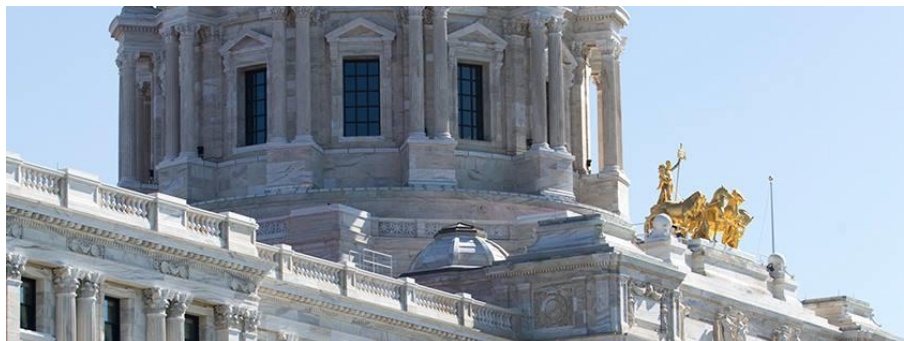




2023 Minnesota Legislative Wrap-Up



June 21, 2023



Agenda

1. Statewide Paid Sick Leave (eff. 1/1/24)
2. Statewide Paid FMLA Leave (eff. 1/1/26)
3. Nursing mothers, Pregnancy, Parenting Leave and Miscellaneous Statutes (eff. 7/1/23)
4. Recreational Marijuana and DATWA (eff. 7/1/23)
5. Non-Competes Ban (eff. 7/1/23)
6. Q & A

Statewide Paid Sick Leave (eff. 1/1/24)





Grant T. Collins

Minnesota State Bar Association

Certified ▲ Specialist

Labor and Employment Law

(612) 373-8519
gcollins@felhaber.com



Omnibus Jobs Bill – 2023 Minn. Law ch. 53

- Effective ***January 1, 2024***
- Minn. Stat. §§ 181.9445 to 181.9448 creates new entitlement to “earned sick and safe time” (or “ESST”) for all “employees” in Minnesota.
- Repeals Minn. Stat. § 181.9413 relating to “sick leave benefits” and “care of relatives.”



ESST Coverage

- “Employer” defined to include all employers with **1 or more** employees.
 - Does **not** include the federal government.
 - Staffing agencies are the “employer” of temp workers unless contract states otherwise.
- “Employee” means anyone (including temporary or part-time employees) who performs work in Minnesota for 80 hours or more in a year.
 - Does **not** include “independent contractors.”



ESST Accrual and Frontloading

- Accrual
 - 1 hour for every 30 hours worked
 - Maximum of 48 hours of per year
- Front Loading
 - 48 hours in first year
 - 80 hours each year thereafter (unless the employer cashes out unused ESST, then 48 hours each year)



ESST Accrual & Carryover Caps

	§ 181.9446
Annual Accrual Cap	48 hours
Maximum Carry-Over Cap	80 hours
Maximum Accrual Cap	80 hours



ESST Use

- Unlike other ESST ordinances, there is no 90-day waiting period for use.
- Minn. Stat. § 181.9446
 - “Earned sick and safe time under this section begins to accrue at the commencement of employment of the employee.”
 - ***“Employees may use earned sick and safe time as it is accrued.”***
- Minn. Stat. § 181.9447, subd. 5—“[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.”



Six Eligible Uses

- (1) For employee's own illness, injury, health condition, or preventative care;
- (2) To care for a "family member" for the same reasons;
- (3) Domestic violence or personal safety issues for employee or "family member";
- (4) "Closure of 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";



Uses (cont.)

- (5) Inability to work or telework because of a public emergency relating to a communicable disease;
- (6) Health authorities have determined 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 to a communicable disease.



Subd. 7. Family member. "Family member" means:

(1) an employee's:

(i) 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;

(ii) spouse or registered domestic partner;

(iii) sibling, stepsibling, or foster sibling;

(iv) biological, adoptive, or foster parent, stepparent, or a person who stood in loco parentis when the employee was a minor child;

(v) grandchild, foster grandchild, or stepgrandchild;

(vi) grandparent or stepgrandparent;

(vii) a child of a sibling of the employee;

(viii) a sibling of the parents of the employee; or

(ix) a child-in-law or sibling-in-law;

(2) any of the family members listed in clause (1) of a spouse or registered domestic partner;

(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.



Uses (cont.)

- Employer cannot require employee to find a replacement worker.
- Employee entitled to reinstatement and maintenance of health insurance at same rate.
- Documentation after 3 Consecutive Days
 - “When 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 covered by subdivision 1.”



Notice and Recordkeeping

- Foreseeable Leave
 - Employers can require 7 days notice.
- Non-foreseeable Leave
 - Employers can require notice “as soon as practicable”
- To require notice, employers must have a written policy



Notice

Subd. 2. Notice. An employer may require notice of the need for use of earned sick and safe time as provided in this paragraph. If the need for use is foreseeable, an employer may require advance notice of the intention to use earned sick and safe time but must not require more than seven days' advance notice. If the need is unforeseeable, an employer may require an employee to give notice of the need for earned sick and safe time as soon as practicable. An employer that requires notice of the need to use earned sick and safe time in accordance with this subdivision shall have a written policy containing reasonable procedures for employees to provide notice of the need to use earned sick and safe time, and shall provide a written copy of such policy to employees. If a copy of the written policy has not been provided to an employee, an employer shall not deny the use of earned sick and safe time to the employee on that basis.



Retaliation

Subd. 6. **Retaliation prohibited.** (a) An employer shall not discharge, discipline, penalize, interfere with, threaten, restrain, coerce, or otherwise retaliate or discriminate against a person because the person has exercised or attempted to exercise rights protected under this act, including but not limited to because the person requested earned sick and safe time, used earned sick and safe time, requested a statement of accrued sick and safe time, informed any person of his or her potential rights under sections 181.9445 to 181.9448, made a complaint or filed an action to enforce a right to earned sick and safe time under this section, or is or was participating in any manner in an investigation, proceeding, or hearing under this chapter.

(b) It shall be unlawful for an employer's absence control policy or attendance point system to count earned sick and safe time taken under this act as an absence that may lead to or result in retaliation or any other adverse action.

(c) It shall be unlawful for an employer or any other person to report or threaten to report the actual or suspected citizenship or immigration status of a person or their family member to a federal, state, or local agency for exercising or attempting to exercise any right protected under this act.

(d) A person need not explicitly refer to this act or the rights enumerated herein to be protected from retaliation.



Statement of Earnings

- Must include:
 - “the total number of [ESST] hours accrued and available for use under section 181.9446”;
 - “the total number of [ESST] hours used during the pay period under section 181.9447”;



Current PTO Policies

- Non-Exemption, Exemption
 - Employer policy must provide paid leave that “meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements provided in” the ESST law.
- To satisfy the “exception,” the paid leave policies must provide the minimum accrual, use, carry-over, etc.



