

Chance for Increased Employment Damages With New Wisconsin Law

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Yesterday, Wisconsin Governor Jim Doyle signed a new law that allows plaintiffs in Wisconsin discrimination cases to recover compensatory and punitive damages, if they jump through certain procedural and evidentiary hoops. The new law will take effect after the publication of the 2009-2011 budget bill.

Prior to this new law, the only damages available in a Wisconsin discrimination claim were back pay, reinstatement, potential front pay, and attorney's fees. Punitive and compensatory damages were only available in federal court. Punitive damages are "punishment" damages, and under the new law must be awarded in the amount the court or jury finds appropriate, subject to certain caps. Compensatory damages are also known as "actual damages" and in employment cases typically involve medical bills, pain and suffering, and emotional distress.

Under the new Wisconsin law, compensatory and punitive damages are subject to caps based on the number of workers the employer employs:

- 15 to 100 workers: up to \$50,000
- 101 to 200 employees: up to \$100,000
- 201 to 500 employees: up to \$200,000
- 501 or more workers: up to \$300,000

The bill will not apply to employers with less than 15 employees or local government units.

Plaintiffs will not automatically get these damages, and they will not be easy to obtain. First, a plaintiff must win probable cause before the Equal Rights Division. Then, the plaintiff has to win his or her case at hearing before the Administrative Law Judge. Next, the plaintiff must go through all appeals, if any, through the Labor and Industry Review Commission. Finally, if the plaintiff has been successful at all of these stages, he or she may file a petition with a Wisconsin circuit court for the special damages.

Even then, the court may only award punitive damages if the plaintiff proves that the employer acted "maliciously" or with "an intentional disregard" for the employee's rights. How courts will apply these standards remains to be seen.

Though this new law may raise the long-term stakes on Wisconsin discrimination claims, the law does not alter the analysis of the merits of these claims. Wisconsin employers should continue to exercise caution when making hiring, discipline and termination decisions, and follow these tips:

1. Have good hiring, performance review, discipline, and harassment policies and procedures in place. Distribute these policies and procedures, train supervisors, and follow the policies and procedures uniformly.
2. Avoid surprising employees with sudden terminations without warning, except in extreme circumstances.
3. Develop and follow a progressive discipline policy (but give the company the right to "skip steps" depending on the circumstances).
4. Create a record of communication with a problem employee.
5. Do fair and honest performance evaluations.
6. Consider entering into a severance agreement to obtain a waiver of all employment claims.

Finally, when you have concerns, get help. Many times, a brief telephone call with your employment law attorney can save hours of worry and years of litigation.

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