

Labor and Employment 2019 Symposium

Accelerating Change: Legislative Trends in Minnesota & Beyond

Speakers

Marilyn Clark
Partner

Dorsey & Whitney LLP
Minneapolis, Minnesota
clark.marilyn@dorsey.com
(612) 492-6885

Ryan Mick
Partner

Dorsey & Whitney LLP
Minneapolis, Minnesota
mick.ryan@dorsey.com
(612) 492-6613

Molly Sigel
Legislative Affairs Director

Dorsey & Whitney LLP
Minneapolis, Minnesota
sigel.molly@dorsey.com
(612) 492-6537

Materials

1. PowerPoint Presentation

ahead of the curve

Workplace law trends for today and beyond.
Come up to speed to stay ahead.



Accelerating Change: Legislative Trends in Minnesota & Beyond

Meet the Speakers:

Elise Diedrich, Sr. Policy Manager – Government Affairs, Target Corporation

Marilyn Clark, Partner, Dorsey & Whitney

Ryan Mick, Partner, Dorsey & Whitney

Molly Sigel, Legislative Affairs Director, Dorsey & Whitney

© 2019 Dorsey & Whitney LLP. All rights reserved.



Agenda



1. The 2019 Legislative Session – An Inside View

2. National Trends & Minnesota Developments

- Sexual Harassment
- Paid Family Leave
- “Wage Theft”
- “Fair Scheduling”
- Paid Sick/Safe Leave

3. Prognostications!

© 2019 Dorsey & Whitney LLP. All rights reserved.



Sexual Harassment: A National Priority

In October 2018, the EEOC shared preliminary data for its 2018 fiscal year (October 2017 – September 2018):

- Statistics show a **12 percent increase** in the number of sexual harassment complaints the agency has received in the year since the Weinstein scandal broke — this is the **first increase** in such charges the agency has seen in the last ten years
- The agency initiated **50% more** sexual harassment lawsuits in FY 2018 than it did in FY 2017
- The agency recovered approximately **\$70 million** for sexual harassment victims in FY 2018, compared with approximately \$47 million recovered in FY 2017

Data + anecdotal claims + political incentives = strong drive to “do something”

© 2019 Dorsey & Whitney LLP. All rights reserved.



Sexual Harassment: 2018 Legislative Developments

Prohibitions on non-disclosure terms in sexual harassment settlements

- Bills introduced in at least 16 states in 2018 to restrict the use by private employers of non-disclosure agreements in sexual harassment cases
- Laws passed in Arizona, Louisiana, Maryland, New York, Tennessee, Vermont, Washington, and – as of September 30 – California
- 2018 federal tax law prohibited federal tax deductions for sexual harassment settlements with confidentiality requirements

Starting to hear anecdotal resistance from some plaintiff’s lawyers

- ✓ Reduces value of settlement
- ✓ Many *claimants* want confidentiality

© 2019 Dorsey & Whitney LLP. All rights reserved.



4

Sexual Harassment: 2018 Legislative Developments

Bans/limitations on mandatory arbitration of sexual harassment claims

- Laws passed in Maryland, New York, Vermont, Washington
- Possible conflict with federal law, but trend of progressive employers dropping mandatory arbitration voluntarily provides political cover
 - ✓ Google
 - ✓ Facebook
 - ✓ eBay
 - ✓ Airbnb
 - ✓ Uber
 - ✓ Lyft

© 2019 Dorsey & Whitney LLP. All rights reserved.



5

Sexual Harassment: 2018 Legislative Developments

Mandatory sexual harassment prevention policies and training

- California, Connecticut, Delaware, Maine, Massachusetts, New York, Rhode Island, Vermont have/will have laws requiring written anti-harassment policies and/or training requirements
- Additional bills introduced in New York, Pennsylvania, Rhode Island, Virginia and NYC in 2018

Mandatory reporting of harassment settlements

- Maryland

© 2019 Dorsey & Whitney LLP. All rights reserved.



6

Sexual Harassment: 2018 Legislative Developments

Changing the legal standard for sexual harassment claims

- **Minnesota** – bill would have eliminated the “severe or pervasive” standard
- **California** – SB 1300 (signed 10/1/18) included non-binding statements of legislative intent regarding sexual harassment cases
 - Rejected “stray remarks” doctrine
 - “Single Incident” sufficient
 - Summary judgment “rarely appropriate”

© 2019 Dorsey & Whitney LLP. All rights reserved.



