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EMPLOYERS NOW RISK COMPENSATORY AND PUNITIVE DAMAGES IN STATE COURTS

On June 8, 2009, Governor Doyle signed the 2009 Wisconsin Act 20, which will substantially increase the amount of potential damages employers will be required to pay should they violate the Wisconsin Fair Employment Act ("WFEA") by engaging in discriminatory practices, unfair genetic testing or unfair honesty testing. This Act takes effect the second day after publication of the 2009-2011 biennial budget act (a date which has yet to be established). Although the Act does not apply to pending cases, it will cause substantial changes of which employers need to be aware.

What is Different?

Currently, when an employee brings a discrimination claim under the WFEA, the case is heard by an Administrative Law Judge from the Wisconsin Equal Rights Division, an administrative agency under the umbrella of the Department of Workforce Development. If the employee is successful in his/her claim, potential remedies at that stage are limited to reinstatement, back pay, front pay, as well as reasonable costs and attorneys' fees. None of these procedures or recoverable damages have changed. However, the Act now allows employees to recover additional compensatory and punitive damages above and beyond any remedies they may have received through the administrative process. Under the Act, an employee has 60 days after a final administrative decision in his/her favor to initiate an action in circuit court asking for such

additional damages. If the employee does so, s/he is entitled to a trial, either by judge or jury, to determine the amount, if any, of compensatory and punitive damages to be awarded.

Compensatory damages are generally awarded for future economic losses, pain and suffering, emotional distress, mental anguish and loss of enjoyment of life. Punitive damages are calculated according to an employer's financial position and are designed to serve as both a punishment and deterrent. In order to recover punitive damages, an employee must show the employer acted with either malice or intentional disregard for the employee's rights.

Theoretically, a jury could refuse to award any of these additional damages if they believed that the employer's conduct did not merit additional damages. Practically speaking, when a jury is told that an employer intentionally discriminated against an employee will they not take the opportunity to award the employee additional compensation? Chances are, juries will do exactly that, making these claims much more costly to employers than they were before.

Caps on Damages

There is some slight protection for employers under the new Act. Depending on the number of employees an employer has, the sum of compensatory and punitive damages are capped as follows:

Number of Employees:	Damages Capped At:
100 or fewer employees	\$50,000
101 - 200 employees	\$100,000
201 – 500 employees	\$200,000
501 or more employees	\$300,000

Who is Excluded from the Act?

Employers, labor organizations and employment agencies employing fewer than 15 individuals are not subject to the Act.

What Does This Mean for Employers?

Due to the additional incentives this Act creates for employees to bring discrimination suits on state claims, it will almost certainly lead to increased litigation in state courts. It will also lead to substantially larger damage awards, not only because of the additional damages employees are entitled to under the Act, but because a jury will simply be asked to award damages to an employee the jury is told was discriminated against.

Given the Act's far-reaching ramifications, now more than ever, employers must take proactive measures to ensure they are not engaging in discriminatory practices, or risk paying a much steeper price.

Any questions? Feel free to contact the author of this article at 608.252.9320 or mjr@dewittross.com, or any member of the DeWitt Ross & Stevens S.C. Labor & Employment Relations Practice Group.

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