

# 2023 LABOR & EMPLOYMENT LAW UPDATES

Martin D. Kappenman  
Phone: (952) 921-4603  
Email: [mkappenman@prkalaw.com](mailto:mkappenman@prkalaw.com)

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*The Lawyers for Employers*

# Agenda

- Minnesota Updates
  - ▣ Ban on Non-Compete Agreements
  - ▣ State-Wide Earned Safe and Sick Time
  - ▣ Parenting Leave
  - ▣ State-Funded Paid Family and Medical Leave
  - ▣ Cannabis Legalization: Employment-Related Implications
  - ▣ Accommodating Nursing Mothers, Lactating Employees, and Pregnancy
  - ▣ Contractor Liability for Wage Theft
  - ▣ Ban on Pay History Inquiries
  - ▣ Upcoming MN OSHA Penalty Increases



# Updates in State Law

- Ban on Non-Compete Agreements
- State-Wide Earned Safe and Sick Time
- Parenting Leave
- State-Funded Paid Family and Medical Leave
- Cannabis Legalization: Employment-Related Implications
- Accommodating Nursing Mothers, Lactating Employees, and Pregnancy
- Contractor Liability for Wage Theft
- Unemployment Benefits and Non-Instructional School Employees
- Minimum Wage Updates
- Ban on Pay History Inquiries
- Upcoming MN OSHA Penalty Increases



## Ban on Non-Compete Agreements

# Ban on Non-Compete Agreements

- Effective: July 1, 2023. Does not apply retroactively.
- Applicability: Individuals who reside or work in Minnesota - Employees and independent contractors.
- Agreements that prevent the following after termination of employment are banned:
  - ▣ Work for another employer for a specified time;
  - ▣ Work in a specified geographical area; or
  - ▣ Work for another employer in a capacity that is similar to the employee's work for the employer that is party to the agreement.
- Previously, courts had restricted the duration and scope of non-compete agreements.

# Ban on Non-Compete Agreements

- The following agreements are still permitted:
  - Confidentiality agreements;
  - Nondisclosure agreements;
  - Non-solicitation agreements; and
  - Specific types of non-compete agreements
    - Made during the sale of business – where the seller of the business is prohibited from carrying on a similar business within a reasonable geographic area for a duration.
    - Made during the anticipation of the dissolution of a business – where the members or partners of the business agree that all or any number of the parties will not carry on a similar business within a reasonable geographic area where the business has been transacted.
- Existing requirements for enforceability (e.g., offer, acceptance, consideration) continue to apply to these agreements.



## Earned Sick and Safe Time

# Earned Sick and Safe Time

- Effective: January 1, 2024
- Employer Coverage: All employers
  - ▣ Smallest increment allowed by payroll
  - ▣ Must maintain benefits
- Penalization: Failure to comply with law may result in a \$10,000 penalty



# Earned Sick and Safe Time

- Eligible Employees: Employees who work at least eighty (80) hours in a year are eligible for paid sick leave benefits. Accruals for sick time commence upon employment.
- Employees earn one (1) hour from every thirty (30) hours worked up to forty-eight (48) in a year. Allowed to carry over up to eighty (80) hours, unless the employer pays out unused leave at the end of the year.
- This new law does not affect city ordinances that provide more generous protections and benefits for employees.

# Earned Sick and Safe Time

## Reasons for sick and safe time:

Employees are eligible to take sick and safe time for, among other reasons:

- (1) their own mental or physical illness, or for medical appointments;
- (2) care of a family member who is sick or needs to attend a doctor's appointment;
- (3) absences due to domestic abuse, sexual assault, or stalking, provided the absences is due to:
  - (i) seeking medical attention;
  - (ii) obtaining services from a victim services organization;
  - (iii) counseling;
  - (iv) relocating due to the abuse, assault or stalking; or,
  - (v) seeking legal advice or taking legal action.



# Earned Sick and Safe Time

## Reasons for sick and safe time (cont.)

(4) closure of the employee's workplace due to weather or public emergency, or to take care of a family member whose school or place of care has been closed due to weather or public emergency;

(5) the employee's inability to work or telework due to health concerns related to:

- (i) potential transmission of a communicable illness related to a public emergency; or,
- (ii) seeking or waiting for a diagnostic test of a communicable disease that is a public emergency; or

(6) when the healthcare provider has determined the employee's presence would jeopardize the health of others because of a communicable disease.