Sick and Safe Time in Minnesota

	MPLS	STP	Duluth	Bloomington	MN
Effective Date	7/1/2017	7/1/2017	1/1/2020	7/1/2023	1/1/2024
Employer Coverage	1+	1+	5+	1+	1+
Employee Eligibility	80 hours in the City	80 hours in the City	50% of time in the City	80 hours in city	80 hours in state
Amount of Paid Sick Leave	1 hour for 30 hours worked	1 hour for 30 hours worked	1 hour for 50 hours worked	1 hour for 30 hours worked	1 hour for 30 hours worked

Statewide Paid FMLA Leave (eff. 1/1/26)



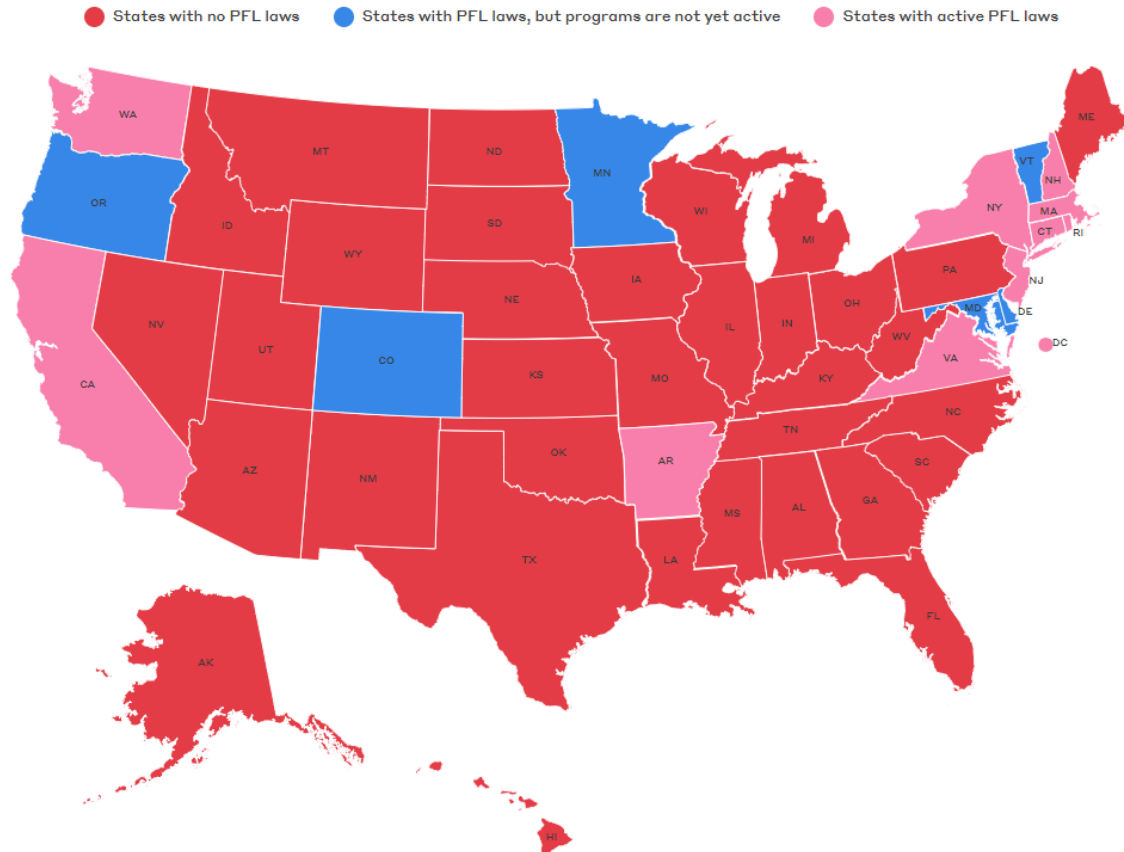


Paid Family Leave Laws

- 16 states and D.C. have enacted paid family leave (PFL) laws:
 - Arkansas, California, Connecticut, the District of Columbia, Massachusetts, New Jersey, New Hampshire, New York, Rhode Island, Vermont, Virginia, and Washington have laws in effect;
 - Colorado, Delaware, Maryland, Minnesota, and Oregon enacted laws not yet in effect.

Paid Family Leave Laws

Status of PFL Laws





MN-PFMLA – 2023 Minn. Laws ch. 59

- MN-PFML creates a publicly-funded statewide insurance program [Minn. Stat. ch. 159B] that provides Minnesota workers with partial wage replacement benefits for up to 20 weeks per year.
- The program is funded via a .7% payroll tax (up to the social security maximum).
 - Employers can deduct half of that amount from employee's wages.
- Both the taxes and benefits begin on ***January 1, 2026.***



MN-PFML – Coverage

- ***All Minnesota employers, regardless of size.***
 - Includes out-of-state employers with MN employees.
 - Includes non-profits, state and local government agencies, faith organizations, and other typically tax-exempt associations.
- Does **not** cover “independent contractors,” “self-employed individuals,” the federal government, or “seasonal employees.”



Seasonal Employee

Subd. 35. Seasonal employee. (a) A seasonal employee is an individual who is employed for no more than 150 days during any consecutive 52-week period in hospitality by an employer whose average receipts during any six months of the preceding calendar year were not more than 33 percent of its average receipts for the other six months of such year.

(b) For the purposes of this section, "hospitality" has the meaning given under the collective definitions in section 157.15, subdivisions 4 to 9 and 11 to 14.

(c) For an individual to be classified as a seasonal employee, an employer must apply to the department in a format and manner prescribed by the commissioner and certify that:

(1) the employee meets or will meet the 150-day maximum employment duration under this subdivision;

(2) the employee's primary line of work is hospitality;

(3) the employer meets the receipts threshold under this subdivision; and

(4) the employer has provided the required employee notice required under section 268B.26.

(d) An employer must notify the department, in a format and manner prescribed by the commissioner, within five business days if a previously classified seasonal employee no longer meets the criteria above and is no longer a seasonal employee.



MN-PFML – At a Glance

Item	Summary
Types of Leave	(1) Medical Leave, (2) Family Care Leave, (3) Bonding Leave, (4) Safety Leave, (5) Qualifying Exigency Leave
Duration of Benefits	Up to 12 weeks medical leave; up to 12 weeks family/bonding/safety/QE; maximum of 20 weeks total
Premium Rate	0.7% of Social Security wages (up to \$160,200 in 2023); employers must pay at least 50% of the premium
Wage Replacement	Maximum benefit of 100% state average weekly wage (\$1,287 in 2023); higher percentage of wage replacement for lower incomes
Eligibility Requirements	Employee must make 5.3% of state average annual wage (\$3,546 in 2023) in base period and work primarily in Minnesota



MN-PFML – At a Glance (cont.)

Item	Summary
Family Definition	Spouse (incl. domestic partner), spouse's parent, child, child's spouse, parent, parent's spouse, sibling, sibling's spouse, grandparent, a grandchild, or a spouse of a grandparent or grandchild, or "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."
Eligibility for Protected Leave	"90 calendar days from the date of hire, an employee has a right and is entitled to reinstatement" under MN-PFML
Effective Date	January 1, 2026



MN-PFML – Types of Leave

Five Types of Leave Under MN-PFML

1. “Serious Health Condition” Leave, which includes “Pregnancy-related” Leave
2. “Family Care” Leave
3. “Bonding” Leave
4. “Safety” Leave
5. “Qualifying Exigencies” Leave



Types of Leave (cont.)

1. “Serious Health Condition” Leave

- “A physical or mental illness, injury, impairment, condition, or substance use disorder that involves [one of three factors].”
- Definitions similar to federal FMLA, but **not** the same.
- Defined to include incapacity due to “***medical care related to pregnancy***,” which is defined to include “prenatal care or incapacity due to pregnancy or recovery from childbirth, stillbirth, miscarriage, or related health conditions.”



Serious Health Condition

Subd. 39. **Serious health condition.** (a) "Serious health condition" means a physical or mental illness, injury, impairment, condition, or substance use disorder that involves:

(1) inpatient care in a hospital, hospice, or residential medical care facility, including any period of incapacity; or

(2) continuing treatment or supervision by a health care provider which includes any one or more of the following:

(i) a period of incapacity of seven or more days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances beyond the individual's control prevent a follow-up visit from occurring as planned, by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider; or

(B) treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider;

(ii) a period of incapacity due to medical care related to pregnancy;

(iii) a period of incapacity or treatment for a chronic health condition that:

(A) requires periodic visits, defined as at least twice a year, for treatment by a health care provider or under orders of, or on referral by, a health care provider;



Serious Health Condition

(B) continues over an extended period of time, including recurring episodes of a single underlying condition; and

(C) may cause episodic rather than continuing periods of incapacity;

(iv) 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

(v) 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 health care provider, for:

(A) restorative surgery after an accident or other injury; or

(B) 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.

