

PUBLIC SECTOR EMPLOYMENT IN A VOLATILE MARKET

Susan Hansen

Madden Galanter Hansen, LLP

Shansen@mgh-lawfirm.com

(763) 545-2525

Information is intended to be educational in nature and doesn't constitute legal advice.

MPELRA LEGISLATIVE HISTORY

MN Public Employees Labor Relations Act (MPELRA)

Chapter 179A. Public Employers Labor Relations.

First enacted in 1971 after illegal teachers strike

Establishes special rights, responsibilities, procedures, and limitations regarding public employment relationships which will provide for the protection of the rights of the public employee, the public employer, and the public at large

MPELRA

- * Created occupationally-based bargaining units
- * Defined which groups are essential and created a separate processes for resolution of contract impasse
 - * "Essential employee" means firefighters, police, 911 dispatchers, correctional officers, confidential employees, supervisory employees, assistant county attorneys, principals, etc.
- * Non-essential groups able to strike after impasse
- * Essential groups at contract impasse have interest arbitration



BARGAINING UNIT COMPOSITION

COMMUNITY OF INTEREST FACTORS

Principles and the coverage of uniform comprehensive position classification and compensation plans of employees

Professions and skilled crafts and other occupational classifications

Relevant administrative and supervisory levels of authority

Geographical location

History

Extent to organization

Recommendation of the parties

Commissioner places particular importance on history and extent of organization and the desires of the petitioning employee representative

OTHER RELEVANT FACTORS:

Degree of functional integration

Nature of the employee skills and occupational functions

Interchangeability and contact among employees

General working conditions

Hours of work

Number of employees affected

Work Location

Nature of compensation

Common supervision

SUPERVISORY STATUS

MINN. STAT. 179A.03,
SUBD. 17

ABILITY TO
PERFORM OR
EFFECTIVELY
RECOMMEND
PERFORMANCE
OF
6 OUT OF 10

Hire

- Interview and select candidates for employment
- Completing and signing probationary evaluation forms

Transfer

- Transferring from department to department
- Transferring from a job class to an equal job classification

Suspend

- Writing and signing letters of suspension and authorizing the removal of employees from the payroll

Promote

- Completing and signing promotional rating forms

Discharge

- Discharging as last step of progressive disciplinary system

Assign

- Assigning or establishing work tasks, overtime and hours of work

Reward

- Initiating and authorizing placement of letters of commendation in personnel files
- Nominating employees for achievement awards

Discipline

- Authorizing oral or written reprimands

Direct

- Approving or rejecting the assigned work product
- Being responsible for a unit/division work product
- Training employees
- Approving written position descriptions
- Completing/signing employee performance evaluation forms
- Instructing employees in the performance of work tasks
- Providing guidance/constructive criticism regarding work performance or work product
- Approving vacation and sick leave requests
- Approving time records

Adjust Grievances

- Having authority to represent management at step one or above of the contractually established grievance procedure

CONFIDENTIAL STATUS

“Confidential employee” means an employee who as part of the employee's job duties:

- (1) is required to access and use “labor relations information”;
or
- (2) actively participates in the meeting and negotiating on behalf of the public employer.

“Labor relations information” means management positions on economic and noneconomic items that have not been presented during the collective bargaining process or interest arbitration, including information specifically collected or created to prepare the management position.

Access to personnel files, performance evaluations and other private personnel data will not result in a finding of confidential status. Confidential employee status relates solely to collective bargaining such as:

- Gathering and researching market trends.
- Costing out potential proposals.
- Analyzing CBA to determine proposals.

MUTUAL OBLIGATIONS UNDER MPELRA

Meet and negotiate in good faith

Comply with arbitration awards

No discrimination against employees
because of union membership or activity

No coercion of employees or interference
with employees who exercise their rights
under PELRA

No unfair labor practices (ULP's)

LEGAL FRAMEWORK IN PELRA

Obligation to Meet & Negotiate - Minn Stat 179A.03 subd 11

“‘Meet and negotiate’ means the performance of the mutual obligations of public employers and the exclusive representatives of public employees to meet at reasonable times, including where possible meeting in advance of the budget making process, with the good faith intent of entering into an agreement on terms and conditions of employment. This obligation does not compel either party to agree to a proposal or to make a concession.”

