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Minnesota Legislative Update: Bills to Watch

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The Minnesota Legislature is in session through May 20, 2019. This session promises to be very active with numerous bills affecting employers and the workplace. Major bills include paid leaves of absence (including family and sick leave), restrictions on an employer's ability to access social media accounts, right-to-work legislation, vaccination exemptions, wage theft, and the legal standard for sexual harassment, and making available to a complaining party more information regarding the employer's investigation and corrective action.

Paid Family Leave: H.F. No. 5 and S.F. No. 1060

Bills have been introduced in the Minnesota House of Representatives (H.F. No. 5) and Senate (S.F. No. 1060) seeking to create a state-administered paid family and medical leave insurance program, which would require Minnesota employers to provide employees with up to 12 weeks of paid leave benefits for qualifying family care and up to 12 more weeks for qualifying medical reasons per year (both largely mirroring the qualifying reasons available under the federal Family and Medical Leave Act). The bills would create a funding mechanism through a payroll tax on employers and employees, though they do not yet provide a specific tax rate.

Similar laws have been enacted in six states, including California, New York, and New Jersey, although with different requirements and funding mechanisms from those proposed by the Minnesota bill. Similar legislation was proposed during Minnesota's past two legislative sessions, but it was ultimately blocked by the Republican majority. Democrats, who strongly support the bill, have since regained control of the Minnesota House—and newly elected Minnesota Governor Tim Walz has devoted over $60 million in his budget to set up a paid family and medical leave benefit—but the bill is likely to face stiff opposition from the Republican-controlled Senate.

Statewide Paid Sick Leave: H.F. No. 11, H.F. No. 29, S.F. No. 528, and S.F. No. 1597

Also in the legislature are several bills (H.F. No. 11, H.F. No. 29, S.F. No. 528, and S.F. No. 1597)

that, if passed, would add Minnesota to the rapidly growing list of states and cities requiring employers to provide paid sick leave to employees. Specifically, these bills—unlike those proposing paid family leave—would require that employees accrue a minimum of one hour of paid sick and safe leave for every 30 hours worked, up to a maximum of 48 hours per year. Employees could then use the accrued sick and safe time for various reasons, including to deal with their own illness or injury, to care for a family member, and/or to address domestic abuse–related issues. Moreover, the bills would allow employees to carry over up to two weeks of leave from one year to the next. Employers already offering paid time off benefits meeting or exceeding the requirements of the bills would not need to implement new benefit programs.

Three Minnesota cities—Minneapolis, St. Paul, and Duluth—have already passed ordinances providing for paid sick and safe time. It is unclear if the proposed statewide program would preempt these city ordinances or how the paid leave would be funded (though the responsibility would likely fall on employers alone). The bills were authored by state Democrats, who control the House, but they likely face a steep climb in the Republican-controlled Senate.

Wage Theft: H.F. No. 6 and S.F. No. 1933

A Minnesota bill, H.F. No. 6, seeks to provide that "[n]o employer shall commit wage theft." Generally, "wage theft" refers to instances where an employer intentionally does not pay an employee all wages to which he or she is entitled. Common examples of wage theft include denying meal or rest breaks, paying a wage below the minimum wage, withholding tips, and not paying overtime. Minnesota state law currently addresses many of these specific scenarios (see Minn. Stat. § 181.03), but the proposed bill seeks to broadly define "wage theft" to include all situations where "an employer has failed to pay an employee all wages to which that employee is entitled."

The bill also seeks to introduce stricter recordkeeping requirements for employers, increase the Minnesota Department of Labor and Industry's enforcement tools (e.g., granting it the ability to issue subpoenas), and impose stricter penalties on employers for certain violations. Specifically, the bill proposes increasing monetary penalties for certain recordkeeping violations from $1,000 to $10,000, and imposing harsher criminal penalties upon employers for violations. For example, under the bill, an employer would be guilty of a gross misdemeanor if it engaged in wage theft and the total of unpaid wages to all affected employees was $10,000 or more.