# Earned Sick and Safe Time

## Family Member is defined as:

### 1. An employee's

- child, foster child, adult child, legal ward, child for whom the employee is legal guardian, or child to whom the employee stands or stood in loco parentis;
- spouse or registered domestic partner;
- sibling, stepsibling, or foster sibling;
- biological, adoptive, or foster parent, stepparent, or a person who stood in loco parentis when the employee was a minor child;
- grandchild, foster grandchild, or step-grandchild;
- grandparent or step-grandparent;
- a child of a sibling of the employee;
- a sibling of the parents of the employee;
- a child-in-law or sibling-in-law; or



# Earned Sick and Safe Time

## Family Member is defined as (cont.):

2. Any of the family members listed in clause (1) of a spouse or registered domestic partner of the employee;
3. Any other individual related by blood or whose close association with the employee is the equivalent of a family relationship; and
4. Up to one individual annually designated by the employee.



# Earned Sick and Safe Time

## □ Notice Requirements:

- If an employee's leave is *foreseeable*, employers may require employees to provide up to seven (7) days' advance notice of the intention to use sick and safe time.
- If an employee's leave is *unforeseeable*, employers may require an employee to give leave notice ASAP.

## □ Written Policy:

- Employers requiring advance notice of the need to use earned sick and safe time must develop a written policy detailing the procedures for providing such notice. If the written policy has not been provided to the employee, the employer cannot deny the use of sick leave.

# Earned Sick and Safe Time

- Documentation:
  - ▣ May request some forms of reasonable documentation, depending upon the circumstances for the leave. Ex: may require reasonable documentation for employees' use of earned sick and safe time lasting more than three (3) consecutive days.
  - ▣ Written statements by employees may be in their own language.
  
- Replacement:
  - ▣ May *not* require employee to find a replacement worker as a condition of using their earned sick and safe time.
  
- Non-Retaliation:
  - ▣ Cannot retaliate against employees for using paid sick leave.
  
- Notice and Posting by Employers:
  - ▣ Must notify employees of their entitled sick leave;
  - ▣ Must notify employees of amount of leave earned, accrual year, and any policy;
  - ▣ The notice to employees must be provided by Jan. 1, 2024 — or at the start of employment, whichever is later, informing on earned safe and sick time. The notice itself must be in English as well as the employee's primary language.

# Earned Sick and Safe Time

- Statement to Employees:
  - ▣ Must give employees a statement of their earned sick and safe time, and amount used – payroll
- Paid Time Off Policies:
  - ▣ PTO policies can be written to comply with the law





# Earned Sick and Safe Time

- Use of Earned Sick and Safe Time:
  - Related information and documents must be:
    - Kept confidential
    - Maintained separate from the personnel file
  - Not required to pay out earned sick and safe time upon termination.
    - However, if employee is rehired within 180 days, employer must reinstate earned sick and safe time.

# Current City Ordinances & Earned Sick and Safe Time

|                                  | <b>Bloomington</b><br>(Effective July 1, 2023)   | <b>Duluth</b>   | <b>Minneapolis</b>   | <b>St. Paul</b>  |
|----------------------------------|--|---|--|--|
| <b>Accrual Rate</b>              | 1 hour of ESST / <b>30</b> hours worked  | 1 hour of ESST/ <b>50</b> hours worked  | 1 hour of ESST/ <b>30</b> hours worked   | 1 hour of ESST/ <b>30</b> hours worked   |
| <b>Usage</b>                     | May begin using ESST on the 91st day of employment   | May begin using ESST on the 91st day of employment  | May begin using ESST on the 91st day of employment   | May begin using ESST on the 91st day of employment   |
| <b>Accrual Cap</b>               | Can earn up to <b>48</b> hours per year, employer may allow more   | Can earn up to <b>64</b> hours per year, employer may allow more  | Can earn up to <b>48</b> hours per year, employer may allow more   | Can earn up to <b>48</b> hours per year, employer may allow more   |
| <b>Carryover v. Frontloading</b> | Allowed to carry forward <b>80</b> hours into the following year, unless employer allows more; or<br><br>May frontload <b>48</b> hours for employee's first year. Every following year, may frontload <b>80</b> hours per year | Allowed to carry forward <b>40</b> hours into the following year; or<br><br>May frontload at least <b>40</b> hours at the beginning of the year | Allowed to carry forward <b>80</b> hours into the following year, unless employer allows more; or<br><br>May frontload <b>48</b> hours for employee's first year. Every following year, may frontload <b>80</b> hours per year | Allowed to carry forward <b>80</b> hours into the following year, unless employer allows more; or<br><br>May frontload <b>48</b> hours for employee's first year. Every following year, may frontload <b>80</b> hours per year |



