Amendment to Wisconsin Fair Employment Act: 
**Punitive Damages for Discrimination Claims**

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Employees are now able to collect punitive damages in Wisconsin for discrimination claims tried in state court. On June 8, 2009, an amendment to the Wisconsin Fair Employment Act (WFEA) was signed into law. This amendment allows individuals who successfully establish employment-related discrimination in court to bring an action seeking both compensatory and (now) punitive damages of up to $300,000. Before this Act, punitive damages were not allowed at the state level in a suit of this nature.

When employees believe they have been discriminated against, they have the option of choosing to take their case to either state or federal authorities. Due to lower standards of proof, the absence of summary judgment and the involvement of a jury, taking a discrimination case to state court is generally a less expensive option and is typically easier for an employee to win. Traditionally, the state route has lead to lower payouts because punitive damages were not previously allowed. The federal route is costly and more difficult for an employee to win, due in large part to the ability of judges to dismiss cases that lack merit on summary judgment. However, a very strong case in federal court is likely to reward higher payouts than state court.

Now that the law is changing, employees winning discrimination cases through the more plaintiff-friendly state route can collect higher payouts.

According to the Department of Workforce Development (DWD), the purpose of WFEA is to protect the rights of individuals to employment that is free of unlawful discrimination. It is unlawful for employers to refuse to hire, terminate or otherwise discriminate because of an individual’s protected class. Such protected classes include race, color, creed, ancestry, national origin, age, sex/gender, handicap or disability, arrest/conviction record, marital status, sexual orientation, military service, and use or nonuse of lawful products outside of the workplace, such as tobacco or alcohol.

Under the current WFEA, an individual is required to file a complaint with the DWD. If such a complaint results in an administrative law judge finding discrimination, the DWD can order the employer to reinstate the individual to employment, award back pay (not to exceed two years) and reimburse the individual for incurred legal costs.

A successful complainant now has the opportunity to sue an employer for compensatory and punitive damages, plus reasonable costs and legal fees incurred as a result of this effort, provided the employer has more than 15 employees and the accusation is one of employment discrimination, unfair genetic testing or unfair honesty testing. Compensatory damages include issues that are much more difficult to measure, such as pain and suffering, emotional distress and inconvenience. **Punitive damages can only be assessed if the defendant is**
found to have acted maliciously or with reckless disregard for the complainant’s rights. The new Amendment became effective June 23, 2009 and will not apply to any ongoing or pending claims prior to that date.

Since claimants can now collect compensatory and punitive damages, state courts will likely see more discrimination cases filed with the DWD. During tough economic times, claimants are often searching for additional sources of income. To protect themselves from increased liability and costs, companies doing business in Wisconsin should enhance their in-house employment processes against discrimination complaints by shoring up language in employee handbooks, administering proper personnel training and reviewing current insurance coverage.

Unlike many states, Wisconsin allows punitive damages to be covered under an insurance policy. If your company has an Employment Practices Liability (EPL) policy, check to be sure punitive damages are covered.

Information was taken from various sources in the development of this article. Such sources include: dwd.wisconsin.gov, June 11, 2009 article by Lindner & Marsack, S.C., June 10 article on website of Ford & Harrison, LLP, June 16 editorial by Partick McIlheran of the Milwaukee Journal Sentinel.

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