H.F. No. 6, as written, has 33 Democrat and 2 Republican sponsors, but it is opposed by the Minnesota Chamber of Commerce. Proponents argue the bill is necessary to protect not only Minnesota employees, but also businesses and the community, which are harmed by those engaging in wage theft. For example, supporters argue that businesses engaging in wage theft cause the state to lose revenue from unpaid taxes on employee income. Conversely, critics argue that the bill's definition of "wage theft" would presumably include situations where an underpayment was unintentional, which would therefore criminalize honest mistakes (for example, an employer could be found guilty for an inadvertent payroll error that caused a shortage in an employee's paycheck). The bill was referred to the House's Judiciary Finance and Civil Law Division on February 14, 2019.

Sexual Harassment Standard: H.F. No. 10, H.F. No. 31, and S.F. No. 1307

In response to the #MeToo movement, lawmakers in several states have been introducing bills aimed at curbing workplace sexual harassment. The Minnesota Legislature is again considering amending the state's discrimination statute to state that a plaintiff need not prove that sexual harassment was "severe or pervasive" to be actionable under the state's sexual harassment law.

The “severe or pervasive” standard emanates from a 1986 case, *Meritor Savings Bank v. Vinson*, in which the Supreme Court of the United States held that sexual harassment could be a form of sex discrimination under Title VII of the Civil Rights Act of 1964 if (1) the harassment involves the conditioning of employment benefits on sexual favors, or (2) the harassment, “while not affecting economic benefits, creates a hostile or offensive working environment.” Minnesota state courts have adopted the *Vinson* standard, but, like federal courts, Minnesota courts have grappled with numerous fact situations in an effort to define what is “severe or pervasive,” sometimes leading to outcomes that some legislators now find questionable or even outrageous.

The proposal failed to pass in last year’s legislative session despite being strongly supported by the commissioner of the Minnesota Department of Human Rights and the plaintiffs’ bar, as well as having initial bipartisan support. The bill stumbled in the Senate amid strong opposition from several employers and business groups, including the Minnesota Chamber of Commerce. It remains to be seen how support for these bills will develop during this legislative session, but there is strong support for such legislation among state Democrats (though the bills are again opposed by the Minnesota Chamber of Commerce). The House Judiciary Finance and Civil Law Division recently sent H.F. No. 10to the floor by a vote of 16–0.

Disclosure of Information in Workplace Sexual Harassment Investigations: H.F. No. 798 and S.F. No. 172

Also in the legislature are two bills (H.F. No. 798 and S.F. No. 172) that would expand access to employee personnel data in limited circumstances by authorizing employers to disclose to complainants of sexual harassment certain personnel data obtained by the employer as part of the company’s sexual harassment investigations. Data subject to disclosure would include whether the allegations were substantiated and whether the allegations resulted in disciplinary or nondisciplinary corrective actions. Complainants would be permitted to release said data only to courts, law enforcement agencies, criminal prosecutors, civil rights enforcement authorities, and any attorneys who are representing them in pursuit of legal remedies, including obtaining restraining orders. The Minnesota bills join a swath of state laws aimed at addressing sexual harassment issues as legislators across the country continue to respond to the #MeToo movement. Employers may want to keep an eye on developing legislation in this area.

Restrictions on Employer Use of Social Media Account Information: H.F. No. 1196 and S.F. No. 1432

Employers may wish to pay attention to bills in the Minnesota House (H.F. No. 1196) and Senate (S.F. No. 1432) that would prohibit them from accessing their employees’ and applicants’ personal social media accounts in certain situations or obtaining their usernames and passwords.

An employer would be prohibited from accessing an employee’s or applicant’s personal social media account by requiring or requesting that an employee or applicant disclose the username or password to his or her personal social media account, requiring or requesting that the employee or applicant access said account in the employer’s presence, or “compel[ling] an employee or applicant to add any person, including the employer, to their list of contacts . . . or otherwise coerc[ing] an employee or applicant to change the settings that affect a third party’s ability to view the contents of a personal social networking account.” Moreover, employers would be prohibited from taking or threatening to take negative action against an employee for refusing to grant the employer access to his or her account in any of the aforementioned ways. If enacted, the bill would apply to all employers

in the state of Minnesota, including nonprofit and charitable organizations.

