LEGAL UPDATES

Employers Should Take Note of Important Minnesota Employment Law Developments From the 2023 Legislative Session

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The 2023 Minnesota legislative session was an active one and has resulted in a number of new employment law obligations for employers with Minnesota-based employees. We previously issued a client alert related to the Minnesota law banning noncompete agreements as of July 1, 2023, which can be accessed here. In addition, during the 2023 legislative session, the Minnesota Legislature passed, and Governor Walz signed into law an earned sick and safe time law, amendments to Minnesota's pregnancy accommodation and lactating employee break laws, expanded pregnancy and parenting leave provisions, a paid family and medical leave law, and a law legalizing recreational adult-use marijuana. This alert summarizes these developments and identifies next steps for employers to take to comply with these new laws.

Earned Sick and Safe Time – January 1, 2024

Effective January 1, 2024, employers must provide paid sick and safe time to Minnesota employees. Employers must pay employees for their use of earned sick and safe time at the same hourly rate the employees earn when they are working.

Coverage: Minnesota's earned sick and safe time law applies to any individual, business, or organization with one or more employees. All employees, including part-time and temporary employees, who perform work for their employer in Minnesota for at least 80 hours in a year are eligible to earn paid sick and safe time. The law does not apply to independent contractors or certain individuals employed by an air carrier as a flight deck or cabin crew member. Temporary employees provided by a staffing agency are considered employees of the staffing agency unless a contractual agreement states otherwise.

Accrual, Carryover and Frontloading: Employees will earn one hour of paid sick and safe time for every 30 hours worked, up to a permissible annual cap of 48 hours per year. Employees will accrue earned sick and safe time at the beginning of employment and may use earned sick and safe time as it is accrued. Employees who are exempt from overtime requirements under the Fair Labor Standards Act ("FLSA") are deemed to work 40 hours in each workweek for accrual purposes unless the employee's normal workweek is less than 40 hours. In that case, the

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employee will accrue earned sick and safe time based on the employee's normal workweek.

The law includes both a permissible annual cap and a total accrual cap: as noted above, employers may cap annual accrual of sick and safe time at 48 hours. In addition, employers may cap total accrual at any given time at 80 hours of earned sick and safe time. Employers may agree to higher annual and point-in-time accrual caps at their discretion.

An employer must permit employees to carry over accrued but unused earned sick and safe time, up to the permissible 80-hour total accrual cap, unless the employer provides earned sick and safe time at the beginning of each year, which is known as "frontloading." Under the law, employers may frontload earned sick and safe time at the beginning of each year as follows:

- 48 hours, if the employer pays employees for accrued but unused sick and safe time at the end of a year at their same hourly rate; or
- 80 hours, if the employer does not pay employees for accrued but unused sick and safe time at the end of a year.

The law does not require employers to pay employees for accrued but unused earned sick and safe time upon the employee's separation of employment, but as noted above, the employer's decision on whether to pay out unused time or not may impact permissible frontloading options.

If an employee separates from employment and is rehired within 180 days of separation by the same employer, the employee's previously accrued earned sick and safe time that has not been used must be reinstated.

Use of Earned Sick and Safe Time: An employee may use accrued earned sick and safe time for the employee's:

- mental or physical illness, injury, or other health condition;
- need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or
- need for preventive medical or health care.

An employee also may use accrued earned sick and safe time for care of a family member:

- with a mental or physical illness, injury, or other health condition;
- who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or
- who needs preventive medical or health care.

In addition, earned sick and safe time may be used for an absence due to domestic abuse, sexual assault, or stalking of the employee or the employee's family member, if 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; or
- 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.

An employee also may use earned sick and safe time if the employee's place of business has been closed, or if the employee needs to care for a family member whose school or place of care is closed, due to weather or another public emergency. The law also allows an employee to use earned sick and safe time if the employee cannot work due to the potential transmission or diagnosis of a communicable disease related to a public emergency, or if exposure to the employee or family member jeopardizes the health of others.

"Family member" is defined broadly by the law to include 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 stepgrandchild;
- grandparent or stepgrandparent;
- a child of a sibling of the employee
- a sibling of the parents of the employee;
- a child-in-law or sibling-in-law
- the family members of a spouse or registered domestic partner;
- any other individual related by blood or whose close association with the employee is the equivalent of a family relationship; and
- up to one individual annually designated by the employee.

