



# Employment Law Update

## 2022 Minnesota State Legislative Update



Presented by:

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# Today's Agenda

- New laws taking effect in 2022
  - Reasonable accommodation update
  - Nursing mothers
  - Pregnancy accommodations
- COVID-19 update and current status of state requirements
- 2022 Minnesota Legislative Agenda
  - New bills to be introduced

# Reasonable Accommodation (Amendment)

- Minnesota Human Rights Act, Minn. Stat. § 363A.08, subd. 6(a) defines “reasonable accommodation” as “steps which must be taken to accommodate the known physical or mental limitations of a qualified disabled person.”
- Effective July 1, 2022, amendment adds the following:
  - “To determine the appropriate reasonable accommodation the employer, agency, or organization shall initiate an informal, interactive process with the individual with a disability in need of the accommodation.”
  - “This process should identify the limitations resulting from the disability and any potential reasonable accommodations that could overcome those limitations.”

# Interactive Process

- Not well defined in MHRA
- The U.S. EEOC describes it as follows in disability context:
  - An information-gathering approach used by an employer with the employee to evaluate a request for accommodation
  - Intended to be a flexible approach that centers on the communication between employer and employee
  - Process begins with request for reasonable accommodation.
  - Employer engages in a discussion with the employee and other relevant individuals (e.g., a supervisor, the employee's health care provider or doula)
  - Makes an informed decision about what reasonable accommodation(s), if any, will effectively eliminate the barrier identified by the pregnant employee to allow the employee to perform

# Nursing Mothers

- Minn. Stat. § 181.939, subd.1 (a) (Revised Requirement)
  - “An employer must provide reasonable ~~unpaid~~ 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, run concurrently with any break times *under this section* 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.*”

# Nursing Mothers

- Minn. Stat. § 181.939, subd.1 (b)
  - “The employer must make reasonable efforts to provide a 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.”

# Nursing Mothers

- Minn. Stat. § 181.939, subd.1
  - (c) For the purposes of this section, “employer” means a person or entity that employs one or more employees and includes the state and its political subdivisions.
  - (d) An employer may not retaliate against an employee for asserting rights or remedies under this section.

# Pregnancy Accommodations

- Minn. Stat. § 181.939, subd.2 (a)(New Requirement)
  - Applies only to employers with 15 or more employees (including state and political subdivisions)
  - “An employer must provide **reasonable accommodations** to an employee for **health conditions related to pregnancy or childbirth** upon request, **with the advice of a licensed health care provider or certified doula**, unless the employer demonstrates that the accommodation would impose an **undue hardship** on the operation of the employer’s business. ...”
  - “Reasonable accommodation” means steps that must be taken to accommodate the known *health conditions related to pregnancy or childbirth* of a qualified *pregnant person*.”



# Pregnancy Accommodations

- Minn. Stat. § 181.939, subd. 2(a) (*continued*):
  - “The employee and employer shall engage in **an interactive process** with respect to an employee’s request for a reasonable accommodation. Reasonable accommodation may include but is not limited to:
    - Temporary transfer to a less strenuous or hazardous position
    - Seating
    - Frequent restroom breaks
    - Limits to heavy lifting
  - “[A]n employer shall not be required to create a new or additional position in order to accommodate an employee pursuant to this subdivision and shall not be required to discharge an employee, transfer another employee with greater seniority, or promote an employee.”

# Interactive Process

- As with MHRA, not well defined
- Best practice is to follow EEOC guidance:
  - An information-gathering approach used by an employer with the pregnant employee to evaluate a request for accommodation
  - Intended to be a flexible approach that centers on the communication between employer and employee
  - Process begins with request for reasonable accommodation
  - Employer engages in a discussion with the pregnant employee and other relevant individuals (e.g., a supervisor, the employee's health care provider or doula)
  - Makes an informed decision about what reasonable accommodation(s), if any, will effectively eliminate the barrier identified by the pregnant employee to allow the employee to perform

# Undue Hardship on the Employer

- MHRA, Minn. Stat. § 363A.08, subd. 6(b):
  - In determining whether an accommodation would impose an undue hardship on the operation of a business or organization, factors to be considered include:
    1. the overall **size of the business** or organization with respect to number of employees or members and the number and type of facilities;
    2. the **type of the operation**, including the composition and structure of the work force, and the number of employees at the location where the employment would occur;
    3. the **nature and cost** of the needed accommodation;
    4. the reasonable **ability to finance** the accommodation at each site of business; and
    5. **documented good faith efforts to explore less restrictive or less expensive alternatives**, including consultation with the *pregnant disabled* person, or with *the health care provider or doula* knowledgeable disabled persons or organizations.