Increasing numbers of employees use social media both on and off the job, giving employers unprecedented knowledge of their employees' off-duty activities. Companies may be tempted to take advantage of this by screening potential applicants or monitoring employees' activities, but they must be aware of the limits on an employer's ability to monitor employees. In addition to limitations under federal law imposed by the federal Electronic Communications Privacy Act of 1986, 26 states have enacted laws that limit or ban employers from accessing workers' social media accounts. Similar bills to those currently under consideration were introduced in the Minnesota legislature in 2016, 2017, and 2018. Employers may want to stay up to date on developments in this area.

Right to Work: H.F. No. 352

A bill has been introduced in the Minnesota House (H.F. No. 352) that would grant employees the right to work without being required to become a member of or pay dues to a labor organization. Federal labor laws allow collective bargaining agreements to include a requirement that employees either join the union or pay dues within a certain time after starting a job. Although unions cannot compel full membership, they can require that workers who remain outside the union pay dues or fees to cover the services the union provides them. Under the National Labor Relations Act, states are allowed to establish "right-to-work" laws that make this practice illegal. Union organizing is likely to be far less robust in states that have passed right-to-work laws, because they are no longer fertile ground for growing memberships. Labor unions can still operate in those right-to-work states, but workers cannot be compelled to become union members or pay dues or fees as a condition of employment.

State legislatures have prioritized right-to-work laws in recent years, though the issue has divided states since the 1940s. In 2017, Kentucky and Missouri became the most recent states to enact right-to-work legislation (though Missouri's law was reversed by voters the following year). In total, 27 states and Guam have now enacted right-to-work laws. In Minnesota, two right-to-work bills were introduced in the House in 2012, proposing a constitutional amendment that would provide a right to work. Ultimately, both bills failed to pass in the committee. In 2019, it is likely that any freestanding right-to-work bill, even if passed by the legislature, would be vetoed by Governor Walz.

Employee Immunization Refusal Protection: H.F. No. 999

Another bill, H.F. No. 999, which was introduced in January 2019, would prohibit an employer from disciplining or discharging an employee (including unpaid volunteers) or not considering an applicant for refusing an immunization. If this bill is enacted, an employee would be protected if he or she can provide a signed doctor's note stating that "an immunization is contraindicated for medical reasons" or "adequate immunity exists," or a notarized statement that he or she is refusing immunization "because of conscientiously held beliefs." This bill covers refusals of any type of vaccination and would apply to all employers in the state, with no carve-outs for hospitals or other healthcare facilities.

Although exemptions vary from state to state, almost all states grant religious exemptions, while 17 states permit philosophical exemptions for those who object to immunizations based on personal, moral, or other beliefs. Between 2011 and 2017, 175 bills related to immunization exemptions were introduced in state legislatures across the country, with the volume increasing over time. Of that number, a little over half (53 percent) proposed expanding access to exemptions. Such laws are particularly controversial in light of a recent study conducted by the American Academy of Family Physicians, , which used data that the Centers for Disease Control and Prevention collected to

suggest a link between hotspots of recent measles outbreaks and states that “permit philosophical exemptions based on moral, personal or other beliefs.”

Although H.F. No. 999 is unlikely to gain much traction during this legislative session, the increase in vaccination legislation activity at the state level is a trend employers may want to continue to monitor. In addition, since mandatory vaccine programs have become a hotbed for litigation, employers may want to make sure their processes and procedures comply with applicable federal anti-discrimination laws, including the Americans with Disabilities Act and Title VII. Employers with a compelling reason to require vaccination may want to ensure their policy includes an appropriate exemption procedure for employees with a plausible disability or religious belief.

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