

Basics and Implications of Employment Law Changes

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Fredrikson

A red graphic element consisting of a horizontal bar that tapers to a point on the right side, positioned below the name 'Fredrikson'.

Where Law and Business Meet®

Agenda

- Non-Competes
- Non-Disparagement & Confidentiality Agreements
- Cannabis & Drug Testing
- Paid Family Leave
- Sick and Safe Time
- Other Updates

Non-Competes/Restrictive Covenants



Non-Compete Ban

- Post-employment non-compete ban
- Restricts any *provision* that prohibits “work for another employer for a specified period of time,” “work in a specified geographical area,” “work for another employer” in a similar capacity
- Does not prohibit non-disclosure or non-solicitation agreements
- *Void* and unenforceable; challenge → attorney fees
- Vague exceptions
- Minnesota governing law and venue

Status at the Federal Level

Possible federal ban being pushed by FTC

- Proposed in January; comment period closed in March
- Vote postponed until April 2024 after amendments based on comments
- As proposed, would apply retroactively and require notice to affected employees

NLRB: memo issued by General Counsel

- Expresses view that non-competes violate Section 7 of the NLRA
- Guidance—not a rule

What does all of this mean?

- Existing non-competes not affected
- Opportunity to right-size agreements going forward
 - Can still generally have non-solicit and confidentiality agreements
 - Ensure restrictions are appropriately narrow
- Consider trends
- Stay updated on evolving changes, including potential FTC ban

Non-Disparagement and Confidentiality



Severance Scenario



“We have a risky termination, so we are going to offer severance in exchange for a release of claims. We think this employee is going to bad mouth us on Glassdoor and Facebook. We want this employee to agree not to disparage us and to keep quiet that we are paying them to leave. We can still do that right?”

Non-Disparagement and Confidentiality in Severance

- The Old Standard: confidentiality and non-disparagement sections were key aspects of any severance agreement.
- The Trend: Both state and federal law began to chip away at these sections
 - Largely in response to #metoo
 - Certain state laws: could not bar employee from disclosing information about harassment, discrimination, unlawful acts.
 - Federal law: Speak Out Act prohibits NDA's that prevent an employee from speaking out about harassment or sexual assault.

The NLRB Breaks it Wide Open!

- McLaren Macomb Decision
 - Severance agreements which contain “broad” non-disparagement/confidentiality provision are unlawful
 - Applies to non-union and union
- NLRB General Counsel Memo
 - Aggressive interpretation
 - Confidentiality: cannot bar employees from speaking about disputes
 - Non-Disparagement: can only bar maliciously untrue statements (i.e. defamation)
 - Caveat: Does not apply to “supervisors” under the law!



Action Items and Impact



- Review your severance agreements for non-supervisors
 - Confidentiality: limit to financial terms of agreement
 - Non-Disparagement: limit to defamation definition
 - Tweak others as needed
- Consider whether other agreements need changing
 - NDAs
 - Settlement agreements?
- The Trend so far:
 - No increase in employees who disparage despite limits
 - Severance still your friend

Cannabis and Drug Testing



Marijuana and the Workplace

“Marijuana is legal. Can we still drug test applicants and employees for THC?”

Drug Testing as it Stood

- The Old Standard: drug testing in Minnesota was exceedingly complicated and gave drug-using employees *more protection* than non-drug using employees
 - Second chance for first positive test!
 - We counseled employers to use testing wisely and focus on performance
- The Trend: More legalization, more cannabis protection
 - Medical Cannabis: protected as a matter of law in MN and elsewhere
 - Legal cannabis in many states
 - Hemp-derived edibles in Minnesota

MN Recreational Cannabis: Change to Drug Testing?