# Pregnancy Accommodations

- Minn. Stat. § 181.939, subd.2 (b)(New Requirement)
  - (b) Nothing in this subdivision shall be construed to affect any other provision of law relating to sex discrimination or pregnancy or in any way diminish the coverage of pregnancy, childbirth, or health conditions related to pregnancy or childbirth under any other provisions of any other law.
  - (c) An employer shall not require an employee to take a leave or accept an accommodation.
  - (d) An employer shall not retaliate against an employee for asserting rights or remedies under this subdivision.

# Past Legislation and Regulations (Update) – Federal

- Emergency relief legislation (FFCRA, etc.) and extensions have expired
- OSHA Emergency Temporary Standards declared unconstitutional by 6-3 vote of U.S. Supreme Court
- CDC has no regulatory authority, can only make recommendations

# Past Legislation and Executive Orders (Update) – Minnesota

- COVID-19 restrictions
  - Governor Walz ended peacetime emergency effective July 1, 2021
    - No longer has authority to issue executive orders common in the first year of pandemic
  - Vaccinations are not mandatory throughout state of Minnesota, but private businesses or public events may require proof of vaccination or a negative COVID-19 test before entering a venue.
  - As of Jan. 19, 2022, the cities of Minneapolis and St. Paul require proof:
    - A completed vaccination series or proof of a negative COVID-19 test (taken under medical supervision within the last 72 hours) at restaurants and other venues serving food and/or drink for on-site consumption

# Past Legislation and Executive Orders (Update)

- Masking requirements
  - Not likely to be long-lived
  - Effective Jan. 6, Minneapolis and St. Paul require any individual, except small children, who is able to medically tolerate a face covering is required to cover their nose and mouth with a medical-grade mask or cloth face covering when in indoor public spaces regardless of vaccination status, except for the purposes of eating and/or drinking.
  - In mid-January, Duluth, Minnetonka, Hopkins, and Golden Valley added similar temporary mask mandates.

# Permissible Employer Restrictions

- Subject to reasonable accommodation requirements for employees on the basis of religion, disability, or pregnancy, employers have the authority to require employees to:
  - Be vaccinated against COVID-19 with no testing option
  - Be vaccinated or, alternatively, get tested at reasonable intervals
  - Get tested at reasonable intervals regardless of vaccination status
  - Be banned from workplace for reasonable period if employee tests positive
    - But adhere to then-current MDH or CDC guidelines regarding return to work to avoid disability discrimination claims
- If testing is mandated, employers in Minnesota may not require employees to pay for their own tests.



# Unemployment Insurance

- Effective July 3, 2022, high school students will be eligible to receive unemployment insurance benefits if they meet eligibility requirements.
- Effective July 3, 2022, Social Security old age and disability payments will not serve as an offset for unemployment insurance benefits.
  - Current law provides for offset of 50 percent of federal SS benefits
  - Exception if employee was taking SS while employed

# What's in Store for 2022 Session?

- What to do with \$1 billion deficit in the Unemployment Insurance Trust Fund
  - Current law requires that deficits be replenished by increasing payroll taxes as soon as March 2022.
  - Minnesota Management and Budget office is projecting a \$7.75 billion surplus for the 2022-2023 biennium.
  - Many Republicans are urging that the UI trust fund be replenished from the surplus.
  - Some DFL members are against the proposal and argue that payroll taxes should be the mechanism.

# What's in Store for 2022 Session?

- Reintroduction of SF 171
  - Died in committee April 2021
  - Would prohibit an employer from inquiring into, considering, or requiring 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
  - 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

# What's in Store for 2022 Session?

- SF 29: Provides for statewide mandatory earned sick and safe time.
  - Similar to Minneapolis, St. Paul, and Duluth requirements
- SF 187: Prohibits employers or prospective employers from requiring or using credit information as a condition of employment or for employment purposes
- SF 658: Eliminates subminimum wage; repealing statute and rules allowing payment of subminimum wage to employees with disabilities

# What's in Store for 2022 Session?

- SF 2424: Prohibiting employment discrimination based on vaccination status
  - “An employer commits an unlawful employment practice if the employer fails or refuses to hire, discharges, or otherwise discriminates against an individual with respect to the compensation or the terms, conditions, or privileges of employment because the individual has not received a vaccine.
  - “Any person violating any of the provisions of this section shall be deemed guilty of a gross misdemeanor.”
  - No stated exceptions

# What's in Store for 2022 Session?

- SF 1205: Provides for paid family, pregnancy, bonding, and applicant's serious medical condition benefits; regulating and requiring certain employment leaves
  - Would be paid from a Family and Medical Leave Benefit Insurance Program funded by the state and operated by DEED
  - Would basically be run like unemployment program
- SF 1911: Modifying the minimum wage for certain employees receiving gratuities

# Thank You!

## Questions? Comments?

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