Minnesota Employment Law Changes 2023

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The 2023 Minnesota Legislative session resulted several significant changes to Minnesota's employment law landscape, including:

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Below is a brief overview of these legislative changes. The overview below is not exhaustive and specific questions regarding the application of any recently enacted provision should be reviewed with legal counsel. In addition, employers should review their policies and employment practices and consider revising or adopting new policies prior to the effective dates of these newly enacted laws to ensure compliance with this changing legal landscape.

Minnesota Ban on Noncompete Agreements – Minn. Stat. § 181.988

Effective July 1, 2023

Minnesota has a ban on post-employment noncompete agreements. Per statute, a "covenant not to compete" is "an agreement between an employee and employer that restricts the employee, after termination of the employment from performing: (1) work for another employer for a specified period of time; (2) work in a specified geographical area; or (3) work for another employer in a capacity that is similar to the employee's work for the employer that is party to the agreement." All such agreements are "void and unenforceable." The only exception to the ban applies to noncompete agreements agreed to (1) during the sale of a business or (2) in anticipation of the dissolution of a business.

Notably, a "covenant not to compete" does not include a non-disclosure, confidentiality, trade secret, or non-solicitation agreement that are specifically designed to protect trade secrets, client lists, and confidential information. Further, there is nothing in Minn. Stat. § 181.988 that prohibits the use of noncompetes during the employment to restrict an employee or independent contractor from working for another business while providing services to the employer.

In addition to the noncompete ban, the law also prohibits employers from requiring Minnesota employees, as a condition of their employment, to agree to adjudicate claims outside of Minnesota or deprive the employee from the substantive protections afforded by Minnesota law. This provision prevents insertion of forum shopping clauses into employment agreements in Minnesota.

Additional Protections for Pregnant and Nursing Workers – Minn. Stat. § 181.939

Effective July 1, 2023

The protection for pregnant and nursing workers has been expanded. Previously, Minn. Stat. § 181.939 required employers to provide employees reasonable breaks to express milk for an infant child during the twelve months after the birth of a child. The amendment removes the 12-month limitation in its entirety. In addition, while breaks to express milk *may* run concurrently with any break times already provided to the employee, employees are not required to use pre-existing break times to express milk. Further, the amendment removed language that previously allowed employers to deny nursing mothers breaks to express milk if the breaks would "unduly disrupt the operations of the employer."

The law also provides increased pregnancy accommodations, including specifying that reasonable accommodations may include temporary leaves of absence, modification of work schedule and job assignments and more frequent or longer break periods. Further, the law specifically prohibits

employers from discharging, disciplining, penalizing, interfering with, threatening, restraining, coercing, or otherwise retaliating or discriminating against pregnant employees.

Employers have an affirmative duty to inform employees of their rights to pregnancy accommodations and nursing breakings at the time of hire and when an employee inquires or requests parental leave in English and the primary language of the affected employee. If an employer utilizes an Employee Handbook, a notice of rights provided under Minn. Stat. § 181.939 must be included in the handbook. The commissioner will make available to employers the text to be included in the required notice in English and the five most common languages spoken in Minnesota.

Wage Disclosure Protection – Minn. Stat. § 181.172

Effective July 1, 2023

This amendment strengthens the language preventing retaliatory action for wage disclosure. It prohibits employers from inquiring into, considering or requiring disclosure from any source of pay history of a job applicant for purposes of setting the applicant's compensation. The statute also prohibits employers from retaliating or discriminating against employees who assert their rights under this section the law and gives employees a private right of action to enforce this provision.

Prohibition on Restrictive Franchise Agreements – Minn. Stat. § 181.991

Effective July 1, 2023

This statute has been created to prevent franchisors from adding restrictive franchise agreements to their agreements with franchisees. This means that franchise agreements cannot include provisions that restrict, restrain, or prohibit franchisees from soliciting or hiring employees of franchisees of that same franchisor.

Any term that violates this law will be considered void and unenforceable. If an existing agreement contains a term that violates this section, within one year of the effective date, the agreement must be amended to remove the term, or the franchisor must sign a memorandum of understanding with the franchisee that those provisions are unenforceable and informing the franchisee of their rights under this statute.