7

Sexual Harassment: 2019 Minnesota Legislative Session

- **H.F. 10**
 - **Identical to 2018 bill:**

“An intimidating, hostile, or offensive environment [for purposes of a sexual harassment claim] does not require the harassing conduct or communication to be severe or pervasive.”
 - **Defines actionable sexual harassment as “conduct or communication of a sexual nature when . . . that conduct or communication has the . . . effect of . . . creating a ‘materially offensive’ employment . . . environment.”**

© 2019 Dorsey & Whitney LLP. All rights reserved.



Paid Family Leave – Nationals Trends

- This benefit is politically popular (Governor of California, presidential candidates, President Trump)
- Given gains by Democrats in state legislatures and governor seats in the 2018 elections, more states are pursuing paid leave legislation.
- Companies continue to announce paid family benefit plans.
- Proposals are a mix of state-run and insurance-based programs, voluntary and mandated.

© 2019 Dorsey & Whitney LLP. All rights reserved.



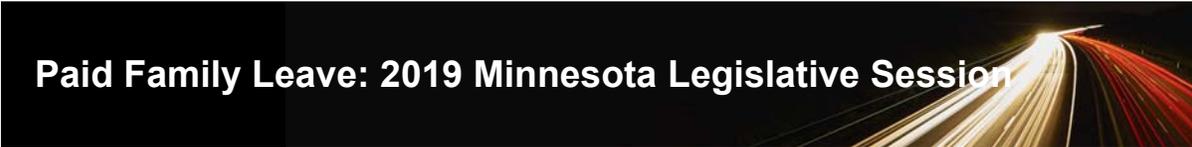
Paid Family Leave: 2019 Minnesota Legislative Session

- **H.F. 5 - Would create a state Paid Family & Medical Leave Insurance Program**
 - Applies to all employers; self-employed and independent contractors can opt in.
 - Requires employers to provide paid leave for part-time and temporary employees.

“Ninety calendar days from the date of hire, an employee has a right to leave from employment for any day, or portion of a day, for which the employee would be eligible for benefits under this chapter...”
 - Premiums would be split 50/50 between employers and employees; employers must deduct and pay similar to workers compensation premiums. Premium amounts are based on what programs are chosen for participation.

© 2019 Dorsey & Whitney LLP. All rights reserved.



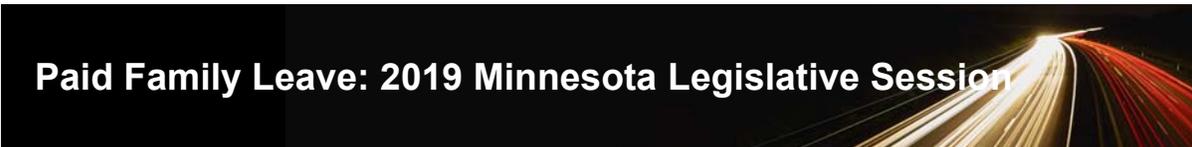


Paid Family Leave: 2019 Minnesota Legislative Session

- **H.F. 5**

- Requires employers to provide up to 24 weeks of leave per year – e.g., if an employee has one situation involving serious health condition or pregnancy *and* one situation involving bonding, safety leave or family care.
- Prohibits employers from requiring employees to use available sick, vacation or PTO time in conjunction with leave – employees could use their 12/24 weeks of protected leave and still have vacation/PTO available.
- Creates new substantive leave rights – e.g., safety leave – under state law.
- Reinstatement requirements mostly track the FMLA, but not all exclusions are specifically called out.
- Imposes substantial notice and information requirements.

© 2019 Dorsey & Whitney LLP. All rights reserved.



Paid Family Leave: 2019 Minnesota Legislative Session

- **H.F. 5**

- “Voids” waivers of rights under H.F. 5, meaning employers and employees cannot privately resolve disputes – i.e., per a private settlement or severance agreement.
- Creates private right of action for violations. Specifically authorizes class actions. Permits recovery of compensatory damages, consequential damages and attorneys’ fees.
- Would permit employers to opt out if they already provide comparable paid leave benefits, but virtually impossible to satisfy opt-out requirements. Employers that opt out would still pay “approval and oversight fee” of \$250 for employers with fewer than 50 employees, \$500 for employers with 50 to 499 employees, and \$1,000 for employers with 500 or more employees.