Notice and Documentation Related to Use of Earned Sick and Safe Time: Employers may require that employees provide up to seven days' advance notice for a foreseeable use of earned sick and safe time. If the need is not foreseeable, employers may require that employees provide notice as soon as practicable. If an employer requires notice of the need to use earned sick and safe time, the employer must have and provide a written policy that sets forth reasonable procedures for employees to provide notice of the need to use earned sick and safe time. An employer may not require an employee to seek or find a replacement worker to cover the hours the employee uses as earned sick and safe time. Earned sick and safe time may be used in the smallest increment of time tracked by the employer's payroll system but that increment cannot be more than four hours.

If an employee uses earned sick and safe time for more than three consecutive days, an employer may require reasonable documentation that the earned sick and safe time is permitted under the law. For absences related to medical issues or other health-related situations, reasonable documentation may include a signed statement by a health care professional indicating the need for use of earned sick and safe time. If, however, the employee or employee's family member did not receive services from a health care professional, or if the documentation cannot be obtained in a reasonable time or without added expense, then reasonable documentation may include a written statement from the employee indicating that the employee is used earned sick and safe time for a qualifying purpose under the law. For safety leave reasons, reasonable documentation may include, among other things, documentation from a court, victim services advocate, attorney or the employee. Employers are prohibited from requiring disclosure of details relating to

domestic abuse, sexual assault or stalking or the details of a medical condition related to the employee's request to use earned sick and safe time.

Types of Permissible Policies: An employer may use a paid time off ("PTO") policy to comply with the new earned sick and safe leave law so long as the policy's terms provide all the employee rights set out in the earned sick and safe time law. Alternatively, an employer can have separate vacation and sick leave policies, ensuring that its sick leave policy complies with the new law.

Additional Employee Protections: The law prohibits employers from taking adverse action against an employee because the employee has exercised or attempted to exercise the rights provided by the law. In addition, employers are required to maintain coverage under any group insurance policy or group health care plan for the employee and any dependents during any use of earned sick and safe time. Employees returning from leave are entitled to return to employment at the same rate of pay the employee received when the leave began, in addition to any automatic adjustments in the employee's pay scale that occurred during the leave period. The returning employee is also entitled to retain all accrued pre-leave benefits of employment and seniority as if there had been no interruption in service.

Employer Notice and Recordkeeping Requirements: Employers must give notice to all employees that they are entitled to earned sick and safe time, including the amount of earned sick and safe time, the accrual year for the employee, the terms of its use under the law, and a copy of the written policy for providing notice of need to use earned sick and safe time. The notice must also include that retaliation against employees who request, or use earned sick and safe time is prohibited and that employees have the right to file a complaint or bring a civil action if an employer denies earned sick and safe time or retaliates against an employee for requesting or using earned sick and safe time. Employers must provide employees with a notice in English and the primary language of the employee at commencement of employment or January 1, 2024, whichever is later. If an employer provides an employee handbook to employees, the employer must include the notice in the handbook. The MN Department of Labor and Industry will prepare a uniform employee notice for employers to use in the five most common languages spoken in Minnesota. Employers must retain accurate records documenting hours worked by employees and earned sick and safe time taken.

Sick and Safe Time Laws and Policies: Minnesota's earned sick and safe time law does not preempt other local paid sick and safe time laws that provide greater benefits or extend other protections to employees. As a reminder, Bloomington, Duluth, Minneapolis, and St. Paul each have local paid sick and safe leave ordinances. In addition, employers who provide earned sick and safe time to their employees under a paid time off policy or other paid leave policy that may be used for the same purposes and under the same conditions as required by the law are not required to provide additional earned sick and safe time. The law also permits collective bargaining agreements with a bona fide building and construction trades labor organization to waive the earned sick and safe time provisions.

Enforcement: The Commissioner of the Department of Labor and Industry may fine employers up to $10,000 for each failure to submit or deliver employment records and order compliance with the earned sick and safe time law. In addition, the statute provides a private right of action for individuals to recover damages, so long as the action commenced within three years of the violation that caused the injury to the employee.

Amendment to Minnesota's Nursing Mothers, Lactating Employees, and Pregnancy Accommodations Statute – July 1, 2023

Minnesota has also amended its Minnesota's Nursing Mothers, Lactating Employees, and Pregnancy Accommodations statute, and the amendment went into effect on July 1, 2023. The law, which previously applied to employers with 15 or more employees, now applies to employers with one or more employees. In addition, the provision in the previous law that requires employers to provide breaks to employees to express milk only during the 12 months following the birth of the child has been amended to eliminate the 12-month time restriction, so employers will be required to provide breaks to employees to express milk regardless of when the child was born.

