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## WISCONSIN LEGISLATIVE COUNCIL

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*Terry C. Anderson, Director*  
*Laura D. Rose, Deputy Director*

TO: REPRESENTATIVE CHRISTINE SINICKI

FROM: Jessica L. Karls, Staff Attorney

RE: 2009 Assembly Bill 31 and Assembly Substitute Amendment \_\_ (LRBs0036/2)

DATE: April 7, 2009

This memorandum describes 2009 Assembly Bill 31, relating to authorizing the circuit court to order a person who engages in discrimination in employment to pay compensatory and punitive damages and a surcharge and making an appropriation, and Assembly Substitute Amendment \_\_ (LRBs0036/2) to the bill. This memorandum also briefly describes provisions in Title VII of the federal Civil Rights Act of 1964, as amended, that are similar to certain provisions in Assembly Substitute Amendment \_\_ (LRBs0036/2). Title VII prohibits discrimination based on race, color, religion, sex, and national origin.

### **CURRENT LAW**

Current law provides that a person alleging a violation of the Fair Employment Law may file a complaint with the Department of Workforce Development (DWD). If a hearing examiner finds a violation, the examiner may order such action as will effectuate the purpose of the Fair Employment Law, including reinstatement of the employee and payment of back pay, attorney fees, and costs. However, current law does not allow DWD to order the payment of compensatory or punitive damages or other surcharges.

### **2009 ASSEMBLY BILL 31**

Assembly Bill 31 provides that a person discriminated against or DWD may bring an action in circuit court against an employer, labor organization, licensing agency, or employment agency to recover damages caused by an act of employment discrimination after the completion of an administrative proceeding, including judicial review, regarding that act. If the circuit court finds that a defendant has committed an act of discrimination, the court must order that the defendant pay to the person discriminated against compensatory and punitive damages in an amount determined by the court. The circuit court must also order that the defendant pay a surcharge to the court equal to 10% of the amount of compensatory and punitive damages ordered. If the circuit court orders payment because of

an act of discrimination by an individual employed by an employer, the employer of that individual is liable for the payment.

The clerk of circuit court must collect and transmit the surcharge to the county treasurer. The treasurer must pay the surcharge to the Secretary of the Department of Administration (DOA), who must then deposit the surcharge into the general fund to be credited to a DWD appropriation account.

An action in circuit court must be commenced within 60 days after the completion of an administrative proceeding, including judicial review, regarding the violation or within two years after the violation occurred (or after DWD or the person discriminated against should have reasonably known that the violation occurred), whichever is later.

**ASSEMBLY SUBSTITUTE AMENDMENT — (LRBs0036/2)**

Assembly Substitute Amendment \_\_ (LRBs0036/2) provides that if a hearing examiner finds, or the Labor and Industry Review Commission (LIRC) affirms a finding, that the respondent has engaged in discrimination, unfair genetic testing, or unfair honesty testing, DWD or LIRC must serve a certified copy of the examiner’s findings or LIRC’s decision on the complainant, along with a notice advising the complainant that after the completion of all administrative proceedings the complainant may bring an action in circuit court to recover compensatory and punitive damages and advising the complainant of the time within which the action must be commenced. [Title VII of the Civil Rights Act of 1964, as amended, provides that, in some circumstances, the federal Equal Employment Opportunity Commission or the federal Department of Justice must notify the complainant that he or she may bring a civil action. This is often referred to as a “right to sue” notice. [42 U.S.C. s. 2000e-5 (f).]]

Further, the substitute amendment provides that DWD or a person discriminated against or subjected to unfair genetic testing or unfair honesty testing may bring an action in circuit court against an employer, labor organization, or employment agency to recover compensatory and punitive damages caused by the violation, plus reasonable costs and attorney fees incurred in the action. The damages are in addition to any back pay or other amounts awarded in the administrative proceedings. [Title VII of the Civil Rights Act of 1964, as amended, provides that a complainant may recover compensatory and punitive damages for intentional discrimination. [42 U.S.C. s. 1981a (a) (1).]]

The substitute amendment prohibits such action against the state, a state agency, or a local governmental unit, or against an employer, labor organization, or employment agency employing fewer than 15 individuals for each working day in each of 20 or more calendar weeks in the current or preceding year. [Title VII of the Civil Rights Act of 1964, as amended, does not apply to employers with less than 15 employees or to the United States. [42 U.S.C. s. 2000e (b).]] If the circuit court orders payment because of a violation by an individual employed by an employer, the employer of that individual is liable for the payment.

The substitute amendment provides that the sum of the amount of compensatory damages for future economic losses and for pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, and other noneconomic losses and the amount of punitive damages that a circuit court may order may not exceed the following, as indexed for inflation:

- In the case of a defendant that employs 100 or fewer employees for each working day in each of 20 or more calendar weeks in the current or preceding year, \$50,000.

- In the case of a defendant that employs more than 100 but fewer than 201 employees for each working day in each of 20 or more calendar weeks in the current or preceding year, \$100,000.
- In the case of a defendant that employs more than 200 but fewer than 501 employees for each working day in each of 20 or more calendar weeks in the current or preceding year, \$200,000.
- In the case of a defendant that employs more than 500 employees for each working day in each of 20 or more calendar weeks in the current or preceding year, \$300,000.

[Title VII of the Civil Rights Act of 1964, as amended, contains the same monetary limits on compensatory and punitive damages. [42 U.S.C. s. 1981a (b) (3).]]

In addition, the substitute amendment provides that the circuit court must order that the defendant pay a fee to the court equal to 10% of the amount of compensatory and punitive damages ordered. The clerk of circuit court must collect and transmit the fee to the county treasurer, who must pay 50% of the fee to the DOA Secretary and retain the other 50% to pay for the cost of operating the county's circuit court. The DOA Secretary must deposit the fee into the general fund to be credited to a DWD appropriation account.

Lastly, under the substitute amendment, an action in circuit court must be commenced within 60 days after the date on which a copy of the final decision of the hearing examiner is mailed to the last-known address of the complainant or, if that decision is reviewed by LIRC, within 60 days after the date on which a copy of LIRC's final decision is mailed to the last-known address of the complainant. If a petition for judicial review of the findings and order of LIRC regarding the same violation is filed, the court must consolidate the proceeding for judicial review and the civil action.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

JK:wu