Minnesota
Employment
Law Council

MEMORANDUM

TO: Members of the Senate Judiciary and Public Safety

FROM: Minnesota Employment Law Council

DATE: February 28, 2023

RE: Pay History – S.F. 1885

The Minnesota Employment Law Council ("MELC") supports the principles on which S.F. 1885 is based and commends the effort to combat the wage gap in Minnesota. However, two provisions of the bill raise serious due process and fairness concerns. Fortunately, these provisions are not central to the purpose of the bill and can be readily addressed without undermining the bill overall.

The rebuttable presumption of liability (Lines 1.13-1.16) puts this bill at odds with the rest of the Minnesota Human Rights Act ("MHRA") and federal and state law across the nation. Operationally, as long as the rebuttable presumption of liability is in place, an employer who does everything right, and receives pay history information only as a result of an employee's voluntary, unsolicited disclosure, can still be sued as a presumed wrongdoer. To avoid liability, the employer would have to prove a negative; that is, the employer would have to prove that it did not discriminate. That would be very difficult, even for a fully compliant employer, resulting in unjust liability for employers operating in good faith and with an intent to comply with the law. It does not advance the purpose of the legislation to treat employers who try to comply with the law as presumed wrongdoers. Pay history laws are working in other states without this problematic provision. Likewise here, deleting that sentence will not leave aggrieved employees without a remedy.

To MELC's knowledge, there is no precedent under the MHRA or any federal or state civil rights law for a rebuttable presumption of wrongdoing similar to that proposed in S.F. 1885. The well-known burden shifting standard under the MHRA (and other federal and state laws) does not impose a burden of proof on employers, much less presume discrimination in the absence of evidence of an employer's wrongdoing.

Further, the language in subpart (c) that permits an applicant to disclose pay history voluntarily "and without prompting" (Lines 1.23, 2.1-2.2) also is problematic. Unlike affirmative actions by an employer to require disclosure of pay history, whether an employer said or did something to "prompt" a disclosure is a subjective, confusing legal standard. A good faith employer could make a statement or take an action that an applicant misconstrues as "prompting" a disclosure of pay history. Combined with the rebuttable presumption, this proposed language would treat that employer as a presumed wrongdoer – despite its good faith effort to comply with the law – subject to liability for discrimination based on an employee's mistaken perception that the employer was attempting to "prompt" a disclosure. That outcome would not advance the purpose of the legislation and is not necessary to achieve the benefits intended under the proposal. MELC recommends the standard simply be an applicant's "voluntary" disclosure.

Thank you for your consideration.

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