(b) For the purposes of paragraph (a), clauses (1) and (2), treatment by a health care provider means an in-person visit or telemedicine visit with a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider.

(c) For the purposes of paragraph (a), treatment includes but is not limited to examinations to determine if a serious health condition exists and evaluations of the condition.

(d) Absences attributable to incapacity under paragraph (a), clause (2), item (ii) or (iii), qualify for leave under this chapter even if the applicant or the family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than seven consecutive, full calendar days.



Incapacity

Subd. 26. **Incapacity.** "Incapacity" means inability to perform regular work, attend school, or perform regular daily activities due to a serious health condition, treatment therefore, or recovery therefrom.

Independent Contractor

Subd. 27. **Independent contractor.** If there is an existing specific test or definition for independent contractor in Minnesota statute or rule applicable to an occupation or sector as of the date of enactment of this chapter, that test or definition shall apply to that occupation or sector for purposes of this chapter. If there is not an existing test or definition as described, the definition for independent contractor shall be as provided in Minnesota Rules, part 5200.0221.



Types of Leave (cont.)

2. “Family Care” Leave

- Caring for a family member with a serious health condition or caring for a family member who is a covered service member.



Subd. 23. Family member. (a) "Family member" means, with respect to an applicant:

(1) a spouse or domestic partner;

(2) a 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;

(3) a parent or legal guardian of the applicant;

(4) a sibling;

(5) a grandchild;

(6) a grandparent or spouse's grandparent;

(7) a son-in-law or daughter-in-law; and

(8) 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.

(b) For the purposes of this chapter, "grandchild" means a child of the applicant's child.

(c) For the purposes of this chapter, "grandparent" means a parent of the applicant's parent.

(d) For the purposes of this chapter, "parent" means the biological, adoptive, de facto, or foster parent, stepparent, or legal guardian of an applicant or the applicant's spouse, or an individual who stood in loco parentis to an applicant when the applicant was a child.



MN-PFML – Types of Leave (cont.)

3. “Bonding” Leave

- “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.”
- Must end within 12 months of the birth, adoption, or placement of a foster child (unless child remains in hospital)



MN-PFML – Types of Leave (cont.)

4. “Safety” Leave

- Leave because of domestic abuse, sexual assault, or stalking of the employee or employee’s family member.



Safety Leave

Subd. 34. **Safety leave.** "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:

- (1) seek medical attention related to the physical or psychological injury or disability caused by domestic abuse, sexual assault, or stalking;
- (2) obtain services from a victim services organization;
- (3) obtain psychological or other counseling;
- (4) seek relocation due to the domestic abuse, sexual assault, or stalking; or
- (5) seek legal advice or take legal action, including preparing for or participating in any civil or criminal legal proceeding related to, or resulting from, the domestic abuse, sexual assault, or stalking.



Types of Leave (cont.)

5. “Qualifying Exigencies” Leave

- “[A] need arising out of a military member's active duty service or notice of an impending call or order to active duty in the United States armed forces”



Qualifying Exigencies Leave

Subd. 33. **Qualifying exigency.** (a) "Qualifying exigency" means a need arising out of a military member's active duty service or notice of an impending call or order to active duty in the United States armed forces, including providing for the care or other needs of the family member's child or other dependent, making financial or legal arrangements for the family member, attending counseling, attending military events or ceremonies, spending time with the family member during a rest and recuperation leave or following return from deployment, or making arrangements following the death of the military member.

(b) For the purposes of this chapter, a "military member" means a current or former member of the United States armed forces, including a member of the National Guard or reserves, who, except for a deceased military member, is a resident of the state and is a family member of the applicant taking leave related to the qualifying exigency.



MN-PFML – Amount of Leave

- The maximum length of benefits is ***20 weeks per year***.
- Two leave “buckets”:
 - ***12 weeks*** of paid leave for a “serious health condition,” which includes “medical care related to pregnancy,”; and
 - ***12 weeks*** of paid leave for any of the other types of leave (family care, bonding, safety, and qualifying exigencies).
 - But, the benefits max out at 20 weeks per year.



Amount of Leave

Subd. 5. **Maximum length of benefits.** (a) The total number of weeks that an applicant may take benefits in a single benefit year for a serious health condition is the lesser of 12 weeks, or 12 weeks minus the number of weeks within the same benefit year that the applicant received benefits for bonding, safety leave, family care, or qualifying exigency plus eight weeks.

(b) The total number of weeks that an applicant may take benefits in a single benefit year for bonding, safety leave, family care, or qualifying exigency is the lesser of 12 weeks, or 12 weeks minus the number of weeks within the same benefit year that the applicant received benefits for a serious health condition plus eight weeks.



MN-PFML – Eligibility for Benefits

- To receive MN-PFML benefits, an applicant must:
 - (1) Request benefits for a week in the applicant's 52-week "benefit year";
 - (2) Be unable to work due to a "qualifying reason" for at least 7 calendar days;
 - (3) Have earned enough money through covered employment to establish a benefit account (\$3,500 for 2023); and
 - (4) Submit certification supporting request for benefits.



Eligibility for Benefits (cont.)

- Benefits can only be paid for a qualifying event of, at least, 7 calendar days duration.
 - “The days must be consecutive, unless the leave is intermittent.”
- Example
 - EE breaks their leg, and the injury requires 3 days of treatment in a hospital, 2 days recovery at home, and two follow-up visits to a doctor, that would count as a 7-day qualifying event.
- Benefits for bonding are not subject to this requirement.



Eligibility for Benefits (cont.)

- An applicant is ***ineligible*** for benefits for any portion of a week the applicant is receiving:
 - Workers' compensation benefits;
 - Separation pay, severance pay, bonus pay, or any other payments paid by an employer because of, upon, or after separation from employment; or
 - Social security benefits.
- Applicant is ***ineligible*** for benefits or leave in any week the applicant is a "seasonal employee."



Eligibility for Benefits (cont.)

- “An employee **may** use vacation pay, sick pay, paid time off pay, or disability insurance payments, ***in lieu of family or medical leave program benefits*** under this chapter, provided the employee is concurrently eligible.”
- “An employer may offer ***supplemental benefit payments***, as defined in section 268B.01, subdivision 41, to an employee taking leave under this chapter. ***The choice to receive supplemental benefits lies with the employee.***”



Supplemental Benefit Payments

Subd. 41. Supplemental benefit payment. (a) "Supplemental benefit payment" means:

(1) a payment made by an employer to an employee as salary continuation or as paid time off. Such a payment must be in addition to any family or medical leave benefits the employee is receiving under this chapter; and

(2) a payment offered by an employer to an employee who is taking leave under this chapter to supplement the family or medical leave benefits the employee is receiving.

(b) Employers may, but are not required to, designate certain benefits including but not limited to salary continuation, vacation leave, sick leave, or other paid time off as a supplemental benefit payment.

(c) Nothing in this chapter requires an employee to receive supplemental benefit payments.

(d) At no time shall a supplemental benefit payment combined with any leave benefit received under this chapter exceed the regular wage or salary of the applicant.

Subd. 42. Taxable year. "Taxable year" has the meaning given in section 290.01, subdivision



Substitution of Paid Leave

Sec. 38. [268B.27] RELATIONSHIP TO OTHER LEAVE; CONSTRUCTION.

Subdivision 1. Concurrent leave. An employer may require leave taken under this chapter to run concurrently with leave taken for the same purpose under section 181.941 or the Family and Medical Leave Act, United States Code, title 29, sections 2601 to 2654, as amended.

Subd. 2. Construction. Nothing in this chapter shall be construed to:

- (1) allow an employer to compel an employee to exhaust accumulated sick, vacation, or personal time before or while taking leave under this chapter;
- (2) prohibit an employer from providing additional benefits, including but not limited to covering the portion of earnings not provided during periods of leave covered under this chapter including through a supplemental benefit payment, as defined under section 268B.01, subdivision 41;
- (3) limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to leave benefits and related procedures and employee protections that meet or exceed, and do not otherwise conflict with, the minimum standards and requirements in this chapter; or
- (4) be applied so as to create any power or duty in conflict with federal law.