In addition, employers no longer will be able to deny breaks to employees if the breaks would unduly disrupt the operations of the employers. The amended law prohibits employers from denying reasonable break time to employees who need to express milk.

The new law also modifies the types of reasonable accommodations that an employer may need to provide to an employee for health conditions related to pregnancy or childbirth. Under the law, reasonable accommodation may include, but are 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.

The new legislation also states that an employee who returns from a pregnancy-related leave of absence is entitled to return to the employee's former position or in a position of comparable duties, number of hours, and pay. In addition, the employee is entitled to return to employment at the same rate of pay the employee received when the leave commenced, plus any automatic adjustments in the employee's pay scale that occurred during the leave period. The employee also retains all accrued pre-leave benefits of employment and seniority as if there was no interruption in service. If the employer experiences a layoff during the employee's leave, and the employee would have lost a position had the employee not been on leave, the employee is not entitled to reinstatement in the employee's former or a comparable position. But the employee retains all rights under the layoff and recall system as if the employee had not taken leave.

Finally, the amended law requires employers to inform employees of their rights under the law at the time of hire and when an employee inquires about or requests parental leave. The information must be provided in English and the primary language of the employee. If an employer provides an employee handbook to its employee, the notice must be included in the handbook.

Related: New Federal Protections for Pregnant and Nursing Employees in 2023: What Employers Need to Know

Expanded Pregnancy and Parenting Leave – July 1, 2023

Minnesota has also amended Minnesota's statute regarding pregnancy and parenting leave, which requires employers to provide up to 12 weeks of unpaid leave to parents in conjunction with the birth or adoption of a child, or to pregnant employees for prenatal care or incapacity due to pregnancy, childbirth, or related health conditions. The previous law applied to employers with 21 or more employees and employees who have worked for the employer for at least 12 months and for a certain number of hours to provide up to 12 weeks of unpaid leave. The amendment, which went into effect July 1, 2023, amends the law so that it applies to employers with one or more employees. It also removes the minimum length of service and hours requirements. Accordingly, Minnesota employees will, as of July 1, 2023, be entitled to up to 12 weeks of unpaid parental leave as soon as they begin employment.

Paid Family and Medical Leave – January 1, 2026

Minnesota also has a new paid family and medical leave law, which will be effective January 1, 2026. The law creates new leave entitlements and a new family and medical benefit insurance program funded by premiums charged to employers and operates similarly to Minnesota's unemployment insurance program. Employees pay a portion of the premium charged to the employer through a deduction in their wages. The law applies to all employers, though employers may opt out of the program by establishing a private plan through a private insurance product that meets the law's requirements.

Eligibility: To be eligible, an employee must have earned at least 5.3% of the state average annual wage over a prior 12-month base period, which is approximately $3,500. Employees must apply for benefits with the new Family and Medical Benefit Insurance Division (the "Division"), established by the law. There is no length of employment eligibility requirement.

An application for benefits must be based on a single event of at least seven consecutive days, unless it is an application for benefits related to bonding leave. The Division will determine employees' eligibility for benefits. The benefit amount is calculated based on the employee's wages and will be 55 to 90 percent of the employee's wages up to a designated cap. The program will begin providing benefits on January 1, 2026.

Use of Leave: The law will provide for up to 12 weeks of leave a year for one's own serious health condition and up to 12 weeks of leave a year for bonding, safety leave, and family care, except that total leave time under the law can be capped by an employer at no more than 20 weeks annually. In other words, if an employee takes 12 weeks of leave to care for a family member, the employee may take up to 8 weeks for the employee's serious health condition. Leave may be taken intermittently, but employers may limit intermittent leave to 480 hours in any 12-month period. The law includes the following definitions for "bonding," "safety leave," "family care," and "family member":

- "Bonding" means time spent by an applicant who is a biological, adoptive, or foster parent with a biological, adopted, or foster child in conjunction with the child's birth, adoption, or placement.
- "Safety leave" means leave from work because of domestic abuse, sexual assault, or stalking of the applicant or applicant's family member, provided the leave is to:
    - Seek medical attention related to the 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 due to domestic abuse, sexual assault or stalking; or
    - Seek legal advice or take legal action, including preparation for or participating in any civil or criminal legal proceeding related to, or resulting from, the domestic abuse, sexual assault or stalking.
- "Family care" means an applicant caring for a family member with a serious health condition or caring for a family member who is a military member.
- "Family member" means, with respect to an applicant, a spouse or domestic partner, a child, a parent or legal guardian, a sibling, a grandchild, a grandparent or a spouse's grandparent, a 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.