## Parenting Leave: Pregnancy, Parenting, and School Conferences

# Parenting Leave: Pregnancy, Parenting, and School Conferences

- Definition of “employer” and “employee” have been updated for Minn. Stat. § 181.940
- Effective July 1, 2023: Now applies to *all* employers and *all* employees
- Must grant leave for:
  - ▣ Pregnancy, birth, or adoption
  - ▣ School conferences and school-related activities

# Paid Family & Medical Leave



# Paid Family & Medical Leave

- Effective: January 1, 2026.
- Employer Coverage: All employers with employees in MN.
- Employee Eligibility: After ninety (90) days of employment, employees are eligible to participate in this program.
- Funding: Payroll tax – 0.7%. Employers may split up to 0.35% with employees' contributions.
- Benefits Available: Based upon a progression scale. Lower-income workers will earn a higher % of their wages while on leave. The % of income will decrease as workers earn more.
- Reinstatement: Employees are entitled to their job after completing their leave if they have been in the position for at least 90 days.



# Paid Family & Medical Leave

- Under Paid Family & Medical Leave, employees are eligible to receive:
  - Up to twelve (12) weeks of paid leave for their own serious health condition or pregnancy; **and**
  - Up to an additional twelve (12) weeks of paid leave to care for a newborn, adopted or foster child; for safety leave; or to care for a family member who has a serious health condition.
  - Leave is capped at twenty (20) weeks in a single benefit year.
- Claims must be based on a single qualifying event of at least seven (7) calendar days (except for bonding leave for parents in connection with birth, adoption, or foster child placement).

# Paid Family & Medical Leave

- “Family member” includes:
  - ▣ Spouses (including legally-recognized domestic partners);
  - ▣ Child, including a biological, adopted, or foster child, a stepchild, or a child to whom the applicant stands in loco parentis, is a legal guardian, or is a de facto parent;
  - ▣ Parents and legal guardians;
  - ▣ Sibling;
  - ▣ Grandchild;
  - ▣ Grandparent or spouses’ grandparent;
  - ▣ Son-in-law or daughter-in-law; and
  - ▣ an individual who has a relationship with the applicant that creates an expectation and reliance that the applicant care for the individual, whether or not the applicant and the individual reside together.



# Paid Family & Medical Leave

- “Safety leave” is leave due to domestic abuse, sexual assault, or stalking of applicant or applicant’s family member, provided the leave is to:
  - ▣ Seek medical attention related to physical or psychological injury or disability caused by the abuse/assault/stalking;
  - ▣ Obtain services from a victim services organization;
  - ▣ Obtain psychological or other counseling;
  - ▣ Seek relocation due to abuse/assault/stalking; or
  - ▣ Seek legal advice or legal action, including preparing for or participating in any civil or criminal legal proceeding related to, or resulting from, the abuse/assault/stalking.



# Paid Family & Medical Leave

- “Serious health condition” includes, but is not limited to:
  - Inpatient care in a hospital, hospice, or residential medical care facility, and
  - Continuing treatment or supervision by a health care provider including one (1) or more of the following:
    - A period of incapacity of seven (7) or more full, consecutive days, and subsequent treatment, requiring two (2) or more treatments within thirty (30) days of the first day of incapacity, or requiring a regimen of continuing treatment;
    - A period of incapacity due to pregnancy; or
    - A period of incapacity for a chronic health condition that requires periodic healthcare provider visits (at least two (2) a year), continues over an extended period, and may cause episodic periods of incapacity.
      - Ex: anxiety, migraines

# Paid Family & Medical Leave

- Continuing treatment or supervision by a health care provider including one (1) or more of the following (cont.):
  - A period of incapacity which is permanent or long term due to a condition for which treatment may not be effective. The applicant or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider; or
  - A period of absence to receive multiple treatments, including any period of recovery from the treatments, by a health care provider or by a provider of health care services under orders of, or on referral by, a healthcare provider, for:
    - Restorative surgery after an accident or other injury; or
    - A condition that would likely result in a period of incapacity of more than seven full calendar days in the absence of medical intervention or treatment.





