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Promoting Fairness and Equity in Wisconsin's Civil Justice System

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Repeal Punitive and Compensatory Damages under the Wisconsin Fair Employment Act

Last session, Gov. Jim Doyle signed into law 2009 Wisconsin Act 20, which allows circuit courts to award punitive and compensatory damages in cases of employment discrimination, unfair genetic testing, or unfair honesty testing. This legislation would repeal the punitive and compensatory damages.

Background of the Wisconsin Fair Employment Act

The current Wisconsin Fair Employment Act (WFEA) prohibits, for example, employment discrimination based on age, ancestry, arrest record, conviction record, creed, color, disability, marital status, military service, national origin, race, sex, or use or nonuse of legal products during nonwork hours off the employer's premises.

If the Department of Workforce Development (DWD) finds that an employer has refused to hire an individual, terminated an individual's employment, or discriminated against an individual in promotion, in compensation, or in terms, conditions, or privileges of employment based on any of the above criteria, DWD may order any of the following remedies:

- Reinstatement of the employee;
- Provide back pay for not more than two years before the filing of the complaint;
- Require the employer to pay the employee's costs and attorney fees.

Under 2009 Act 20, the employee may then commence a separate civil action in State Court against the employer (if the employer has 15 or more employees) seeking an additional award of:

- Punitive and compensatory damages; and
- The employee's additional costs and attorney fees in the civil action.

Total compensatory damages (future economic losses, loss of enjoyment of life, emotional distress, pain and suffering, mental anguish, and other noneconomic damages) and punitive damages are determined by the size of the employer's business and up to the following amounts:

- \$50,000 for employers that have 15 to 100 employees;
- \$100,000 for employers with 101 to 200 employees;
- \$200,000 for employers with 201 to 500 employees; and
- \$300,000 for employers with more than 500 employees.

Punitive and compensatory damages are indexed to the consumer price index and will increase in future years.

2009 Wisconsin Act 20's Punitive and Compensatory Damages Should Be Repealed

- During the prolonged economic downturn, the last thing Wisconsin can afford is to saddle businesses with extra, and unnecessary, litigation costs.

- Prior to enactment of 2009 Act 20, Wisconsin employers have already been forced to defend WFEA claims before the DWD, and against simultaneously cross-filed claims under federal laws based on the same facts and alleged types of claims before federal agencies, and then in state or federal court under federal law.
- After enactment of 2009 Act 20, Wisconsin employers are now forced to not only defend WFEA claims in the administrative hearing process before the DWD, but also then re-litigate the same case in State Court in a full jury trial (or in a new trial to the court) in defense of potential punitive and compensatory damages, and additional costs and attorney fees.
- At the same time, Wisconsin employers continue to be forced to defend simultaneously cross-filed claims under federal laws based on the same facts and alleged types of claims before federal agencies, and then in state or federal court under federal law.
- 2009 Act 20 is duplicative, unnecessary and unduly burdensome on Wisconsin employers as federal employment laws already provide the same potential punitive and compensatory damages as under 2009 Act 20.
- The same potential punitive and compensatory damages are already available under, for example:
 - The federal Title VII of the Civil Rights Act of 1964 (employers with 15 or more employees);
 - The federal Americans with Disabilities Act of 1990 (employers with 15 or more employees);
 - The federal Genetic Information Nondiscrimination Act of 2008 (employers with 15 or more employees);
 - The federal Employee Polygraph Protection Act of 1988 (employers with one or more employees).