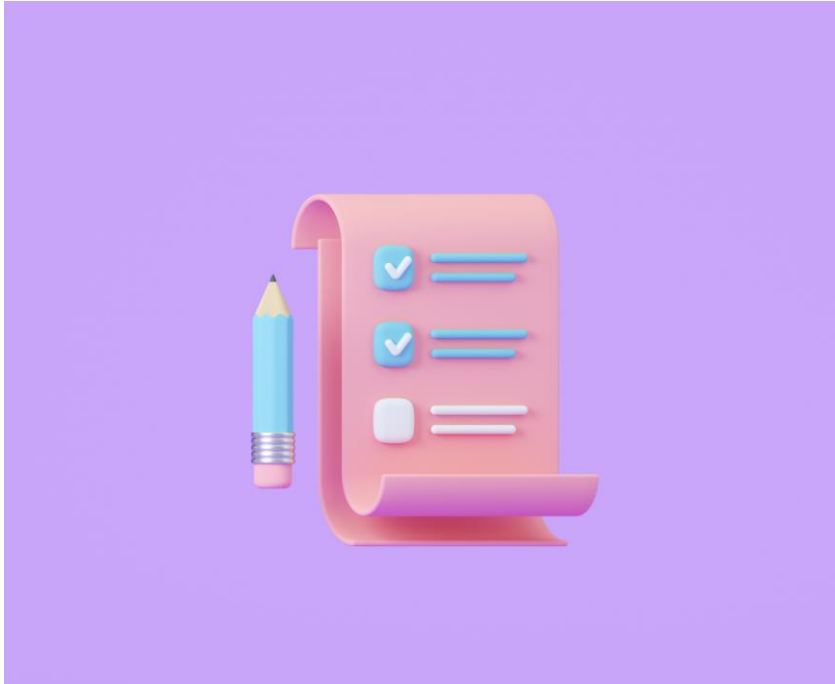
- “Unless otherwise required by state or federal law, an employer must not refuse to hire a job applicant solely because the job applicant submits to a cannabis test or a drug and alcohol test authorized by this section and the results of the test indicate the presence of cannabis.”
 - But safety-sensitive and others are exempt from this bar on applicant testing.
- Otherwise, many aspects of the law as written remain the same:
 - You can still test employees for THC if you have reasonable suspicion
 - You can still bar possession and use on premises and while working
 - You still have to give people second chances

Recreational Cannabis: The Real Change!

“An employer may not refuse to hire a job applicant or discipline or discharge an employee because the applicant or employee engages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during nonworking hours. For purposes of this section, "lawful consumable products" means products whose use or enjoyment is lawful and which are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages, tobacco, **AND CANNABIS.**”

- Regardless of any positive test, you will have to determine whether or not the usage was lawfully done outside of work.
 - How is this possible? Possession? Catching someone in the act?
- Even if you can test applicants, the usage would have to be lawful because it would not be done during work!

Action Items and Impact



- Edit your drug testing policies
 - Remove testing for THC altogether?
 - Allow for THC testing where allowed?
- If you want to still test for THC
 - Be careful to distinguish lawful usage
 - Train your HR employees well
- The Trend so far:
 - In states with legal cannabis, does not appear to be significant impacts on workplace
 - Lawful edibles did not appear to create significant disruption
 - Many employers are removing THC from testing regimen

Minnesota Paid Family and Medical Leave



Federal, State, and City Law Overlap

What was the lay of the land BEFORE 2023?

- Federal Laws
 - FMLA (employee has been employed for at least 12 months and worked 1,250 hours; employer has 50+ employees within 75 miles = 12 weeks unpaid)
 - ADA (leave as a reasonable accommodation)
- Minnesota Laws
 - Parenting leave act (21+ employees, 12 weeks unpaid, employee must be employed 12 months)
 - MHRA (leave as a reasonable accommodation)
 - No requirement that paid leave be provided for any reason except in certain cities
- Sick and Safe Leave Ordinances (St. Paul, Minneapolis, Duluth)
- New Laws—State and Cities are active

Minnesota's New Paid Family and Medical Leave

What is it?

- **Family leave** to care for a family member with a serious health condition, or if employee is bonding with a new baby or child in employee's family.
 - Broad definition of "family member"
 - Spouse, (including a domestic partner in a civil union or other registered domestic partnership recognized by the state), spouse's parent, child, child's spouse, parent, parent's spouse, sibling, sibling's spouse, grandparent, grandchild, or a spouse of a grandparent or grandchild, and an individual selected by the incapacitated person.
- **Medical Leave** when your own serious health condition prevents employee from working.
- **Qualifying exigency leave** and **safety leave**
- Run by Minnesota DEED with enforcement by DLI
- Benefit follows employee from employer to employer, payment is based on wages over prior applicable quarters

Minnesota's New Paid Family and Medical Leave

How much leave are employees entitled to?

- Up to 20 weeks total:
 - Up to twelve (12) weeks for either family or medical leave
 - Plus eight (8) additional weeks for the type of leave that was not used
 - Example: 12 weeks for employee's serious medical condition; 8 weeks for child bonding leave
- Intermittent leave is also available

How does this interact with other leave?

- Can overlap with FMLA, if reason for leave applies to both
- Statute does not mention overlap with Minnesota Pregnancy and Parenting Leave

Minnesota's New Paid Family and Medical Leave

Who will receive the benefits?

- Applies to all employers
- Leave must be based on a single event of at least seven calendar days' duration
- Does not include self-employed individuals, independent contractors, or seasonal employees
 - Self-employed and independent contractors can elect to pay and participate
- Employee who works 50% or more of their time in Minnesota (evaluated quarterly)
- Employee does not work 50% or more of their time in Minnesota, or any other state, or Canada, **but** some of the employment is performed in Minnesota and the employee resides in Minnesota 50% of the time in the relevant quarter
- Must have made 5.3 percent of the state's average annual wage in relevant quarters rounded down to the next lower \$100. For 2023, this amount would be about \$3,300.