Eligibility for Benefits (cont.)

- Application process is modeled after unemployment statute.
- A determination or amended determination is final unless an applicant files an appeal within 60 days.
- Applicants are required to promptly notify DEED of any changes that may affect their eligibility for benefits.



MN-PFML – Amount of Benefits

- Benefits are paid weekly.
- There is a formula for calculating weekly benefit amount under the program.
- Weekly benefits are capped at a maximum of the state's average weekly wage (\$1,287 for 2023).



Amount of Benefits

- An applicant's weekly wage is calculated by finding the quarter, out of the prior four completed quarters, in which the applicant earned the most wages and dividing that wage amount by 13.
- An applicant is entitled to a weekly benefit amount equal to:
 - 1) 90 percent of their weekly wages that do not exceed 50 percent of the state's average weekly wage (\$1,287 for 2023, so 90 percent of \$643.50 is \$579.15);
 - 2) plus benefits equal to 66 percent of weekly wages above 50 percent but below 100 percent of the state's average weekly wage (66 percent of \$643.50 for 2023, so \$424.71);
 - 3) plus 55 percent of any weekly wages that exceed 100 percent of the state's average weekly wage (wages over \$1,287 for 2023).



Amount of Benefits (cont.)

As an example, for 2023 an applicant earning \$40,000 per year (evenly divided into \$10,000 each quarter) has an average weekly wage of \$769.23 (\$10,000 divided by 13). The state's average weekly wage at the time of application is \$1,287 (with 50 percent equal to \$643.50). So, under the formula, the applicant would be entitled to \$662.13 (90 percent of \$643.50, so \$579.15) + (66 percent of \$125.73, so \$82.98).



MN-PFML – Right to Leave

- “Right to Leave”
 - 90 days after date of hire, an employee has a right to leave for any day, or portion of a day, in which the employee would be eligible for benefits under the MN-PFML law.
- This means that employers need to be familiar with each type of leave under the MN-PFML.
- In effect, MN-PFLA effectively expands FMLA-type leave to all employers in Minnesota.



Right to Leave

(h) Ninety calendar days from the date of hire, an employee has a right and is entitled to reinstatement as provided under this subdivision for any day for which:

(1) the employee has been deemed eligible for benefits under this chapter; or

(2) the employee meets the eligibility criteria under section 268B.06, subdivision 1, clause (2) or (3), and the employee has applied for benefits in good faith under this chapter. For the purposes of this paragraph, good faith is defined as anything that is not knowingly false or in reckless disregard of the truth.



Right to Leave (cont.)

Five Types of Leave Under MN-PFML

1. “Serious Health Condition” Leave, which includes “Pregnancy” Leave
2. “Family Care” Leave
3. “Bonding” Leave
4. “Safety” Leave
5. “Qualifying Exigencies” Leave



Right to Leave (cont.)

- Notice by Employee
 - 30 days' notice if leave is "foreseeable."
 - "As soon as practicable" if leave is not "foreseeable."



Notice to Employer

(c) An employee shall provide at least oral, telephone, or text message notice sufficient to make the employer aware that the employee needs leave allowed under this chapter and the anticipated timing and duration of the leave.

(e) An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, including the employer's attendance or call-out policies and procedures, absent unusual circumstances or other circumstances caused by the reason for the employee's need for leave. An employee may be required by an employer's or covered business entity's policy to contact a specific individual or designated phone number to report this information. Leave under this chapter must not be delayed or denied where an employer's usual and customary notice or procedural requirements require notice to be given sooner than set forth in this subdivision.



Intermittent Leave

- Defined as “leave taken in separate blocks of time due to a single, seven-day qualifying event.”
- Serious Health Condition Leave
 - “May be taken intermittently if such leave is ***reasonable and appropriate*** to the needs of the individual with the serious health condition.”
- All Other Leaves
 - “***For all other leaves under this chapter, leave may be taken intermittently.***”



Intermittent Leave (cont.)

- Certification
 - “For a leave taken on an intermittent basis, based on a serious health condition of an applicant or applicant's family member, the certification . . . must include an explanation of how such leave would be medically beneficial to the individual with the serious health condition.”
- Intermittent leave may be limited to **480 hours** per 12 months.
- Employer may run intermittent leave concurrently with intermittent leave under the FMLA.



Intermittent Leave

(c) An employee requesting leave taken intermittently shall provide the employer with a schedule of needed workdays off as soon as practicable and must make a reasonable effort to schedule the intermittent leave so as not to disrupt unduly the operations of the employer. If this cannot be done to the satisfaction of both employer and employee, the employer cannot require the employee to change their leave schedule in order to accommodate the employer.

(d) Notwithstanding the allowance for intermittent leave under this subdivision, an employer shall not be required under this chapter to provide, but may elect to provide, more than 480 hours of intermittent leave in any 12-month period. If an employer limits hours of intermittent leave pursuant to this paragraph, an employee is entitled to take their remaining leave continuously, subject to the total amount of leave available under section 268B.04, subdivision 5. An employer may run intermittent leave available under the Family and Medical Leave Act, United States Code, title 29, sections 2601 to 2654, as amended, concurrent with an employee's entitlement to intermittent leave under this chapter.



Right to Leave (cont.)

- Health Insurance
 - Employer is required to continue health insurance coverage.
 - Employee can be required to continue to pay employee's share of cost.

Subd. 5. **Continued insurance.** (a) During any leave for which an employee is entitled to benefits or leave under this chapter, 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 was not on leave, provided, however, that the employee must continue to pay any employee share of the cost of such benefits.



MN-PFML – Reinstatement

- Reinstatement
 - An employee has the right to reinstatement following the leave to a position with equivalent seniority, status, benefits, pay, duties, responsibilities, and other terms and conditions.
 - Also entitled to “any unconditional pay increases which may have occurred during the leave period, such as cost of living increases.”



Reinstatement

(b)(1) An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, prerequisites, and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(2) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, or similar condition, as a result of the leave, the employee must be given a reasonable opportunity to fulfill those conditions upon return from leave.

(c)(1) An employee is entitled to any unconditional pay increases which may have occurred during the leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify for leave under this chapter. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime, and corresponding overtime pay, each week an employee is ordinarily entitled to such a position on return from leave under this chapter.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or nondiscretionary, made to employees consistent with clause (1). If a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold, or perfect attendance, and the employee has not met the goal due to leave under this chapter, the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify for leave under this chapter.



MN-PFML – Employment Protections

- Protections against discrimination, retaliation, and interference.
- Damages.
 - Penalties from \$1,000 to \$10k per violation.
 - Employees can recover double damages plus attorneys' fees.
- Class actions are expressly authorized by the proposed statute.



MN-PFML – Premiums

- MN-PFML would be funded via **.7% *payroll tax***
 - Up to the FICA/Social Security wage base (\$160,200 for 2023)
- An employer to deduct up to **50%** of the premiums paid by the employer from employee wages.
- If the employer has a “private plan,” it can avoid the tax for one or both programs:
 - .4% for medical benefit program only
 - .3% for family benefit program only



Premium

Subd. 6. Annual employer premium rates. The employer premium rates beginning January 1, 2026, shall be as follows:

(1) for an employer participating in both family and medical benefit programs, 0.7 percent;

(2) for an employer participating in only the medical benefit program and with an approved private plan for the family benefit program, 0.4 percent; and

(3) for an employer participating in only the family benefit program and with an approved private plan for the medical benefit program, 0.3 percent.