## Recreational Marijuana Legalization

# Minnesota's Medical Cannabis Program

- Effective 2015, medical cannabis may be used by individuals with a qualifying condition
  - ▣ Ex: Cancer, Alzheimer's disease, MS, ALS, Autism Spectrum Disorder
- OCD and IBS will become qualifying conditions beginning August 1, 2023

# Recreational Marijuana Legalization



- Effective: August 1, 2023.
- Minnesota becomes the 23rd state to legalize recreational marijuana use.
- Adults 21 years of age and older can purchase up to
  - ▣ 2 ounces of cannabis flower to possess or transport in public;
  - ▣ 2 pounds of cannabis flower to possess at home;
  - ▣ 8 grams of concentrate; and
  - ▣ 800 milligrams of edible products at a time.
- May grow up to 8 plants at home, though only four plants can be mature at a time.
- Records for misdemeanor convictions for marijuana will be expunged automatically, though the process will take up to a year.
  - ▣ A committee will be established to consider expunging felony level offenses.

# Recreational Marijuana Legalization – Drug Testing

- New amendments to existing Drug and Alcohol Testing in the Workplace Act\* (DATWA)
  - ▣ Definition of “Drug” does not include marijuana and marijuana products.
  - ▣ Definition of “Drug and Alcohol Testing” no longer includes cannabis or cannabis testing, unless stated otherwise.
  - ▣ Employers may still require employees to submit to random cannabis testing if they are (1) employed in safety-sensitive positions, or (2) professional athletes subject to a collective bargaining agreement.

\*Minn. Stat. 181.950-181.957

# Recreational Marijuana Legalization – Drug Testing

- New amendments to existing DATWA
  - Employers may still conduct cannabis testing if the employer has a reasonable suspicion that the employee
    - Is under the influence of drugs or alcohol;
    - Has violated written workplace rules that prohibit the use, possession, sale, or transfer of cannabis while working;
    - Has sustained a personal injury or caused another to sustain a personal injury; or
    - Has caused a work-related accident, or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.



# Recreational Marijuana Legalization – Drug Testing

- New amendments to existing DATWA
  - Employers may not require a job applicant to undergo cannabis testing for the sole purpose of determining the presence or absence of cannabis as a condition of employment, unless required by state or federal law.
    - Employer may not refuse to hire an applicant solely because the applicant “fails” a cannabis test, unless required by state or federal law.

# Recreational Marijuana Legalization – Drug Testing

- New amendments to existing DATWA
  - Cannabis and its metabolites are considered a drug, and subject to drug and alcohol testing provisions for the following positions:
    - Safety-sensitive persons – positions where impairment by cannabis would threaten the health and safety of any person;
    - Peace officers;
    - Firefighters;
    - Positions requiring face-to-face care, training, education, supervision, counseling, consultation or medical assistance to:
      - Children, vulnerable adults, and patients who receive health care services;
    - Positions requiring CDLs or requiring an employee to operate a motor vehicle for which state or federal law requires drug or alcohol testing;
    - Employment funded by a federal grant; or
    - Any other position for which state or federal law requires testing.

# Recreational Marijuana Legalization – Drug Testing

- New amendments to existing DATWA:
  - Unless otherwise provided by state or federal law, an employer does not have to permit cannabis use, possession, impairment, sale, or transfer while an employee is working, on company properties, or using an employer’s vehicle, machinery, or equipment.
    - Employer may enact and enforce written rules prohibiting cannabis use, possession, impairment, sale, or transfer while an employee is working, on company properties, or using an employer’s vehicle, machinery, or equipment.



# Recreational Marijuana Legalization – Drug Testing

- DATWA amendments *do not* apply to employees and job applicants where the specific work performed requires those employees or job applicants to be tested for cannabis pursuant to:
  - ▣ Federal regulations that specifically preempt state regulation of cannabis testing with respect to those employees and job applicants;
  - ▣ Federal regulations or requirements necessary to operate federally regulated facilities;
  - ▣ Federal contracts where cannabis testing is conducted for security, safety, or protection of sensitive proprietary data; or
  - ▣ State agency rules that adopt federal regulations applicable to the interstate component of a federally regulated industry, and the adoption of those rules is for the purpose of conforming the non-federally regulated intrastate component of the industry to identical regulation.

