contractors to certify their compliance with pay equity laws, provides unemployment benefits for victims of sexual assault, domestic abuse, or stalking, offers time-off rights for relatives and "safety" leave, enhances rights and protections for pregnant and nursing mothers, expands new parent leave, and provides discrimination protections for familial status.

Wage Disclosure Protection

This provision of the new law, which takes effect August 1, 2014, applies to both men and women. The law gives employees the right to discuss their wages, and prohibits employers from taking any adverse action against employees for discussing their or other employees' wages.

The law recognizes, however, that employees are still bound to maintain an employer's confidential information, and does not allow disclosure to the employer's competitors.

The law requires that the employer give employees written notice of their rights, including their right to bring a civil action to seek reinstatement, back wages, and attorneys' fees, if they are terminated in violation of the law.

State Contractor Pay Equity Certification

WESA amends the Minnesota Human Rights Act (MHRA) to require certain state contractors to obtain a certificate periodically from the Minnesota Department of Human Rights (MDHR) regarding compliance with equal pay laws. This requirement will apply to businesses with state contracts for goods or services in excess of \$500,000 and 40 or more full-time employees. This requirement will not apply, however, to most contracts with the state regarding insurance, health care, or the reimbursement of health care services.

As a condition of doing business with the state, contractors have long been required to obtain certificates of compliance from the MDHR confirming that the contractor has filed an affirmative action plan and related reports. Under this new law, covered businesses will also now be required to obtain a separate equal pay certificate. The employer will need to certify that it is in compliance with Title VII of the Civil Rights Act of 1964, Equal Pay Act of 1963, MHRA, and Minnesota Equal Pay for Equal Work Law.

As part of its equal pay compliance statement, the business is also required to identify and describe the “approach” that it uses to set compensation and benefits.

The new statute requires state contractors to compare periodically the compensation being paid to women not only vis-à-vis men performing the same jobs, but also within the broader job categories utilized for EEO-1 reporting. Such an exercise will reveal the extent to which men and women may tend to be concentrated in different jobs and suggest opportunities to increase pay equity by seeking to recruit and retain women in higher-paying jobs.

Otherwise, WESA’s pay equity provisions do not change existing laws. Under existing laws, a claim of pay discrimination on the basis of sex fails if the disparity in pay is due to a factor other than sex, such as differences in job duties, supervisors, the location of the work, productivity, seniority, education, experience, or market conditions.

In terms of enforcement procedures, elements of a claim, methods of proof, defenses, and remedies, the Minnesota legislature has no authority to make changes to Title VII or the federal Equal Pay Act and the WESA does not make any changes in these areas to Minnesota’s Human Rights Act or equal pay statute.

Equal pay certification remains a very hot topic at the state capital. Both supporters and opponents of the legislation have vowed to seek further changes to the law in future sessions. Employers that care about this issue will want to stay informed regarding future proposals and make sure that their voices are heard in the event the legislature revisits this issue after the November election.

New Discrimination Protections: Familial Status, Including Pregnancy

In addition to the protections provided under federal law, the MHRA currently protects applicants and employees from discrimination and harassment based upon creed, marital status, status with regard to public assistance, membership or activity in a local commission, or sexual orientation. The law also prohibits employers from requiring or requesting information that pertains to protected classifications.

Under WESA, Minnesota’s protected classifications have been expanded to include “familial status” protection. Familial status is defined as “the condition of one or more minors being domiciled with (1) their parent or parents or the minor’s legal guardian or (2) the designee of the parent or parents or guardian with the written permission of the parent or parents or guardian.” Familial status includes pregnant women and anyone “in the process of securing legal custody of an individual who has not attained the age of majority.” There is no provision in the expanded MHRA protection that expressly requires an accommodation of familial status, but other provisions in WESA address such accommodations.

Pregnancy Accommodations

Immediately effective under WESA, employers who have 21 or more employees at a site must provide reasonable accommodation to pregnant employees who have worked 12 consecutive months and on average half of a full-time schedule as defined by the employer.