Changes to Minnesota's Drug & Alcohol Testing in the Workplace Act – Minn. Stat. § 342.01-515, Minn. Stat. § 181.938, Minn. Stat. § 191.950-952

Effective July 1, 2023

Minnesota recently became the 23rd state to legalize the use and possession of recreational marijuana. While marijuana currently remains a controlled substance under federal law, with the changes at the state level, Minnesota is likely to see a sharp rise in the use and possession of cannabis products. The statute makes it legal for individuals over the age of 21 to use recreational cannabis products in private spaces and on premises licensed for on-site consumption. The statute contains a variety of provisions related to the establishment of a cannabis industry, including the

establishment of regulatory bodies, licensing provisions, and laws related to packaging and labeling.

Consumption of recreational or medical marijuana is still prohibited in certain locations, such as schools, child care facilities, correctional facilities, state operated treatment facilities, public transportation, anywhere that the smoke or vapor could be inhaled by a minor, places of employment, and motor vehicles. Operating a motor vehicle while under the influence of cannabis will also remain illegal.

In addition to the general statute establishing a cannabis industry in the state, the legislature has made updates to the laws affecting employers and workplace drug testing. In general, employers will no longer be permitted to use cannabis testing or use as a basis for hiring decisions. Employers are also not permitted to discipline or discharge employees for the use of "lawful consumable products," including cannabis products, if they are used outside of work hours and off the premises. Employers are still permitted to prohibit the use possession, impairment, sale, or transfer of cannabis products during working hours, on the employer's premises, or while operating the employer's machinery, vehicles, or equipment.

Employers are permitted to test employees if they have reasonable suspicion that the employee is under the influence of cannabis products. Testing is also permissible if the employer has reasonable suspicion that the employee has violated employer rules related to the use, transfer, possession, or sale of cannabis products; or if an individual has sustained an injury, caused another individual to sustain an injury, or caused a work-related accident. Even though this testing is legally allowed, the current state of cannabis testing restricts employers' ability to determine whether employees are intoxicated since there is no test currently available to determine an individual's level of intoxication, as cannabis products can remain in the system for several weeks following consumption. Tests are being developed that will measure current intoxication, and they may be available to employers as early as this year.[1]

Additionally, as an exception to the general rule, cannabis testing will continue to be permissible as it has traditionally been in the following circumstances:

(1) Safety sensitive positions (defined as any job where impairment from drug and alcohol use would threaten the health or safety of any person);

(2) Peace officer positions;

(3) Firefighter positions;

(4) Positions that require face-to-face care, training, education, supervision, counseling, consultation, or medical assistance to:

i. Children;

[1] Safety and Sobriety: The Evolving Landscape of Workplace Cannabis Testing : Risk & Insurance (riskandinsurance.com)

ii. Vulnerable Adults

iii. Patients who receive health care services from a provider for the treatment, examination, or emergency care of a medical, psychiatric, or mental condition

(5) Positions requiring a commercial driver's license or requiring an employee to operate a motor vehicle for which state or federal law requires drug or alcohol testing of a job applicant or an employee

(6) Positions of employment funded by a federal grant;

(7) Any other position for which state or federal law requires testing of a job applicant or employee for cannabis.

Prohibition on Captive Audience Meetings – Minn. Stat. § 181.531

Effective August 1, 2023

Minnesota employers will no longer be able to require employees to attend employer-sponsored meetings, commonly known as "captive audience meetings." The new statute states that employers may not "discharge, discipline, or otherwise penalize or take any adverse employment action against an employee" if the employee declines to participate in any meeting where the purpose is to communicate the opinion of the employer on religious or political matters. Further, adverse action cannot be taken to induce attendance or because an employee makes a good-faith report of a violation of this statute.

The law defines political matters as "matters relating to elections for political office, political parties, proposals to change legislation, proposals to change regulations, proposals to change public policy, and the decision to join or support any political party or political, civic, community, fraternal, or labor organization," and religious matters as "matters relating to religious belief, affiliation, and practice and the decision to join or support any religious organization or association."