Charge to Employees

Subd. 3. **Employee charge back.** Notwithstanding section 177.24, subdivision 4, or 181.06, subdivision 1, employers must pay a minimum of 50 percent of the annual premiums paid under this section. Employees, through a deduction in their wages to the employer, must pay the remaining portion, if any, of the premium not paid by the employer. Such deductions for any given employee must be in equal proportion to the premiums paid based on the wages of that employee. Deductions under this section must not cause an employee's wage, after the deduction, to fall below the rate required to be paid to the worker by law, including any applicable statute, regulation, rule, ordinance, government resolution or policy, or other legal authority, whichever rate of pay is greater.



Premiums (cont.)

- There is a formula for adjusting the payroll tax each year by the DEED commissioner.
- Cap on Annual Premium
 - “In no year shall the annual premium rate exceed 1.2 percent of taxable wages paid to each employee.”



MN-PFML – Private Plans

- MN-PFML would allow employers to substitute a “private plan” that has been approved by the commissioner of DEED.
 - Can be for either (or both) the medical benefit program and the family benefit program.
 - Must pay a fee each time the plan is approved and/or amended.



Private Plans (cont.)

- For the medical benefit program, private plan must meet the rights, protections, and benefits provided under the MN-PFML.
- For the family benefit program, private plan must meet the rights, protections, and benefits provided under the MN-PFML.
- Private insurance products may be used in the creation of a private plan.



MN-PFML – Relationship to Other Leave

- MN-PFML allows employer to run paid leave concurrently with federal FMLA.
 - But, there are many instances where leave will qualify for MN-PFML, but will not qualify for FMLA.
 - E.g., New employee takes MN-PFML for the birth of a child, is the employee entitled to another 12 weeks of FMLA after one year of service?
- Substitution of paid leave is affected by MN-PFML.



Substitution of Paid Leave

Sec. 38. [268B.27] RELATIONSHIP TO OTHER LEAVE;
CONSTRUCTION.

Subdivision 1. **Concurrent leave.** An employer may require leave taken under this chapter to run concurrently with leave taken for the same purpose under section 181.941 or the Family and Medical Leave Act, United States Code, title 29, sections 2601 to 2654, as amended.



MN-PFML – Notice

- MN-PFML would require employers to post notice, prepared by the commissioner of DEED, regarding rights and benefits under MN-PFML.
- Also would require employers to provide certain written notices about the MN-PFML to individual employees and independent contractors.

Nursing Mothers, Pregnancy, Parenting Leave and Miscellaneous Statutes





Sara Gullickson McGrane

Minnesota State Bar Association

Certified ▲ Specialist

Labor and Employment Law

(612) 373-8511

smcgrane@felhaber.com



Pregnant and Nursing Mothers

- Minn. Stat. § 181.939 included protections for nursing mothers and pregnancy accommodations
 - Both protections applied to any “employer” with **15 or more** employees.
- Nursing Mothers Protections
 - Limited to the 12 months following the birth of the child.
 - Not required if the break time would “unduly disrupt” the operations of the employer.



Pregnant and Nursing Mothers (cont.)

- Pregnancy Accommodations
 - Originally passed in 2014 as part of WESA
 - Required employers to make certain accommodations to pregnant employees without requesting a doctor's note or claiming an undue hardship:
 - (1) more frequent restroom, food, and water breaks;
 - (2) seating; and
 - (3) limits on lifting over 20 pounds.



2023 Amendments (eff. 7/1/23)

- Effective July 1, 2023, there will be an expanded definition of “employer” in Minn. Stat. § 181.939.
 - Both protections now apply to any “employer” with **one or more** employees.
- Nursing Mothers Protections (2023 Amendments)
 - Removed limitation of 12 months following the birth of the child.
 - Removed limitation on breaks if they would “unduly disrupt the operations of the employer.”



Nursing Mothers

Subdivision 1. **Nursing mothers and lactating employees.**

(a) An employer must provide reasonable break times each day to an employee who needs to express breast milk for her infant child during the twelve months following the birth of the child. The break times must, if possible, may run concurrently with any break times already provided to the employee. ~~An employer is not required to provide break times under this section if to do so would unduly disrupt the operations of the employer.~~ An employer shall not reduce an employee's compensation for time used for the purpose of expressing milk.

(b) The employer must make reasonable efforts to provide a clean, private, and secure room or other location, in close proximity to the work area, other than a bathroom or a toilet stall, that is shielded from view and free from intrusion from coworkers and the public and that includes access to an electrical outlet, where the employee can express milk in privacy. The employer would be held harmless if reasonable effort has been made.



2023 Amendments (cont.)

- Pregnancy Accommodations (2023 Amendments)
 - Adds “more frequent or longer restroom, food, and water breaks”
 - Adds additional examples of reasonable accommodations: “temporary leave of absence, modification in work schedule or job assignments, seating, more frequent ~~restroom breaks~~ or longer break periods, and limits to heavy lifting.”



2023 Amendments (cont.)

- New Notice Requirement (2023 Amendments)
 - Effective July 1, 2023, employers are required to provide notice to employees about their rights under Minn. Stat. § 181.939 “***at the time of hire and when an employee makes an inquiry about or requests parental leave***”
 - MN-DOLI is required to develop a notice
- Reinstatement protections in MPLA now apply to Minn. Stat. § 181.939.
- MN-DOLI will also develop a workplace poster for the protections in Minn. Stat. § 181.939.



New Notice Requirement

Subd. 3. Notice to employees.

An employer shall inform employees of their rights under this section at the time of hire and when an employee makes an inquiry about or requests parental leave. Information must be provided in English and the primary language of the employee as identified by the employee. An employer that provides an employee handbook to its employees must include in the handbook notice of employee rights and remedies under this section. The commissioner shall make available to employers the text to be included in the notice required by this section in English and the five most common languages spoken in Minnesota.



Minnesota Parental Leave Act

- Minnesota Parental Leave Act, Minn. Stat. §§ 181.940 to 181.944, provides up to 12 weeks of unpaid leave to qualified employees.
 - Applies to “employers” with 21 or more employees.
 - To be qualified, employees must be employed for 1 year and work at least half time.
- MPLA requires continued insurance and reinstatement at the end of leave.
- MPLA also covers “school conference and activities leave” (§ 181.9412) and expanded uses of “sick leave benefits” (§ 181.9413).



MPLA Amendments (eff. 7/1/23)

- Effective July 1, 2023, the MPLA applies to any employer with “**one or more employees.**”
- An employee is covered by the MPLA *immediately upon hire.*
 - There is no longer any requirement to work for an employer for at least one year for at least half time.
 - Definition of “employee” still does not include “independent contractors.”



Pay History Protections (eff. 1/1/24)

- Effective January 1, 2024, Minnesota will become the 29th state to prohibit employers from inquiring into an applicant's salary history.
- The new legislation makes clear that applicants are not prevented from “voluntarily” disclosing their pay history “for the purposes of negotiating wages, salary, benefits, or other compensation.”
- If the applicant voluntarily discloses their pay history, then the employer may consider or act on that “voluntarily disclosed salary history information to support a wage or salary higher than initially offered by the employer[.]”



Pay History (cont.)

- Employers are not prohibited from providing applicants with “information about wages, benefits, compensation, or salary offered in relation to a position” or from “inquiring about or otherwise engaging in discussions with an applicant about the applicant’s expectations or requests with respect to wages, salary, benefits, or other compensation.”



Pay History

Sec. 56. Minnesota Statutes 2022, section 363A.08, is amended by adding a subdivision to read:

Subd. 8. **Inquiries into pay history prohibited.** (a) "Pay history" as used in this subdivision means any prior or current wage, salary, earnings, benefits, or any other compensation about an applicant for employment.

(b) An employer, employment agency, or labor organization 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. The general prohibition against inquiring into the pay history of an applicant does not apply if the job applicant's pay history is a matter of public record under federal or state law, unless the employer, employment agency, or labor organization sought access to those public records with the intent of obtaining pay history of the applicant for the purpose of determining wages, salary, earnings, benefits, or other compensation for that applicant.