Minnesota's New Paid Family and Medical Leave

When does it start?

- Starting in mid-2024 employers must submit a wage detail report
- Starting in late 2025, employers must notify their employees about the program
- Starting in January 2026, premiums and benefits will begin

What are the details of the premiums?

- Total premium rate is 0.7% of employee's wages to start; audited and changed yearly
- Can charge back 50% (0.35% of wages) to employee
- Can opt for self-funded or privately insured that meet state requirements
 - Either Family Leave, Medical Leave, or both

Minnesota's New Paid Family and Medical Leave

What are the payment details?

- Employees will apply through Minnesota DEED
- Can apply several weeks before leave begins, if foreseeable
- Open questions about ongoing certification for benefits
- Benefit amount based on employee's wages over relevant quarters. Percentage of wages paid lowers as employee income rises:
 - 90% if earns up to 50% of state's average weekly wage
 - 66% if earnings exceed 50% but are below 100% of state's average weekly wage
 - 50% if earning exceed 100% of state's average weekly wage
- Employers may not require that employees use PTO of any kind, but may allow employees to use it voluntarily in lieu of PFML and may top-up benefit amount to employee's full wages
- If opting for self-funded or privately insured, application will be through employer or insurer

Minnesota's New Paid Family and Medical Leave

What else does the law require?

- Job reinstatement, unless employer can show employee's job would have been eliminated regardless of leave
 - No key employee exception
- No interference or retaliation
 - Protections begin before benefits—when employees can apply for leave
- Pay increases while on leave, if unconditional/company wide
- Notice (poster to be developed) and individual notice to employees either near start of employment or start of benefits, whichever is later

Minnesota's New Paid Family and Medical Leave

How is the law enforced?

- Private right of action for employees (federal or state court)
 - Cannot waive right to jury trial
- Minnesota Department of Labor and Industry enforcement
 - Protections begin before benefits—when employees can apply for leave (60 days before leave)
 - Auditing
 - DLI will offer conciliation services to resolve disputes between employers and employees

Minnesota Earned Sick and Safe Time



Application

- Eligible employees: all employees, including temporary and part-time employees, work at least 80 hours in a year in Minnesota. Employee does not include:
 - (1) an independent contractor; or
 - (2) an individual employed by an air carrier as a flight deck or cabin crew member who:
 - (i) is subject to United States Code, title 45, sections 181 to 188;
 - (ii) works less than a majority of their hours in Minnesota in a calendar year; and
 - (iii) is provided with paid leave equal to or exceeding the amounts in section 181.9446.
- Applies to all employers. Explicitly states that temporary employees supplied by a staffing agency are employees of the staffing agency, unless there is a contractual agreement stating otherwise.
- May not require an employee, as a condition of using ESST, seek or find a replacement worker to cover their ESST hours.

Accrual and Carryover

Effective January 1, 2024

Option 1:

- 1 hour of ESST for every 30 hours worked, up to 48/year
- Earning starts immediately on hire
- Carryover of up to 80 hours required
- Exempt employees are presumed to work 40 hours per week

Option 2:

- Frontload 48 hours in first year
- Frontload 80 hours each subsequent year

Use of ESST



- Employees may use ESST as it is accrued
- ESST may be used in the smallest increment of time tracked by the employer's payroll system, provided such increment is not more than four hours
- An employee's:
 - Mental or physical illness, injury, or other health condition;
 - Need for medical diagnosis, care, treatment of a mental or physical illness, injury, or health condition; or
 - Need for preventative medical or health care
- Care of a family member for the same reasons

Use of ESST, cntd.

- Absence due to domestic abuse, sexual assault, or stalking of the employee or employee's family member, provided the absence is to:
 - Seek medical attention related to physical or psychological injury or disability caused by domestic abuse, sexual assault, or stalking;
 - Obtain services from a victim services organization;
 - Obtain psychological or other counseling;
 - Seek relocation or take steps to secure an existing home due to domestic abuse, sexual assault, or stalking;
 - Seek legal advice or take legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from domestic abuse, sexual assault, or stalking.
- Closure of the employee's place of business due to weather or other public emergency or an employee's need to care for a family member whose school or place of care has been closed due to weather or other public emergency.

Use of ESST, cntd.

- The employee's inability to work or telework because the employee is:
 - (i) prohibited from working by the employer due to health concerns related to the potential transmission of a communicable illness related to a public emergency; or
 - (ii) seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, a communicable disease related to a public emergency and such employee has been exposed to a communicable disease the employee's employer has requested a test or diagnosis.
- When it has been determined by the health authorities having jurisdiction or by a health care professional that the presence of the employee or family member of the employee in the community would jeopardize the health of others because of the exposure of the employee or family member of the employee to a communicable disease, whether or not the employee or family member has actually contracted the communicable disease.