The provision includes civil remedies, allowing complaining employees to bring a civil action within 90 days of the alleged violation. Remedies for successful complainants include injunctive relief, reinstatement to the employee's former position or an equivalent position, back pay and reestablishment of any employee benefits, including seniority, to which the employee would otherwise have been eligible, any other appropriate relief as deemed necessary to make the employee whole, and reasonable attorney fees and costs.

Within 30 days of the effective date, employers must post and keep posted a notice to employees of their rights under this law. Employers may still hold meetings to communicate these matters, but participation in meetings and receipt of communications on these matters must be completely voluntary. Meetings communicating religious or political matters are allowable to the extent that they are required by law or necessary for the performance of job duties.

Wage Protection for Construction Workers – Minn. Stat. § 181.165

Effective August 1, 2023

This statute creates protections for construction workers. Under this new statute, when a contractor enters into a construction contract, they assume liability for any unpaid wages, fringe benefits, penalties, and resulting liquidated damages owed by subcontractors working under, by, or for that contractor or its subcontractors. Agreements cannot release or transfer liability under this section. Contractors will not be liable for independent contractors if they meet the criteria in Minn. Stat. § 181.723 subd. 4.

This section also requires subcontractors to provide payroll records for all workers on the project within 15 days of a request by the contractor. The records may only be redacted to prevent disclosure of employee Social Security numbers. Contractors may also make requests for the names of all subcontractors, employees, and independent contractors that work on the project. These records also must be provided within 15 days. This information can include the anticipated start date, the scheduled duration of work, local unions with which the subcontractor is a signatory, and contact information for the subcontractor. Names of employees and confirmation of employment are the only personal identifying information that may be disclosed under this section.

This section cannot be used to alter the owner's obligation to pay a contractor. Additionally, this section does not apply if contractor or subcontractor is a signatory to a collective bargaining agreement that contains a grievance procedure to recover unpaid wages and unpaid contributions to fringe benefit trust funds.

This statute applies to agreements and contracts that are entered into, renewed, modified, or amended on or after August 1, 2023.

The CROWN Act – Minn. Stat. § 363A.03 (36a)

Effective August 1, 2023

The CROWN Act is intended to protect individuals from racial discrimination, specifically preventing employers from discriminating based on natural hairstyles. The act amends the definition of race to include "traits associated with race, including but not limited to hair texture and hair styles such as braids, locs, and twists." Under this statute, employers may not prevent individuals from wearing natural hairstyles or engage in discriminatory behavior against individuals with those hairstyles. If there is a legitimate reason, like safety, that a hairstyle is not allowed, a decision may stand so long as the rule applies equally to all workers.

Earned Sick & Safe Leave – Minn. Stat. §§ 181.9445-9448 & § 177.50

Effective January 1, 2024

The Earned Sick and Safe Leave provision requires employers to provide one hour of sick and safe time for every 30 hours worked by an employee, up to 48 hours per year. Employers can opt to

provide additional sick and safe time, but are not required by state statute to do so. This law applies to all employees who work more than 80 hours/year but does not apply to independent contractors.

Generally, sick and safe leave can be used for:

- An employee's mental or physical health condition, including preventative care, diagnostics, care or treatment;

- Care of a family member's mental or physical health condition, including preventative care, diagnostics, care or treatment;

- Absence due to domestic abuse, sexual assault or stalking of the employee or employee's family member, provided the absence is to: (1) seek medical attention caused by the domestic abuse, sexual assault or stalking, (2) obtain services from a victim services organization, (3) obtain psychological counseling; (4) seek relocation/secure an existing home; or (5) seek legal advice or take legal action arising out of domestic abuse, sexual assault, or stalking;

- Closures of employee's place of business due to weather or other public emergency or an employee's need to care for a family member whose school or place of care has been closed due to weather or other public emergency;

- Employee's inability to work or telework because the employee is: (1) prohibited from working by the employer due to health concerns related to potential transmission of communicable illness or (2) seeking or awaiting the results of a diagnostic test/medical diagnosis of communicable disease related to a public health emergency; and

- When health authorities or a health care professional that the presence of the employee or the employee's family member in the community would jeopardize the health of others because of exposure to a communicable disease.