Pay History

(c) Nothing in this subdivision shall prevent an applicant for employment from voluntarily and without asking, encouraging, or prompting disclosing pay history for the purposes of negotiating wages, salary, benefits, or other compensation. If an applicant for employment voluntarily and without asking, encouraging, or prompting discloses pay history to a prospective employer, employment agency, or labor organization, nothing in this subdivision shall prohibit that employer, employment agency, or labor organization from considering or acting on that voluntarily disclosed salary history information to support a wage or salary higher than initially offered by the employer, employment agency, or labor organization.



Pay History

(d) Nothing in this subdivision limits, prohibits, or prevents a person from bringing a charge, grievance, or any other cause of action alleging wage discrimination because of race, color, creed, religion, national origin, sex, gender identity, marital status, status with regard to public assistance, familial status, membership or activity in a local commission, disability, sexual orientation, or age, as otherwise provided in this chapter.

(e) Nothing in this subdivision shall be construed to prevent an employer from:

(1) providing information about the wages, benefits, compensation, or salary offered in relation to a position; or

(2) inquiring about or otherwise engaging in discussions with an applicant about the applicant's expectations or requests with respect to wages, salary, benefits, or other compensation.

“Keeping Nurses at the Bedside Act”

May 22, 2023 10:10 PM

Last-minute compromise narrows scope of nurse staffing bill that goes to governor

By Steve Abrams



After years of demanding action from the Legislature, nurses were on the cusp of finally gaining a voice in hospital staffing levels.

The “Keeping Nurses at the Bedside Act”, [approved by a conference committee Saturday](#), had aimed to address the working conditions of direct care nurses in hospitals and the related staffing shortages seen statewide.

But that deal fell through on the last day of session.



“Keeping Nurses at the Bedside Act”

- As passed, the bill only targets the rising violence seen against health care workers by requiring incident response action plans and laying out specific criteria for their implementation.
- This would apply to all hospitals in the state.
- The bill expands the health professional education loan forgiveness program to include direct care nurses at nonprofit hospitals.



Mandatory Ergonomics Program

- Effective January 1, 2024
- Applies to any “health care facility”

Sec. 21. [182.677] **ERGONOMICS.**

Subdivision 1. **Definitions.** (a) For purposes of this section, the definitions in this subdivision apply unless otherwise specified.

(b) "Health care facility" means a hospital with a North American Industrial Classification system code of 622110, 622210, or 622310; an outpatient surgical center with a North American Industrial Classification system code of 621493; and a nursing home with a North American Industrial Classification system code of 623110.



Ergonomics Program

Subd. 2. Ergonomics program required. (a) Every licensed health care facility, warehouse distribution center, or meatpacking site in the state shall create and implement an effective written ergonomics program establishing the employer's plan to minimize the risk of its employees developing or aggravating musculoskeletal disorders. The ergonomics program shall focus on eliminating the risk. To the extent risk exists, the ergonomics program must include feasible administrative or engineering controls to reduce the risk.

(b) The program shall include:

(1) an assessment to identify and reduce musculoskeletal disorder risk factors in the facility;



Ergonomics Program

(2) an initial and ongoing training of employees on ergonomics and its benefits, including the importance of reporting early symptoms of musculoskeletal disorders;

(3) a procedure to ensure early reporting of musculoskeletal disorders to prevent or reduce the progression of symptoms, the development of serious injuries, and lost-time claims;

(4) a process for employees to provide possible solutions that may be implemented to reduce, control, or eliminate workplace musculoskeletal disorders;

(5) procedures to ensure that physical plant modifications and major construction projects are consistent with program goals; and

(6) annual evaluations of the ergonomics program and whenever a change to the work process occurs.



Ergonomics Program

Subd. 4. **Employee training.** (a) An employer subject to this section must train all employees on the following:

- (1) the name of each individual on the employer's safety committee;
- (2) the facility's ergonomic program;
- (3) the early signs and symptoms of musculoskeletal injuries and the procedures for reporting them;
- (4) the procedures for reporting injuries and other hazards;
- (5) any administrative or engineering controls related to ergonomic hazards that are in place or will be implemented for their positions; and
- (6) the requirements of subdivision 9.

(b) New employees must be trained according to paragraph (a) prior to starting work. Current employees must receive initial training and ongoing annual training in accordance with the employer's ergonomics program. The employer must provide the training during working hours and compensate the employee for attending the training at the employee's standard rate of pay. All training must be in a language and with vocabulary that the employee can understand.

(c) Updates to the information conveyed in the training shall be communicated to employees as soon as practicable.



Health Care Entity Transactions – 2023 Minn. Laws ch. 66

- Establishes notice and review requirements for health care entities seeking to enter into a transaction.
- Authorizes the attorney general to seek relief if a health care entity or transaction violates the notice and review requirements or is contrary to the public interest.
- Extends the moratorium on conversion transactions by nonprofit service plan corporations and nonprofit health maintenance organizations to July 1, 2026.
- Limits the ownership or control of University of Minnesota health care facilities.



Coverage

Subd. 2. Notice required. (a) This subdivision applies to all transactions where:

(1) the health care entity involved in the transaction has average revenue of at least \$80,000,000 per year; or

(2) the transaction will result in an entity projected to have average revenue of at least \$80,000,000 per year once the entity is operating at full capacity.

Sec. 3. [145D.02] DATA REPORTING OF CERTAIN HEALTH CARE TRANSACTIONS.

(a) This section applies to all transactions where:

(1) the health care entity involved in the transaction has average revenue between \$10,000,000 and \$80,000,000 per year; or

(2) the transaction will result in an entity projected to have average revenue between \$10,000,000 per year and \$80,000,000 per year once the entity is operating at full capacity.



Nursing Home Workforce Standards Board

- The Minnesota Nursing Home Workforce Standards Board Act, Minn. Stat. §§ 181.211 to 181.217, creates the “Nursing Home Workforce Standards Board.”
- The board will “adopt rules establishing minimum nursing home employment standards that are reasonably necessary and appropriate to protect the health and welfare of nursing home workers.”
- This includes establishing initial standards for wages and working hours no later than August 1, 2024.



NHWS Board (cont.)

- The board will be comprised of nine members.
 - HHS and MN-DOLI would each designate one member.
 - Employers and employees would be given three seats each to represent their interests as well.
- The governor would have to make these initial appointments no later than August 1, 2023.
- A simple majority vote would be needed for the board to take any binding action.



NHWS Board (cont.)

- Prior to adopting minimum employment standards, the board would have to investigate industrywide market conditions to ensure standards meet or exceed existing conditions for a majority of workers.
- These standards would have to be reviewed at least once every two years.



Other Legislative Changes

- Warehouse Distribution Worker Safety
 - Establishes new worker safety requirements for warehouse distribution centers and require MN-DOLI to open investigations into warehouse distribution centers when injury rates warrant such scrutiny.
 - The law requires communication to employees about each quota they are required to meet, how the work standards for the quota will be measured and any employment consequence for not meeting the quota.
 - The law also allows employees to access work speed data and prohibits retaliation for seeking the data.



Other Legislative Changes (cont.)

- Construction Worker Wage Protection Act
 - Establishes that a contractor entering a “construction contract” assumes liability for unpaid wages, fringe benefits and liquidated damages owed to a claimant by a subcontractor of any tier.

Recreational Marijuana (eff. 7/1/23)





Penelope J. Phillips

Minnesota State Bar Association

Certified ▲ Specialist

Labor and Employment Law

(612) 373-8428

pphillips@felhaber.com



The New Cannabis Law

- Any person aged 21 or older may:
 - Possess up to 2 ounces of cannabis flower in a public place or 2 pounds in a person's residence;
 - Possess or transport no more than 8 grams of adult-use cannabis concentrate;
 - Possess or transport edible products infused with up to 800 milligrams of THC;



The New Cannabis Law (cont.)

- Give away cannabis flower and cannabinoid products in an amount that is legal for a person to possess in public;
- Use cannabis flower and cannabinoid products in private areas; and
- Cultivate up to eight cannabis plants, of which four or fewer may be mature, flowering plants.