© 2019 Dorsey & Whitney LLP. All rights reserved.



“Wage Theft” Protections – National Trends

- **2017-18 “Wage Theft Prevention and Wage Recovery Act” would have:**
 - Expanded information and notice requirements
 - Created straight-time wage claim under the FLSA
 - Created \$2,000 civil penalty for first time FLSA violations; \$10,000 civil penalty for repeated violations
 - Increased liquidated damages under the FLSA from 2x actual damages to 3x actual damages
 - Strengthened anti-retaliation protections
 - Added \$1,000/\$5,000 civil penalties for FLSA record-keeping violations
 - Extended statute of limitations for FLSA claims from 2 years to 4 years
 - Changed collective action procedure under FLSA from “opt-in” to “opt-out”

© 2019 Dorsey & Whitney LLP. All rights reserved.



“Wage Theft” Protections – National Trends

- **State wage theft statutes**
 - California
 - Connecticut
 - Colorado
 - Delaware
 - Illinois
 - Maryland
 - Massachusetts
 - New York
 - Texas
- **Recent state legislative proposals**
 - Massachusetts
 - New Jersey
 - Washington
 - Wisconsin

© 2019 Dorsey & Whitney LLP. All rights reserved.



Wage Theft – 2019 Minnesota Legislative Session

- **H.F. 6**

- **Eliminates “intent to defraud” requirement for wage theft**
 - Includes any failure to pay wages, including mistakes or good faith disputes
 - Includes retaliation for asserting statutory rights; retaliation *presumed* for any adverse action within 90 days of an assertion of rights
- **Adds new pay statement obligations for employers**
- **Requires 16 day-pay periods . . . but requires payment of earned wages within 10 days of the end of the pay period**

© 2019 Dorsey & Whitney LLP. All rights reserved.



Wage Theft – 2019 Minnesota Legislative Session

- **H.F. 6**

- **Gives labor commissioner broad power to inspect premises and demand documents in specific formats**
 - \$10,000 penalty *per failure* for noncompliance
 - Any act that “delays” the commissioner, or any “refusal to admit” the commissioner is a misdemeanor
- **Authorizes commissioner to issue subpoenas**
 - Any failure to comply is automatic contempt of court

© 2019 Dorsey & Whitney LLP. All rights reserved.



