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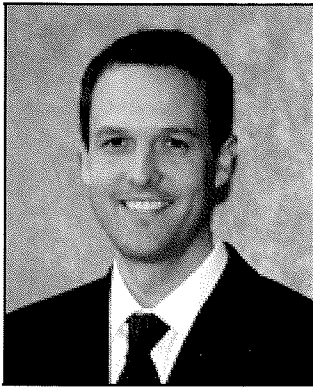
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Legislative Update: Governor Walker and Legislature Continue Focus on Civil Liability Reforms

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Introduction

Governor Scott Walker began his current term by calling a special session of the Legislature to focus on bills intended to enhance the State's business environment. The first bill introduced in that session—which ultimately became the second bill signed into law as 2011 Wisconsin Act 2¹—included significant civil liability reforms.

At the time of this writing, Governor Walker has again convened a special session to act on proposals aimed at improving Wisconsin's economy. Similar to the previous special session, Governor Walker has included a number of civil liability reform bills.

September Special Session Civil Liability Reforms²

Interest on Judgments: This bill reduces Wisconsin's high pre- and post-judgment interest rate from 12 percent to the Prime Rate set by the Federal Reserve Board, plus one percent. The legislation applies to civil actions in tort, actions brought under Wisconsin's Consumer Act, and in consumer protection actions commenced by the Department of Agriculture, Trade, and Consumer Protection. Wisconsin currently has one of the highest pre- and post-judgment interest rates in the nation.

Immunity for Manufacturers and Sellers of FDA-Approved Drugs and Devices: This legislation provides civil liability immunity to a manufacturer or a seller of a drug or device for any claim based on strict liability for a defect if the drug or device was approved by the federal Food and Drug

Administration (FDA) at the time it left control of the manufacturer or seller. The bill also provides immunity from liability for any claim based on the failure to warn of the risk of the drug or device if labeling was made available and it was in compliance with applicable standards established by the FDA at the time the drug or device left the control of the manufacturer or seller.

Determining Reasonable Attorney Fees: This legislation requires courts to consider 14 criteria when determining whether to award attorney fees and in determining whether the amount of the fees is reasonable. Considerations for setting fees include the time and labor required by the attorney, the complexity of the case, and the experience, reputation, and ability of the attorney performing the services.

In addition, the bill limits attorney fees to no greater than three times the amount of compensatory damages awarded. The bill provides an exception in cases where only nonmonetary relief is awarded or in cases involving compensatory damages and nonmonetary relief. In cases where both compensatory damages and nonmonetary relief are awarded, the bill sets forth a rebuttable presumption that an attorney fee is not reasonable if it is more than three times the amount of compensatory damages.

Trespasser Liability: In Wisconsin and most other states, land possessors generally owe no duty of care to trespassers, and are not liable for their injuries.³ These rules have existed for decades, usually as part of the common law. The American Law

Institute's Third Restatement of Torts potentially expands trespassers' rights to sue landowners. The proposed legislation would codify existing Wisconsin case law pertaining to landowner liability to trespassers, preventing Wisconsin courts from adopting the expanded liability contained in the Third Restatement.

Non-Special Session Bills

A number of other bills relating to civil liability but not included in the special session have been introduced as well.

Repealing Compensatory and Punitive Damages under the Wisconsin Fair Employment Act (AB 289/SB 202): Last session, the Legislature passed and Governor Doyle signed into law 2009 Wisconsin Act 20,⁴ which provided for the recovery of compensatory and punitive damages in actions arising out of employment discrimination under the Wisconsin Fair Employment Act (WFEA). Recently introduced 2011 Assembly Bill 289 and 2011 Senate Bill 202⁵ would repeal 2009 Wisconsin Act 20 and eliminate recovery of compensatory and punitive damages under the WFEA.

Removing Felony Conviction Record as an Impermissible Basis for Discrimination under the WFEA (AB 286/SB 207): Under the WFEA, an employer may not discriminate against an individual based on his or her felony conviction record. 2011 Assembly Bill 286 and 2011 Senate Bill 207,⁶ if passed, would specify that it is not employment discrimination to refuse to hire or terminate an individual based on a felony conviction record if that person has not been pardoned, regardless of whether the circumstances of the felony substantially relate to the circumstances of the particular job.

*Statements of Condolences or Apology by Health Care Provider (AB 147/SB 103)*⁷: This legislation would add a new provision under Wis. Stat. § 904.14 providing that a "statement, gesture, or the conduct of a health care provider or a health care provider's employee or agent, that expresses apology, benevolence, compassion, condolence,

fault, liability, remorse, responsibility, or sympathy to a patient or to his or her relative or representative is not admissible into evidence or subject to discovery in any civil action or administrative hearing regarding the health care provider as evidence of liability or as an admission of guilt."

Conclusion

It has, and continues to be, a very active session in the area of civil liability reforms in the Wisconsin Legislature. The Hamilton Consulting Group will continue to keep you apprised regarding these and other issues moving forward through the end of the legislative session. If you have any questions, feel free to contact Andy Cook at cook@hamilton-consulting.com.

References

- 1 See 2011 Wisconsin Act 2, available at <https://docs.legis.wisconsin.gov/2011/related/acts/2>.
- 2 At the time of this writing, the bills discussed in this section had not yet been formally introduced, and accordingly did not yet have bill numbers to reference.
- 3 *Hofflander v. St. Catherine's Hosp., Inc.*, 262 Wis. 2d 539, 575, 664 N.W.2d 545 (2003) ("Property owners possess a lesser duty of care to trespassers upon their property than they do to employees, guests, or frequenters of their property. This lesser duty merely requires owners to refrain from willful, wanton, or reckless conduct directed towards the trespasser.").
- 4 2009 Wisconsin Act 20, available at <https://docs.legis.wisconsin.gov/2009/related/acts/20>.
- 5 2011 Assembly Bill 289, available at <https://docs.legis.wisconsin.gov/2011/related/proposals/ab289>; 2011 Senate Bill 202, available at <https://docs.legis.wisconsin.gov/2011/related/proposals/sb202>.
- 6 2011 Assembly Bill 286, available at <https://docs.legis.wisconsin.gov/2011/related/proposals/ab286>; 2011 Senate Bill 207, available at <https://docs.legis.wisconsin.gov/2011/related/proposals/sb207>.
- 7 2011 Assembly Bill 147, available at <https://docs.legis.wisconsin.gov/2011/related/proposals/ab147>; 2011 Senate Bill 103, available at <https://docs.legis.wisconsin.gov/2011/related/proposals/sb103>.