# Recreational Marijuana Legalization – Drug Testing

- Collective Bargaining Agreements and Cannabis Testing
  - A collective bargaining agreement may still create a cannabis testing policy – provided it *meets* or *exceeds*, and does not conflict with, the minimum employee protection standards and requirements under DAWTA.
  - Existing collective bargaining agreements on cannabis testing that *exceed* minimum employee protection standards and requirements under DAWTA will not be affected by the new amendments.





## Accommodating Nursing Mothers, Lactating Employees, and Pregnancy

# Accommodating Nursing Mothers, Lactating Employees, and Pregnancy

- Effective: July 1, 2023.
- Applicability: Employers with one or more employees.
- Notice Requirements: Employers must inform employees of their pregnancy and lactation accommodation rights at the time of hire and when an employee asks about or requests parental leave.
- Employers must include a notice of such rights in the employee handbook. The Commissioner of MN Department of Labor and Industry will be publishing the required notice.

# Accommodating Lactating Employees

- Employers must provide reasonable breaks for employees to express milk.
  - There is no time limit on duration for providing these breaks. Previously, the original law only applied to the first 12 months after childbirth.
  
- Employers cannot refuse reasonable break time for expressing milk.
  - Previously, the original law permitted employers to deny breaks if doing so would unduly disrupt operations.
  
- Workplace lactation space must be a “clean, private, and secure” room or other location, close to the work area.



# Pregnancy Accommodations

- Accommodations:
  - Pregnancy employees are not required to obtain medical advice, nor employers may no longer claim *undue hardship* for the following pregnancy accommodations:
    - More frequent or longer restroom, food, and water breaks;
    - Seating; and
    - Limits on lifting over 20 pounds.
  - Newly added reasonable accommodations under this law include:
    - Temporary leaves of absence
    - Modification in work schedule or job assignments
    - More frequent or longer break periods
  
- Reinstatement rights: Employees who take a leave under section 181.939 (protections for nursing mothers, lactating employees, and pregnancy accommodations) have the right to
  - Return to their previous position; OR
  - Be placed in a comparable position with similar duties, number of hours, and pay.



## Contractor Liability for Wage Theft

# Contractor Liability for Wage Theft

Effective: August 1, 2023.

Applicability: Construction contracts or agreements entered into, renewed, modified, or amended on or after that date.

Law update: General contractors are liable for workers' unpaid wages by subcontractors.

- General contractors are required to pay workers their unpaid wages and then may take legal action to recover it from the subcontractor who failed to pay workers all of what they are owed.
- In the case of an unpaid wages action being taken against a subcontractor, general contractors shall be held jointly and severally liable.
- The law does not apply to unionized contractors, due to unions having their own procedures for recovering unpaid wages.



## Ban on Pay History Inquiries

# Ban on Pay History Inquiries

- Effective: January 1, 2024
  
- Law update:
  - Employers are prohibited from inquiring into a job applicant's pay history for the purpose of determining pay or benefits
  - Applicants may voluntarily disclose this information if they wish
    - If an applicant chooses to disclose, an employer may take this information into consideration as a basis to offer a **higher** wage or salary than initially planned
  - Employers may still:
    - Provide applicants with information on pay or benefits associated with a particular position
    - Engage in discussions with applicants regarding their expectations or requests surrounding pay or benefits

# Upcoming MN OSHA Penalty Increases

- Effective: August 1, 2023
- Penalties under Minn. Stat. 182.666 are increased to conform with federal OSHA penalty amounts
  - ▣ Willful or repeated violations increase from a maximum of \$70,000 to \$156,259
  - ▣ Serious violations increase from a maximum of \$7,000 to \$15,625
  - ▣ Serious violations which cause or contribute to the death of an employee shall be \$25,000 for **each** violation
  - ▣ Nonserious violations increase from a maximum of \$7,000 to \$15,625
  - ▣ Failure to correct violations increase from a maximum of \$7,000 to \$15,625
- Future increases in these penalties to correspond with federal penalties are tied to inflation



# QUESTIONS?



Martin D. Kappenman  
Phone: (952) 921-4603  
Email: [mkappenman@prkalaw.com](mailto:mkappenman@prkalaw.com)

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THANK YOU!