

North Dakota

Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

Topics

I. Discrimination

State anti-discrimination provisions have been amended to provide that an employer commits unlawful discrimination if it fails or refuses to make reasonable accommodations for an otherwise qualified individual because she is pregnant.

Additionally, the amended statute provides that a reasonable accommodation for an individual's disability, pregnancy, or religion is not required if it:

- Would disrupt or interfere with the employer's normal business operations;
- Threatens an individual's health or safety;
- Contradicts an employer's business necessity; or
- Imposes an undue hardship on the employer, taking into consideration the business's size, business type, employer's financial resources, and the accommodation's estimated cost and extent.

N.D. Cent. Code, § 14-02.4-03 (Effective Date 08/01/2015).

II. Pre-Employment Inquiry Guidelines

No new laws or regulations enacted in 2015 or 2016.

III. Family and Medical Leave

No new laws or regulations enacted in 2015 or 2016.

IV. Wage and Hour Laws

A. PTO & Final Wages

A wage payment statute covering paid time off (PTO) and final wages has been amended to provide that, if an employee separates from employment, an employer does not have to pay out PTO if:

- PTO was awarded by the employer but not yet earned by the employee; and
- Before awarding PTO, the employer provided the employee written notice of the limitation on payment of awarded PTO.

The new provision will only apply to separations occurring on or after the amendment takes effect.

The amendment broadens an employer's ability to use PTO forfeiture provisions. Before the amendment, forfeiture provisions were allowed if four conditions were met:

1. An employee voluntarily separated from employment;
2. At the time of hiring, written notice of the forfeiture provision was provided;
3. The employee was employed less than one year; and
4. The employee provided less than five days' written or oral notice of quitting.

Although not specifically discussed in the bill, the amendment will likely require the state labor department to partially revise its corresponding regulation concerning PTO and final wages. The regulation provides that: 1) PTO, once earned or awarded, is considered wages that, if available for use when employment ends, must be paid out at the employee's regular rate; and 2) employment contract and policies cannot contain provisions stating that earned PTO is forfeited when employment ends. The regulation, which provides that PTO includes annual leave, earned time, personal days, or any other employment provisions intended to provide compensation as vacation, does allow employers to adopt "use-it-or-lose-it" policies that require an employee to take vacation by a certain date or lose the vacation, if s/he was provided a reasonable opportunity to take PTO and the employee received notice of the policy.

N.D. Cent. Code, § 34-14-09.2 (Effective Date 08/01/2015).

B. Equal Pay Act Amendments

North Dakota's sex-based wage discrimination statute has been amended, along with corresponding remedies, statutes of limitations, and recordkeeping statutes.

Wage-Based Discrimination Statute

The exceptions to the general prohibition against sex-based wage discrimination have been amended to provide that differentials paid pursuant to an established seniority system, systems that measure earnings by quantity or quality of production, merit systems, or a bona fide factor other than gender (e.g., education, training, experience), and that do not discriminate based on gender, are permitted. Before the amendments, "systems" were "job descriptive systems;" "merit systems" were "merit increase systems;" and "a bona fide factor . . ." has replaced "executive training programs."

The amended statute contains a new subsection providing that an unlawful employment practice occurs when a discriminatory compensation decision or other practice is adopted, or when an individual becomes subject to or affected by the same. This applies each time wages, benefits, or other compensation is paid that wholly or partly results from the decision or practice.

Remedies Statute

The remedies statute has been amended to clarify where a corresponding lawsuit can be filed. Previously, a suit could be filed "in any court of competent jurisdiction." The amended statute provides that a suit may be filed: 1) In a district court in the judicial district in which the unlawful practice allegedly was committed; 2) In the district in which records relevant to the alleged unlawful practice are kept or administered; or 3) In the district in which the individual would have worked or obtained credit were it not for the allegedly unlawful practice.

Additionally, a new subsection provides that, if a lawsuit is filed, the labor commissioner will dismiss any wage-based discrimination complaint it received that was based on the same alleged unlawful practice.

Statute of Limitations

Before the amendment, a lawsuit had to be filed no later than two years after a claim for relief occurred. The amended statute provides that a suit must be filed no later than two years after an unlawful practice occurred, but if the individual first files a complaint with the labor commissioner, the limitations period will be tolled until the commissioner's investigation is completed or the commissioner notifies the individual it will take no further action on the complaint.

Recordkeeping

Before the amendments, the statute did not address how long records must be kept. The amended statute provides these records must be kept for as long as the employee is employed, and for two years after employment ends.

N.D. Cent. Code, § 34-06.1-03, N.D. Cent. Code, § 34-06.1-05, N.D. Cent. Code, § 34-06.1-06, N.D. Cent. Code, § 34-06.1-07 (Effective Date 08/01/2015).

V. Drug Testing

No new laws or regulations enacted in 2015 or 2016.

VI. Noncompete and Other Employment Agreements

No new laws or regulations enacted in 2015 or 2016.

VII. Workplace Safety

No new laws or regulations enacted in 2015 or 2016.

VIII. Workers' Compensation

No new laws or regulations enacted in 2015 or 2016.

IX. Miscellaneous

A. Data Security Breach Notification

North Dakota's data security breach statute requires a covered entity (including an employer) to provide notice of the breach to affected individuals when the entity discovers or is notified of a breach where unencrypted personal information of a North Dakota resident was, or is reasonably believed to have been, acquired by an unauthorized person. The new amendment adds a requirement that the covered entity must also report to the state attorney general any data security breach that requires notification to 250 or more individuals. The covered entity may make the report to the state attorney general by email or by U.S. mail.

In addition, the amendment updates a portion of the definition of "personal information." Among several other categories of data elements that comprise the statutory definition of personal information, an identification number assigned to the individual by the individual's employer is a data element considered to be personally identifying. The amendment clarifies that the identification number assigned to an individual by his or her employer must also

include any required security code, access code, or password that accompanies the identification number.

N.D. Cent. Code, § 51-30-01 and N.D. Cent. Code, § 51-30-02 (Effective Date 08/01/2015).

B. Business Expense Reimbursement

North Dakota is one of the few states with a statute requiring employers to reimburse employee business expenses. Generally speaking, employers must indemnify employees for expenses or losses they directly incur due to employment. This law been amended to provide that the indemnification obligation does not include expenses incurred to purchase or rent tools of the trade or any equipment that an employee also uses outside of employment.

N.D. Cent. Code, § 34-02-01 (Effective Date 08/01/2015).

C. Unemployment Benefits & Stalking Victims

Under amended unemployment provisions, an employee will be eligible to receive unemployment benefits if the reason s/he separated from employment was directly attributable to stalking. A claimant must submit documentation to state officials which substantiates the reason for leaving employment and states that continued employment would jeopardize the safety of the individual or his or her spouse, parent, or minor child. Moreover, documentation must include:

- A police or law enforcement record; AND
- A written affidavit provided by an individual who has assisted the claimant in dealing with the stalking and who is a:
 - Licensed counselor;
 - Licensed social worker;
 - Member of the clergy;
 - Director of domestic violence advocate at a domestic violence sexual assault organization; or
 - Licensed attorney.

Documentation must be received by state officials within 14 calendar days from the date the individual filed an unemployment claim after separating from employment for reasons directly attributable to stalking.

An employer's account may not be charged for benefits paid if an employee separated from his or her most recent employer for reasons directly attributable to stalking.

N.D. Cent. Code, § 52-04-07 and N.D. Cent. Code, § 52-06-02 (Effective Date 08/01/2015).