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Legislation Eliminates Compensatory and Punitive Damages Under the Wisconsin Fair Employment Act

By Jason Plowman

On February 21, 2012, the Wisconsin Assembly passed legislation that would eliminate compensatory and punitive damage awards as potential remedies for violations of the Wisconsin Fair Employment Act (WFEA). The bill passed the Senate in November 2011 and is expected to be signed by Republican Governor Scott Walker. The law would repeal 2009 legislation, which provided for compensatory and punitive damages under a capped scheme similar to Title VII.

The WFEA prohibits a person from refusing to hire an individual, terminating an individual's employment, or discriminating against an individual in promotion, compensation, or in terms, conditions, or privileges of employment based on the individual's age, race, creed, color, disability, marital status, sex, sexual orientation, national origin, ancestry, arrest or conviction record, military service, use or nonuse of a lawful product off the employer's premises during non-working hours, or based on the use of unfair honesty or genetic testing. Prior to 2009, the Department of Workforce Development (DWD) could order reinstatement or front pay, back pay for up to two years before the filing of the complaint, and attorneys' fees and costs to remedy violations of the WFEA. Effective July 1, 2009, the WFEA was amended to permit the DWD or an individual discriminated against under the WFEA, following exhaustion of all administrative and judicial appeals, to bring an action in circuit court to also recover compensatory and punitive damages. Under the 2009 legislation, if the circuit court finds that a defendant had committed such an act of discrimination, it must order the defendant to pay compensatory and punitive damages in an amount the circuit court finds appropriate (subject to damage caps based on employer size similar to Title VII).

The legislation recently passed, and expected to be signed into law shortly, repeals the 2009 legislation and eliminates compensatory and punitive damages as a remedy available under the WFEA. The DWD may still award other remedies (reinstatement or front pay, back pay, and attorneys' fees and costs). The new law will apply to all future complaints and all pending complaints where a final determination has not been reached by the DWD or the Labor and Industry Review Commission, the appeal tribunal. While there is theoretically a window of complaints for which compensatory and punitive damages can be pursued (i.e., a final decision finding discrimination that occurred after July 1, 2009), the DWD has indicated that no such decisions exist. Further, in providing a fiscal estimate to the Legislative Reference Bureau regarding the legislation, the DWD stated that in calendar years 2009 and 2010, the DWD issued an average of 37 findings of discrimination across all cases filed under the WFEA.

Assuming the bill is enacted, employers will be able to defend claims before the DWD knowing that the employee has no potential to recover compensatory and punitive damages. Employees may still pursue certain claims in federal court, where compensatory and punitive damages remain available remedies. However, employers would no longer have a risk of compensatory or punitive damages for claims of arrest and conviction record discrimination under the WFEA.

Jason Plowman is an Associate in Littler Mendelson's Milwaukee office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Plowman at jplowman@littler.com.