Additional Requirements: The law prohibits employers from taking adverse action against employees for requesting or obtaining benefits or leave, or for exercising any other rights provided by the law. Upon return from leave, an employee is entitled to return to the same position the employee held when the leave began or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment. During the employee's leave, the employer must maintain coverage under any group insurance policy, group subscriber contract or health care plan for the

employee and any dependents as if the employee were not on leave, though the employee must continue to pay any employee share of the cost of those benefits.

Legalization of Adult-Use Marijuana –August 1, 2023

Minnesota has also passed legislation legalizing recreational cannabis use for adults 21 years of age or older. The new law includes employment provisions that go into effect on August 1, 2023.

Testing: The recreational marijuana law amends the Minnesota Drug and Alcohol Testing in the Workplace Act ("DATWA") to exclude cannabis from DATWA's definition of "drug" and creates a separate "cannabis testing" category, which limits testing and discipline for employees subject to cannabis testing rules. The new legislation, with some limited exceptions, prohibits employers from:

- Requesting or requiring a job applicant to undergo cannabis testing as a condition of employment;
- Refusing to hire a job applicant solely because of a positive cannabis test, unless otherwise required by state or federal law; or
- Requiring an employee or job applicant to undergo cannabis testing on an "arbitrary or capricious" basis.

Employers may request or require an employee to undergo cannabis testing if the employer has a reasonable suspicion that the employee:

- Is under the influence of drugs or alcohol;
- Has violated the employer's written work rules prohibiting the use, possession, sale or transfer of cannabis products while the employee is working, or while the employee is on the employer's premises or operating the employer's vehicle, machinery or equipment;
- Has sustained a personal injury or has caused another employee 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.

The following positions are exempt from these cannabis testing rules, and continue to be subject to existing DATWA requirements that permit wider cannabis testing:

- A safety-sensitive position;
- A peace officer position;
- A firefighter position;
- A position requiring face-to-face care, training, education, supervision, counseling, consultation or medical assistance to children, vulnerable adults and patients receiving health care services;
- A position requiring a commercial driver's license or requiring an employee to operate a motor vehicle for which state or federal law requires drug or alcohol testing of a job applicant or an employee;
- A position of employment funded by a federal grant; or
- Any other position for which state or federal law requires testing of a job applicant or an employee for cannabis.

Employer Policy: The legislation does not require employers to permit or accommodate cannabis use, possession, impairment, sale or transfer while an employee is working on the employer's premises, or operating the employer's vehicle, machinery or equipment. But employers may enact and enforce written work rules prohibiting cannabis use only while an employee is working, or while an employee is on the employee's premises or operating the employer's vehicle, machinery or equipment.

Discipline: An employer may discipline, discharge, or take other adverse personnel action against an employee for cannabis use, possession, impairment, sale, or transfer while an employee is working, on the employer's premises, or operating the employer's vehicle, machinery or equipment as follows:

- If, as a result of consuming cannabis, the employee does not possess "that clearness of intellect and control of self that the employee otherwise would have;"
- If cannabis testing verifies the presence of cannabis;
- As provided in the employer's written rules regarding cannabis use; or
- As otherwise required under state or federal law or regulation, or if a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or regulations.

Note, however, that where cannabis testing is permissible and the employer tests, the DAWTA prohibits termination for a first-time positive test unless certain statutory conditions are met.

Lawful Consumable Product: The new legislation also amends Minnesota's lawful consumable products statute to include cannabis as a lawful consumable product. Under the state lawful consumable product law, employers cannot take adverse action against an applicant or employee if the applicant or employee consumes cannabis, so long as the use takes place off the employer's premises during nonworking hours.

Next Steps

Employers should review their employment policies regarding paid sick time, paid time off, lactation breaks, pregnancy accommodations and parental/family leave to ensure that they meet the requirements of these new laws. In addition, employers should review their testing policies for cannabis and consider adopting written work rules regarding cannabis use. We will continue to monitor these new laws and provide updates about developments.