The New Cannabis Law (cont.)

- The new law makes other significant changes to other Minnesota laws including:
 - Creating more than a dozen types of licenses for growing, selling, transporting and testing cannabis;
 - Creating an Office of Cannabis Management to regulate cannabis and take enforcement actions;
 - Taxing cannabis retail sales at 8%, in addition to any already imposed local or state taxes;



The New Cannabis Law (cont.)

- Creating and funding programs to combat cannabis abuse;
- Creating grants to assist individuals entering the legal cannabis market;
- Eliminating criminal penalties for cannabis possession; and
- Expunging the criminal records of people previously convicted of low-level cannabis offenses.



Amendments to the Lawful Consumable Products Statute – Minn. Stat. 181.938

- **Prohibited practice.** (a) 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.



Amendments to the Lawful Consumable Products Statute (cont.)

- 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, and tobacco, cannabis flower, as defined in section 342.01, subdivision 16, cannabis products, as defined in section 342.01, subdivision 20, lower-potency hemp edibles as defined in section 342.01, subdivision 50, and hemp-derived consumer products as defined in section 342.01, subdivision 37.



Amendments to the Lawful Consumable Products Statute

- (b) Cannabis flower, cannabis products, lower-potency hemp edibles, and hemp-derived consumer products are lawful consumable products for the purpose of Minnesota law, **regardless of whether federal or other state law considers cannabis use**, possession, impairment, sale, or transfer to be unlawful.



Amendments to the Lawful Consumable Products Statute

- Nothing in this section shall be construed to limit an employer's ability to discipline or discharge an employee for cannabis flower, cannabis product, lower-potency hemp edible, or hemp-derived consumer product
 - Use, possession, impairment, sale, or transfer **during working hours, on work premises,**
 - or **while operating** an employer's vehicle, machinery, or equipment,
 - or if a failure to do so would violate federal or state law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations.



Additional Limitations for Cannabis

- Employers must include a provision in their policy that prohibits the use of, possession of, and impairment by cannabis on company premises and during work hours.



Drug, Alcohol and Cannabis-Free Workplace Policy

- While on Company property, the Company is not required to accommodate, nor may employees use, possess, distribute, sell, offer, purchase, transfer, be under the influence of or impaired by alcohol, drugs, intoxicating cannabinoids, cannabis products, lower-potency hemp edibles, or hemp-derived consumer products, or any other substances which have an intoxicating effect or impair the ability of employees to work safely and effectively.
- This policy prohibits reporting for work and working anywhere on behalf of the Company, using a Company vehicle, machine, or equipment, while under the influence or impaired by alcohol, drugs, intoxicating cannabinoids, cannabis products, lower-potency hemp edibles, or hemp-derived consumer products or any substances which have an intoxicating effect or impair the ability of employees to work safely and effectively.



Drug, Alcohol And Cannabis-free Workplace Policy

- This policy applies to all official or unofficial break and meal periods, and all other times during the working day when an employee has reported for work, including paid or unpaid meal breaks. The only exception to this policy is the responsible use of alcohol at official Company sponsored social or business events at which alcoholic beverages are served.
- Employees must report any violations or suspected violations of this policy to Company management.
- Violation of this policy may result in discipline up to and including discharge.



The New Cannabis Law

- The bill also includes significant changes to the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA).
- Specifically, the bill removes “marijuana,” “THC,” “cannabis products,” and “hemp-derived consumer products” from the definition of “drug” under DATWA.
- Instead, it creates a new type of test – called “cannabis testing” – for when an employer tests for “the presence or absence of cannabis flower, . . . cannabis products, . . . lower-potency hemp edibles, . . . hemp-derived consumer products, . . . or cannabis metabolites.”



DATWA Basics – Who is Covered

- Minn. Stat. §§ 181.950-.957:
 - The law applies to all employers.
 - It covers all employees, including independent contractors.
 - Job applicants are also protected.
 - A job applicant is defined as any person who has applied for work with an employer and anyone who has a job offer contingent upon passing a drug or alcohol test.



Employer Requirements:

- Testing can only be done under an employer's **written policy**, which must include the following:
 - Who is subject to testing under the policy and when testing is required;
 - The disciplinary consequences of a positive test result;
 - The employee's right to refuse testing and the consequences of refusal; and
 - The employee's right to explain a positive result and to take a re-test.



Employer Requirements: (cont.)

- Prior to testing, the employer must provide the written testing policy and a form to acknowledge receipt of the policy to the affected employee.
- Notice of the policy must be posted in an “appropriate and conspicuous” location. The notice must state that employees can inspect the policy during regular work hours.



Employer Requirements (Testing)

- An employer must use an accredited or licensed testing laboratory to conduct the testing.
- The test results, with few exceptions, are confidential information which the employer may not disclose without the employee's written consent.



Employment Protections

- Types of testing under Minnesota law:
 - Applicant testing
 - Reasonable Suspicion testing
 - Treatment Program testing
 - Random testing for safety sensitive positions



DATWA: Employer's Limitations

- Employees who fail a drug or alcohol test are entitled to significant protections **even after** testing positive.
- The employer must give written notice of a test result to an employee within three workdays of the employer's receipt of the result.
- After an initial positive screen, the employee must be notified of the right to explain the result, and to disclose any medications taken that could affect the reliability of the result.



Confirmatory Tests

- The laboratory must conduct a confirmatory test on all samples that produce an initial positive test result.
- An employer may not discipline an employee based on a positive result that has not been confirmed by the second test.
- Similarly, an employer may not withdraw an offer of employment to an applicant based on a positive result that has not been confirmed by a second test.



Confirmatory Tests (cont.)

- Upon a positive confirmation test, the employee or applicant may request a retest at their own expense.
- If an initial test result is positive and the confirmatory test has not yet been done, an employer may suspend an employee pending the results only if the employer reasonably believes the suspension is necessary to protect the employee, coworkers, or the public.
- If the confirmatory test or a retest is negative, the employee must be reinstated with back pay.



Confirmatory Tests (cont.)

- After a confirmatory test result comes back positive, an employer may not discharge an employee unless the employer has first offered the employee the opportunity to participate, at the employee's own expense or under the employee's benefit plan, in a drug or alcohol treatment or counseling program, and the employee refuses to participate in the program or fails to complete it successfully.



The New Cannabis Law-DATWA

- The law creates a new type of testing, called “cannabis testing,” in addition to “drug and alcohol testing.”
- The new law places restrictions on “cannabis testing” by employers, unless such testing was required by “state or federal law.”
- The new law creates an “exception” to “cannabis testing” for seven classes of employees.
 - For employees in these classifications, cannabis is considered a “drug” and subject to “drug and alcohol testing” under DATWA.



HF100 – DATWA Amendments

- Minnesota Statutes 2022, section 181.950, subdivision 13, is amended to read:
 - Subd. 13. **Safety-sensitive position.** "Safety-sensitive position" means a job, including any supervisory or management position, in which an impairment caused by drug, alcohol, or cannabis usage would threaten the health or safety of any person.



HF100 – DATWA Amendments (cont.)

- Minnesota Statutes 2022, section 181.951, is amended by adding a subdivision to read:
 - Subd. 9. **Cannabis testing exceptions.** For the following positions, cannabis and its metabolites are considered a drug and subject to the drug and alcohol provisions in sections 181.950 to 181.957;
 - (1) a safety sensitive position, as defined in section 181.950, subdivision 13;
 - (2) a peace officer position, as defined in section 626.84, subdivision 1;
 - (3) a firefighter position, as defined in section 299N.01, subdivision 3;



HF100 – DATWA Amendments (cont.)

- (4) a position requiring face-to-face care, training, education, supervision, counseling, consultation, or medical assistance to:
 - (i) children;
 - (ii) vulnerable adults, as defined in section 626.5572, subdivision 21; or
 - (iii) patients who receive health care services from a provider for the treatment, examination, or emergency care of a medical, psychiatric, or mental condition;



HF100 – DATWA Amendments (cont.)

