



## **Wisconsin Fair Employment Act Now Provides for Compensatory and Punitive Damages Up To \$300,000, Depending Upon Employer Size**

June 10, 2009

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*Free Webinar!*

*When: June 25, 2009 at 11:00 a.m.*

On June 8, 2009, Wisconsin Governor James Doyle signed into law an amendment to the Wisconsin Fair Employment Act (WFEA), which will now allow individuals who successfully establish employment discrimination to bring an action in circuit court to recover compensatory and punitive damages of up to \$300,000, depending on the size of the employer. The democratic majority in the Wisconsin Legislature succeeded in pushing through the amendment despite strong opposition from the business community, including testimony on behalf of employers by Lindner & Marsack attorneys Laura Lindner and Laurie Petersen before Senate and Assembly Committees that held hearings on the amendment.

The WFEA protects individuals from discrimination on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest or conviction record, membership in the national guard or military reserves, or use or nonuse of a lawful product during non-work hours. Under the new law, individuals must still first file a discrimination complaint with the Department of Workforce Development (DWD), which investigates the complaints and provides for an administrative hearing. If an administrative law judge finds discrimination, the

DWD can order reinstatement, back pay for not more than two years, and attorney fees.

Under the new law, the DWD or a successful complainant can now bring an action in circuit court to recover compensatory and punitive damages caused by the act of discrimination, plus reasonable costs and attorney fees incurred in that effort. This claim may be brought only after the completion of all administrative proceedings before the DWD and the Labor and Industry Review Commission (LIRC), the appellate review agency, concerning the violation. The law does not permit an action for damages to be brought against the state, any agency of the state, any local governmental unit or any employer with fewer than 15 employees.

#### New Damages Provisions

In actions brought in circuit court by a successful complainant or the DWD, the circuit court shall order the employer to pay compensatory and punitive damages in an amount that the circuit court or jury finds appropriate, subject to the following limitations, which mirror the caps under analogous federal anti-discrimination law:

1. If the defendant employs 100 or fewer employees, up to \$50,000.
2. If the defendant employs more than 100 but fewer than 201 employees, up to \$100,000.
3. If the defendant employs more than 200 but fewer than 501 employees, up to \$200,000.
4. If the defendant employs more than 500 employees, up to \$300,000.

The only real bright spot for employers is that the final bill eliminated a highly controversial provision that allowed the circuit court to impose a 10% surcharge payable by the employer to the circuit court and the DWD.

### Effective Date

The new law will take effect on June 23, 2009, or on the second day after publication of the 2009-2011 biennial budget act, whichever is later. The additional damages will not be available for any pending claims. The Act only applies to acts of discrimination, unfair genetic testing, and unfair honesty testing committed on or after its effective date.

### Implications for Employers

With the addition of compensatory and punitive damages, there is likely to be an increase in claims filed in the DWD, particularly hostile environment or harassment claims for which claimants previously were unable to recover monetary damages for alleged emotional distress. The cost of litigating WFEA claims is also likely to increase. Employers will now need to engage in discovery relating to emotional distress damages and other compensatory damages, which often involves costly medical testimony. It is unclear whether that discovery will take place in the administrative proceeding or in a subsequent circuit court proceeding, if a successful claimant or the DWD files an action to recover compensatory and punitive damages.

It will also likely become more difficult to settle these types of cases, as plaintiffs and their attorneys will demand greater settlement amounts to account for the possibility of compensatory and punitive damages. The risk to employers is compounded by the fact that these damages claims can be decided by juries, whose biases and sympathies often result in large awards against employers.

The two-phase damages proceeding set up by the amendment is also vulnerable to legal attack. As the evidence relating to the employment decision being challenged also relates to a punitive damages claim, trying the issue of punitive damages in a separate proceeding before a different decision-maker with the possibility of a different evidentiary record raises due process and estoppel issues.

On a positive note, a substantial number of WFEA claims are dismissed at the administrative level. Thus, the number of claims that will proceed to circuit court for a ruling on compensatory and punitive damages is likely to be limited. In its fiscal estimate of the cost of the amendment, DWD anticipated that fewer than 10 cases per year will actually be litigated in the circuit courts each year.

### Webinar

A web-based seminar on the amendment and its implications for Wisconsin employers is being offered by Lindner & Marsack, S.C.

**Date:** June 25, 2009

**Time:** 11:00 a.m. - 12:00 p.m. CST

**Duration:** 60 minutes

**Cost:** Complimentary

**To Register:** Please send an email to [mgemeinhardt@lindner-marsack.com](mailto:mgemeinhardt@lindner-marsack.com)

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