Employers may require employees to give advance notice if the need for leave is reasonably foreseeable. If an employee uses more than three consecutive days of sick and safe leave, the employer may require reasonable documentation. However, employers cannot require employees to find a replacement worker to cover the hours that the employee used.

Employers are required to notify all employees that they are entitled to sick and safe time and advise how much time the employee has earned and accrued. The notice must be provided in English and the primary language of the employee at commencement of employment or upon the effective date of this section. The Department of Labor will provide uniform notices in the five most common languages spoken in Minnesota, and additional languages upon request. Notice may be provided by a physical posting at the employee's place of work, a paper or electronic notice directly to employees, or a conspicuous web or app posting. Notice must be included in an employee handbook if the employer utilizes a handbook.

Employers must permit unused time to carry over into the following year, up to a maximum 80 hours of accrued time. An employer may opt out of providing this carryover if its sick and safe leave provision follows one of two alternative structures. The first structure requires an employer to provide 48 hours of sick and safe leave available for immediate use at the beginning of the year, and pay out whatever remaining time an employee has at the end of the year at the employee's hourly rate. The second is that the employer not pay out remaining hours, but provide 80 hours of sick and safe leave available for immediate use.

Employers must maintain records of hours worked and time earned and accrued for each employee and allow employees to inspect those records upon request. Any information or records obtained by an employer about an employee under this section must be kept confidential. Employers are not permitted to retaliate or discriminate against employees as a result of leave taken under this section.

The Earned Sick & Safe Leave Act provides minimum leave requirements in Minnesota. Nothing in the Act prohibits employers from granting more generous paid time off policies or infringes upon leave benefits negotiated in the collective bargain process.

The statute of limitations for a sick and safe leave act violation are three years from the date of violation. An employee has a private right of action to enforce their sick and safe leave rights.

This law does not limit or preempt ordinances that already provide sick and safe time. If a municipality provides more sick and safe time than is available under this statute, the more generous program will apply.

Paid Family & Medical Leave – Minn. Stat. §§ 268B.01-.29

Effective January 1, 2026

Under Minnesota's new law, all Minnesota employers—regardless of size—are required to provide employees with paid family and medical leave for up to 12 weeks with partial wage replacement related to a serious health condition and up to 12 weeks with partial wage replacement related to pregnancy, bonding, safety leave, family care or active-duty military member's service or call to active-duty service. An employee can claim leave of their own serious health condition and other qualifying basis for leave in a single year, but the total combined benefit is capped at 20 weeks/year. This Act covers nearly all Minnesota workers *except* independent contractors, self-employed individuals, federal government employees and seasonal employees.

Employees who experience a qualifying event of at least seven days duration are eligible for leave. Employees can file an application for paid leave up to 60 days before the start the qualifying event. Intermittent leave is also available, but the employee must provide a schedule of requested days off and must make a reasonable effort to not unduly disrupt employer operations. However, intermittent leave is capped at 480 hours in a 12-month period. If an employee is receiving workers compensation benefits in an amount greater than the available benefits under the Paid Family & Medical Leave provisions, the employee is not eligible for Paid Family & Medical Leave. However, if the workers compensation benefit is less than the benefit available under the Paid

Family & Medical Leave Act, the employee is eligible to receive the difference up to the Act's maximum benefit.

Benefits are calculated by a formula tied to an applicant's weekly wage with maximum benefits capped at the state's average weekly wage ($1,287 for 2023). Benefits are paid for state funds, which will be funded by a 0.7% payroll tax paid by employers and employees. Employers that offer private benefits that meet or exceed the law's requirements can apply for an exemption and opt of out the state plan requirement.

An employee's application for leave must include a certification by a health care provider or other documentation to substantiate the need for leave. If the need for leave is foreseeable, employees are required to provide 30-day notice to the employer before taking leave. If the leave is not foreseeable, notice is required as soon as practicable.

Like federal Family Medical Leave Act, the state provisions require employers to maintain employee benefits during the duration of the leave, provided the employee continues to pay any employee contribution to group insurance policies or health care plans. Further, an employer is required to return the employee to the same or equivalent position at the conclusion of their leave.

Payment of benefits and the payroll tax will go into effect on January 1, 2026.