The employer must provide more frequent restroom, food, and water breaks, seating, and lifting limits over 20 pounds, without proof of medical necessity. A temporary transfer to a less strenuous or hazardous position may be required where other accommodations are not possible. Employees are not required to accept an accommodation or take a leave due to pregnancy. The law requires the employer and employee to enter into an interactive dialogue regarding the reasonable accommodation.

The pregnancy accommodation law does not affect any other protection afforded for sex discrimination or pregnancy.

Private Space to Express Milk

The current law requires employers to make a reasonable effort to provide mothers with a private space near the work area, which is not a toilet stall, to express breast milk for the infant child. The expanded law, which takes effect immediately, states the space also should not be a bathroom, be shielded from view and free from intrusion, and include access to an electrical outlet. The amended statute expressly prohibits retaliation against a woman who exercises her rights under this new provision, provides for Department of Labor and Industry enforcement of the law, and permits the employee to bring a civil action against the employer for any violations.

Increased New Parent Leave - 12 weeks, and Prenatal and Childbirth Incapacity

Minnesota's current Parenting Leave law applies to employers who have 21 or more employees at a site, and to employees who have worked 12 consecutive months and on average half of a full-time schedule as defined by the employer. The law currently provides for six weeks of unpaid new parent leave and benefit continuation, and allows employees to use sick leave for their children and certain relatives.

Under the enhanced Parenting Leave provisions, which become effective August 1, 2014, the definition of an employee has been modified to include an employee who has worked 12 months for the employer, not just 12 consecutive months. For new parent leave, the time allowed is increased to 12 weeks, and can be taken within 12 months after the birth or adoption of the child, or when the child leaves the hospital. Leave can also be used when needed for prenatal care, or incapacity due to pregnancy or childbirth.

The unpaid leave provided under this modified law may be reduced by periods of paid time off, as well as leave time taken under the federal Family and Medical Leave Act.

Expanded Sick Leave Use and "Safety" Leave

Minnesota's current Parenting Leave law requires the employer to allow an employee to use accrued available sick time for their child, adult child, spouse, sibling, parent, grandparent, or stepparent, for reasonable periods of time as the employee's attendance may be necessary, on the same terms upon which the employee is able to use sick leave benefits for the employee's own illness or injury. The law does not, however, require an employer to provide sick leave. In addition, disability pay and salary continuation are not considered accrued and available sick leave.

The law is now expanded to include time necessary for the illness or injury of the employee's mother-in-law, father-in-law, and grandchild, including step-grandchild.

The law has also been expanded to permit the use of sick leave for "safety" leave. Safety leave may be used for the purposes of providing or receiving assistance because of sexual assault, domestic abuse, or stalking.

The employer can limit the use of paid time off for absences for ill or injured adult children, other relatives and for safety leave to 160 hours in any 12-month period. This limit cannot be applied to absences due to the illness or injury of a minor child. These amendments become effective August 1, 2014.

Unemployment Benefits

Employees will be eligible for unemployment if they quit because they or an immediate family member is a victim of domestic abuse, sexual assault, or stalking. This change becomes effective October 5, 2014.

What to Do?

The WESA makes some significant – and immediate – changes to employment law in Minnesota. Employers are advised to take the following steps:

- Make sure practices and policies are updated to allow employees to discuss their wages. Employers should ensure they have published the notice required under the new wage disclosure protections.
- Employers with 40 or more employees should consider the costs of complying with the new requirements before choosing to enter into a covered state contract. In addition, employers should be aware of potential amendments to this portion of the law and provide input accordingly when the legislature revisits this issue.
- Amend handbooks and policies to explain the new familial status, pregnancy, and post-childbirth protections.
- Amend handbooks and policies to address the expanded use of sick leave for relatives and safety leave.
- Develop confidential methods to allow employees to request time off related to sexual assault, domestic abuse, and stalking.

- Train human resources and managers regarding the new safety and pregnancy laws and the need to approve additional accommodations.
- Review attendance policies to ensure they address the new laws.

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