UNFAIR LABOR PRACTICES

Subject to the purview of the PERB

Illegal activities committed by employer, employee or union

Employer

- Dominating or interfering with formation or administration of union.
- Discriminating in hiring because of participation/non-participation in the union

Union

- Engaging in illegal strikes
- Coercion/refusal to handle goods or perform services

Both

- Restraining employees in exercise of rights under PELRA.
- Refusing to meet and negotiate in good faith
- Refusing to follow arbitration decision

**UNFAIR
LABOR
PRACTICE
BASED ON
CONDUCT
DURING
BARGAINING**

Surface Bargaining

Regressive Bargaining

Failure to provide information regarding bargaining

Circumvention of exclusive representation

First and final offer

WHICH TOPICS ARE BARGAINED?

Mandatory subjects of bargaining:

Terms and conditions of employment

- Wages
- Benefits,
- Layoff/bumping rights
- Discipline
- Grievance procedures
- **Staffing Ratios**

Permissive subjects of bargaining:

Something typically to be considered a Management right

Prohibited subjects of bargaining:

- Pensions
- Criteria for promotion to supervisory positions

**INHERENT MANAGERIAL RIGHTS ARE NOT
TERMS AND CONDITIONS OF EMPLOYMENT AND SHOULD
NOT BE NEGOTIATED**

Budget

Classification/Job
Title/ Job
Descriptions/
Organizational
Structure

Assignment and
transfer of
employees

~~Determine
adequacy of
workforce/
Filling
vacancies~~

Reasons or
criteria for layoff


Determine
methods, means,
standards of
service
(~~staffing ratios~~)

Use of
technology

Direct, supervise,
evaluate
employees

Improve
operations


Determine
mission of work
unit



**CONSIDERATIONS
WHEN
APPROACHING
NEGOTIATIONS**

1. Employer needs to communicate to employees general financial condition and situation of employer.
 - a. Today's circumstances should be communicated whether your collective bargaining agreements are open or not.
 - b. Communicate with both management and employees.


2. Prior to start of negotiations, carefully plan short-term and long-term objectives and consider duration of CBA that you want to enter into.
 - a. Don't look at simply entering into a long-term contract since you can avoid frustration of negotiating again in near future.
 - b. Duration of the CBA should relate to what is in best interest of employer.



**CONSIDERATIONS
WHEN
APPROACHING
NEGOTIATIONS**

3. **Cost out current contract and apply costing model reflecting total current cost. Use to cost proposals.**
 - **General increase.**
 - **Step increases or in-range movement.**
 - **Differentials.**
 - **Paid leave benefits**
 - **Creep costs (FICA, PERA, etc.)**
 - **Any other improvements that have a cost impact.**

4. **If you have a wage step schedule, try to include language that does not include automatic continuation of steps upon the end of the duration of the agreement.**



**CONSIDERATIONS
WHEN
APPROACHING
NEGOTIATIONS**

5. Don't give up management rights or flexibility of management in contract negotiations since you don't have money.
 - a. Once you give them up it is nearly impossible to get them back.
6. Carefully review CBA to address ambiguities.
7. Review with union their understanding along with your understanding of how the seniority and layoff article works before you need to use it.
8. If you don't have a defined contribution towards health insurance (flat dollars versus percentages) try to get it in the CBA so that you don't get caught with unanticipated increases in insurance cost due to the percentage formula in the contract for subsequent years.
9. If you do have a defined contribution (flat dollar amount) in the agreement, don't give it up.
10. Treat employees equally.



**IMPASSE -
LEGAL
RIGHT TO
STRIKE**

- Minn. Stat. § 179A.18 authorizes a legal strike upon meeting the following conditions:
 - ❑ Collective bargaining agreement has expired;
 - ❑ Exclusive representative and employer have participated in mediation for at least 45 days;
 - ❑ Exclusive representative has provided a 10-day notice of intent to strike.