Wage Theft – 2019 Minnesota Legislative Session

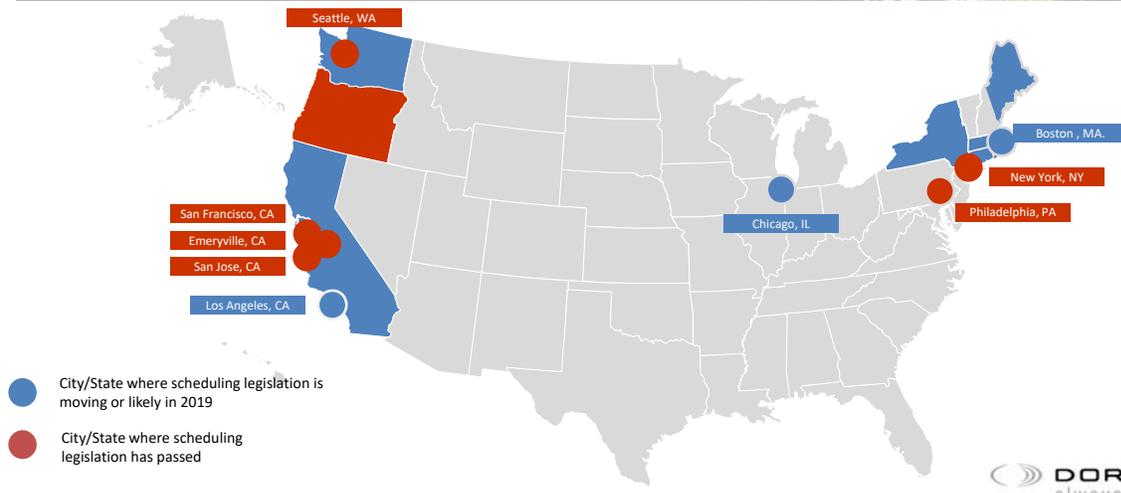
- **H.F. 6**

- Permits citations of up to **\$1,000 per employee, per pay period** for wage theft, including unintentional wage theft
- **Doubles late wage payment penalty**
- **Adds criminal penalties**
 - Any failure to pay wages or failure to provide adequate breaks is a misdemeanor, regardless of intent
 - Any failure to pay wages of **\$10,000 or more** in the aggregate is a gross misdemeanor, regardless of intent
 - Any intentional retaliation is a gross misdemeanor
 - Any intentional failure to pay wages **> \$35,000** is a felony
- **Disqualifies offenders from state contracts**

© 2019 Dorsey & Whitney LLP. All rights reserved.



“Fair Scheduling” – National Trends



© 2019 Dorsey & Whitney LLP. All rights reserved.



“Fair Scheduling” Legislative Elements

Advance Notice of Scheduling – usually 14 days

Penalties for Schedule Changes (Predictability Pay) – ranges from 1-4 hours of pay, or dollar amount

Guaranteed Access to Hours

Right to Rest - “clopening” – restrictions on working “clopening” shifts, penalties

On-Call Restrictions

Good Faith Estimate of Work Hours

Remedies/Violations – Private right of action and allowing third parties to sue

Benefit Parity and Retention Pay (SF & Mpls)

© 2019 Dorsey & Whitney LLP. All rights reserved.



“Fair Scheduling”: 2019 Minnesota Legislative Session

SF 736

- **Not moving this session**
- **Lifted provisions from the 2015 Minneapolis bill**
 - **21 day notice, Employer Statement upon hire and annually, penalty pay, pay rate and leave parity**
- **Legislators are focused on other priorities (wage theft, paid leave, sexual harassment)**
- **Likely to be passed by a city before the state, but if Democrats win the Senate in 2020, we could see it at the state level.**

© 2019 Dorsey & Whitney LLP. All rights reserved.



Paid Sick/Safe Leave – National Trends

- **Eleven states*** and many more cities and counties have paid sick leave laws in place.
- **Critical issue – inconsistency between jurisdictions**
 - Total days/hours accrued
 - Accrual rates
 - Carry-over
 - Use rights
 - Pay rates
 - Record keeping

* Arizona, California, Connecticut, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington

© 2019 Dorsey & Whitney LLP. All rights reserved.

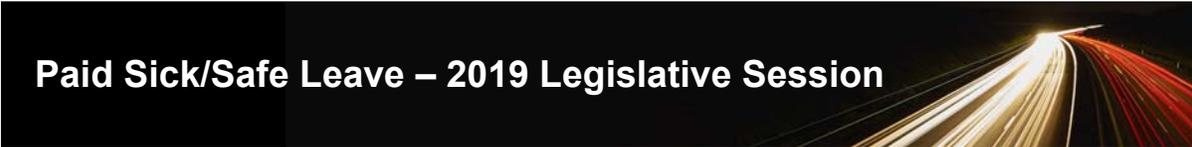


Paid Sick/Safe Leave – 2019 Legislative Session

- **Largely similar to Minneapolis/St. Paul ordinances, except:**
 - Unclear rate of pay requirement – “paid at the same hourly rate as an employee earns from employment”
 - No exception for small/micro employers
 - In addition to broad definition of “family member” (“any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship”) employees could designate an additional individual per year to be treated as a “family member”

© 2019 Dorsey & Whitney LLP. All rights reserved.





Paid Sick/Safe Leave – 2019 Legislative Session

- **Largely similar to Minneapolis/St. Paul ordinances, except:**
 - Retaliation broadly defined - includes “any form of” intimidation, threat, reprisal, discrimination or adverse employment action
 - Front loading not expressly authorized
 - Requires reinstatement of sick/safe balances if an employee is rehired up to 180 days after termination
 - Authorizes civil actions for damages, including consequential damages, plus civil penalties and attorneys’ fees

© 2019 Dorsey & Whitney LLP. All rights reserved.



Prognostications!

© 2019 Dorsey & Whitney LLP. All rights reserved.





Thank you!

© 2019 Dorsey & Whitney LLP. All rights reserved.