- (5) 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;
- (6) a position of employment funded by a federal grant; or
- (7) any other position for which state or federal law requires testing of a job applicant or an employee for cannabis.



HF100 – DATWA Amendments (cont.)

- Subd. 8. Limitations on cannabis testing.
- (a) An employer must not request or require a job applicant to undergo cannabis testing **solely for the purpose of determining the presence or absence of cannabis as a condition of employment unless otherwise required by state or federal law.**
- (b) 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.**



HF100 – DATWA Amendments (cont.)

- (c) An employer must not request or require an employee or job applicant to undergo cannabis testing on **an arbitrary or capricious basis**.
- (d) Cannabis testing authorized under paragraph (d) must comply with the safeguards for testing employees provided in sections 181.953 and 181.954.



HF100 – DATWA Amendments (cont.)

- **Cannabis policy.**
- (a) Unless otherwise provided by state or federal law, an employer is not required to permit or accommodate cannabis flower, cannabis product, lower-potency hemp edible, or hemp-derived consumer product use, possession, impairment, sale, or transfer while an employee is working or while an employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment.
- (b) An employer may **only** enact and enforce written work rules prohibiting cannabis flower, cannabis product, lower-potency hemp edible, and hemp-derived consumer product use, possession, impairment, sale, or transfer while an employee, is working or while an employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment in a written policy that contains the minimum information required by this section.



HF100 – DATWA Amendments (cont.)

- Subd. 10a. **Additional limitations for cannabis.** An employer **may** discipline, discharge, or take other adverse personnel action against an employee for cannabis flower, cannabis product, lower-potency hemp edible, or hemp-derived consumer product 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:
 - (1) if, as the result of consuming cannabis flower, a cannabis product, a lower-potency hemp edible, or a hemp-derived consumer product, **the employee does not possess that clearness of intellect and control of self that the employee otherwise would have;**
 - (2) if cannabis testing verifies the presence of cannabis flower, a cannabis product, a lower-potency hemp edible, or a hemp-derived consumer product following a confirmatory test;



HF100 – DATWA AMENDMENTS (CONT.)

- (3) as provided in the employer's written work rules for cannabis flower, cannabis products, lower-potency hemp edibles, or hemp-derived consumer products and cannabis testing, **provided that the rules are in writing and in a written policy that contains the minimum information required by section 181.952;** or
- (4) as otherwise authorized or required under state or federal law or regulations, or if a failure to do so would cause an employer to lose a monetary or licensing-related benefit under federal law or regulations.



Summary of Key Changes

- The bill includes important limitations on “cannabis testing.”
 - “An employer must not request or require a job applicant to undergo cannabis testing **solely for the purpose** of determining the presence or absence of cannabis as a condition of employment unless otherwise required by state or federal law.”
 - “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.**”
 - “An employer must not request or require an employee or job applicant to undergo cannabis testing on an arbitrary or capricious basis.”



Update Prohibited Use Policies

- Address Cannabis in all policies.
- Ensure that employees are prohibited from using all forms of Cannabis at work or during work hours, possessing Cannabis/Marijuana at work or during work hours, or being **impaired** (not under the influence of) by Cannabis while at work.
- Address “edible cannabinoid products” and “intoxicating cannabinoids.”
- Make sure your policy covers the use of intoxicating **lawful** cannabinoids permitted by the new Minnesota statute.



Don't forget Other State Law Protections re: Applicant Testing

- California
- New York
- New Jersey
- Nevada



Employment Challenge: What is Impairment?

- What constitutes “impairment” of marijuana may be hard to determine.
- The National Institute on Drug Abuse has noted that the “noticeable effects of smoked marijuana [i.e., the feeling of being ‘high’] generally last from 1 to 3 hours,” however, detectable amounts of THC may remain in the body for days or even weeks after use.



Employment Challenge: What is Impairment?

- Minnesota's law has no definition of impairment other than the right of employers to act if, as the result of consuming cannabis flower, a cannabis product, a lower-potency hemp edible, or a hemp-derived consumer product, **the employee does not possess that clearness of intellect and control of self that the employee otherwise would have.**



Employment Challenge: What is Impairment?

- Unlike alcohol, is very difficult to identify whether an individual who tests positive for marijuana is “impaired.”
- Marijuana is stored in fat cells and can often remain in the body (and lead to a positive test) for several weeks.
- Blood and saliva tests are not reliable indicators of impairment because cannabinoids remain in the body for up to 30 days, but impairment may only last a few hours.



Critical Issue: Impairment

- Even when testing accurately measures THC, there is still a lack of scientific agreement, and legal definition, of what levels constitute impairment.
- Colorado, Washington, and Nevada have defined the legal limit for driving under the influence of THC.
 - Colorado and Washington: 5 nanograms of active THC in the blood.
 - Nevada: 2 nanograms of THC in the blood.



Critical Issue: Impairment

➤ **Best Practices:**

- Create clear policies and practices for identifying impairment.
- Document everything used to support reasonable suspicion that an employee is/was impaired.
- The same criteria used to establish that an employer has reasonable cause to require employees to submit to a drug/alcohol test can be used to determine that an employee is impaired.

Non-Compete Ban





Ryan A. Olson

(612) 373-8514

rolson@felhaber.com



Scott D. Blake

(612) 373-8538

sblake@felhaber.com



Non-Compete Ban – Minn. Stat. § 181.988 (July 1, 2023)

- “Any covenant not to compete contained in a contract or agreement is ***void and unenforceable***” unless agreed upon (a) “during the sale of a business” or (b) “in anticipation of the dissolution of a business.”
- A “covenant not to compete” means:
“[A]n agreement between an employee and employer that restricts the employee, after termination of the employment, from performing: (1) work for another employer for a specified period of time; (2) work in a specified geographical area; or (3) work for another employer in a capacity that is similar to the employee’s work for the employer that is party to the agreement.”



Non-Compete Ban (cont.)

- A “covenant not to compete” does not include:
 - Non-disclosure agreements or other agreements designed to protect trade secrets or confidential information
 - Non-solicitation agreements or agreements restricting the ability to use client/contact lists or solicit customers of the employer
- An “employee” means “any individual who performs services for an employer, ***including independent contractors***” *even if the individual has formed an entity.*



Non-Compete Ban (cont.)

- Scope of the Exceptions:
 - Sale of a business
 - “The person selling the business and the partners, members, or shareholders, and the buyer of the business may agree on a *temporary* and *geographically* restricted covenant not to compete that will prohibit the seller of the business from carrying on a similar business within a *reasonable geographic area* and *for a reasonable length of time*”
 - Dissolution of a business
 - “The partners, members, or shareholders, upon or in anticipation of a dissolution of a partnership, limited liability company, or corporation may 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.*”
- Sale of ownership interests or disassociation?



Non-Compete Ban: Other Notables

- Not retroactive: the law “is effective July 1, 2023, and applies to contracts and agreements entered into on or after that date.”
- Choice of Law/Forum provisions: Employer is prohibited from *requiring* an employee who primarily resides and works in Minnesota, as a condition of employment, to agree to another state’s laws or another forum.
- Employees may be awarded “reasonable attorney fees” *for enforcing rights* under Section 181.988.
- Unenforceable covenant not to compete does not render the entire agreement unenforceable.



Additional Efforts to Restrict Covenants Not to Compete

- FTC's Proposed Rule
 - Differences
 - FTC is expected to vote on a Final Rule in early 2024
- Memorandum issued by the NLRB's General Counsel
 - Section 7 of the NLRA
 - Non-binding statement



What Should Minnesota Employers Do Moving Forward?



COURSE: Legislative Update for Minnesota Employers

PROGRAM ID: 23-G2YA2

FORMAT: Seminar

DATE ATTENDED: June 21, 2023

LENGTH OF PROGRAM: 3.0





QUESTIONS?

Thank You.