ESST Nuts and Bolts

- Broad definition of “family member.”
- Can have a PTO policy that fulfills all requirements.
- Can require documentation when an employee uses ESST for more than three consecutive days. Must maintain health records confidentially.
- Notice and posting required in English and the employee’s primary language.
- Must add ESST to employees’ pay statement.
- Right to reinstatement.
- If the employer agrees, an employee may return to work part time during the leave period without forfeiting the right to return to employment at the end of the leave.

Overlap with City Earned Sick and Safe Time



Comparing State and Cities' Laws

	Minnesota	Minneapolis	St. Paul	Bloomington	Duluth
Eligibility	80 hours worked in Minnesota	80 hours worked in city limits	80 hours worked in city limits	80 hours worked in city limits	Based in Duluth or $\geq 50\%$ of working time in
Accrual	1 hr per 30 hrs	Same	Same	Same	1 hr per 50 hrs
Frontloading	Year 1 = 48 hrs Year 2+ = 80 hrs	Same	Same	Same	40 hours
Unpaid/Paid	Paid	Paid if ≥ 6 EEs	Paid	Paid if ≥ 5 EEs	Paid if ≥ 5 EEs

Comparing State and Cities' Laws

	Minnesota	Minneapolis	St. Paul	Bloomington (7/1/23)	Duluth
Use	After 90 days of work	Same	Same	Same	Same
Compensation	Regular hourly rate	Same	Same	Same	Same
Add to pay statement?	Yes	Yes	Yes	Yes	Not required
Require policy in handbook?	Yes	Yes	Yes	Yes	Yes
Prehire notice?	Yes	Yes	No	No	No but must provide policy at start of employment

Minnesota Pregnancy and Parenting Leave



Minnesota Pregnancy and Parenting Leave Changes

- Recap:
 - 12 weeks of unpaid leave if needed for condition related to pregnancy or upon birth or adoption of child
 - Must be taken within 1 year of child's being brought home
- Formerly applied to employers of 20+ employees, now applies to all employers
- Formerly, employee eligible after 12 months of employment and to employees who worked at least ½ of full time, now eligible immediately at start of employment with no hours of service requirement
- Changes are effective July 1, 2023

Action Items



- Policies
 - Check on city ESST policies
 - Minnesota state ESST policy end of 2023 (for implementation in 2024)
 - Update/add Pregnancy and Parenting Leave Policy
 - Update parenting leave policies
- Pre-Hire Notices and Posters
- Check in with your payroll company
 - Payroll statements need to reflect balance and used amounts
- Set up periodic audit
- Ensure you are tracking wages received and hours worked for each employee so that you are prepared to submit Wage Detail Report in 2024

Amendments to Minnesota Human Rights Act



Salary History Ban

- Effective January 1, 2024
- Employer shall not inquire into, consider or require disclosure from any source the pay history of an applicant for employment for the purpose of determining wages, salary, earnings, benefits or other compensation for that applicant.
- Employer can ask about applicant's expectations or requests with respect to wages, salary, benefits or other compensation.
- Pay History includes wages, salary, earnings, benefits or any other compensation.

CROWN Act



- Legislation added a definition of race to the Minnesota Human Rights Act to explicitly protect natural hair styles and textures, including but not limited to "braids, locks, and twists."

Other Important Updates



Captive Audience Law, Minn. Stat. § 181.531

- Prohibits an employer from discharging, disciplining, threatening to discharge or discipline, or penalizing an employee who declines to attend or participate in an employer-sponsored meeting or declines to receive or listen to communications from the employer about religious or political matters
- “Political matters” defined as “matters relating to elections for political office, political parties, proposals to change legislation, proposals to change regulations, proposals to change public policy, and the decision to join or support any political party or political, civic, community, fraternal, or labor organization.”
- Must post notice

Nursing Mothers & Pregnancy Accommodations, Minn. Stat. § 181.939

Nursing Mothers

- Effective July 1, 2023
- Removes 12-month limitation on right to breaks to express milk
- Removes the “unduly disrupt” language
- Breaks do not have to run concurrently with other breaks

Pregnancy Accommodations

- Effective July 1, 2023
- Applies now to employers with one or more employee
- Reasonable accommodation may include but is not limited to temporary transfer to a less strenuous or hazardous position, temporary leave of absence, modification in work schedule or job assignments, seating, more frequent or longer break periods, and limits to heavy lifting.

SCOTUS Decision on Religious Accommodations

Groff v. DeJoy, June 29, 2023

- ERs must show that granting a religious accommodation would lead to “substantial increased costs” in relation to the conduct of its business.
 - Previous incorrect interpretations of Title VII “blessed the denial of even minor accommodation in many cases, making it harder for members of minority faiths to enter the job market.”

Questions?

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