IMPLEMENTATION OF FINAL OFFER

Unilateral implementation of final offer.

In *Central Lakes Education Association v. Independent School District No. 743*.

- ❑ The right to strike has matured; and
- ❑ The parties have reached impasse.

Court adopted the private sector rule that requires a subjective determination of when an impasse has occurred. An impasse will be found where, despite good faith efforts, the parties are deadlocked and any further discussion between the parties would be fruitless.

INTEREST ARBITRATION PROCESS - MINN. STAT. § 179A.16, SUBD. 2-3

An exclusive representative or employer of a unit of essential employees may petition for binding interest arbitration by filing written request with other party and commissioner.

- Written request must specify items which that party wishes to submit to binding arbitration.
- Within 15 days of request, Commissioner determines whether further mediation of dispute would be appropriate and shall only certify matters for arbitration in cases where commissioner believes that both parties have made substantial, good faith bargaining efforts and an impasse has occurred.
- Within 15 days from the time commissioner has certified a matter to be ready for binding arbitration, both parties shall submit their final positions on items in dispute.



INTEREST ARBITRATION

- Mediation – mandatory step
- Arbitration - Last stage of impasse in negotiations
- Outside neutral arbitrator
- Final and Binding
- Arbitrator imposes terms of CBA

CRITERIA USED BY INTEREST ARBITRATORS

- Internal Comparison
- External and Market Comparison
- Ability-to-Pay and Fiscal Constraint
- Cost-of-Living
- Public Interest

INTERNAL CONSISTENCY

Maintenance of a uniform pattern in compensation and benefits:

- Maintains labor relations stability and morale;
- Avoids whipsaw bargaining; and
- Encourages unions to engage in serious, good faith bargaining, rather than resorting to interest arbitration.

INTEREST ARBITRATION DO'S AND DON'TS

- Listing of issues in mediation
- Research of arbitrators on panel
- Drafting final positions
- Issue by issue presentation
- Utilization of testimony
- Public sector finance
- Verbal closing argument vs. post-hearing brief

COST CONTAINMENT HEALTH INSURANCE OPTIONS

- Labor/management committees.
- Plan design changes
 - ✓ Deductibles.
 - ✓ Co-payments
 - ✓ Out-of-pocket management maximum.
- Self-funded insurance.
- Aggregate Value of Benefits. Minn. Stat. § 471.6161, subd. 5 provides:

The aggregate value of benefits provided by a group insurance contract for employees covered by a collective agreement shall not be reduced, unless the public employer and exclusive representative of the employees of an appropriate bargaining unit, certified under section 179A.12, agree to a reduction in benefits.

PUBLIC SECTOR LABOR CONCEPTS THAT MAY PRESENT THEMSELVES IN ULPS



Role of Exclusive Representative – exclusivity



Concerted activity – protected



Past Practices

EXCLUSIVITY

A bargaining unit is the “exclusive representative” of all employees it represents

Employers may not engage in “direct dealing” and “work out deals” with individual employees on matters covered by CBA

Employees may not bring a private attorney to Loudermill meeting or meeting to address a dispute covered by CBA

**CONCERTED
ACTIVITY IS
PROTECTED**

Prohibition of:

Taking action to
discourage

Taking action to punish



Examples

Discussing
pay,
benefits, or
supervisor
actions

Encouraging
employees to
join or
support a
union

Discussing
contract
negotiation

Encouraging
or discussing
grievances

Posting
work-
related
comments
on social
media



PAST PRACTICE

- Long-standing
- Consistently applied
- Reoccurring frequent practice
- Affecting terms and conditions of employment
- Accepted and known by union and employer
- Continuity of underlying circumstances
- Situation is not addressed in CBA or the CBA language is ambiguous

MPELRA AMENDMENTS 2023

BARGAINING UNIT INFORMATION

**MINN. STAT. 179A.07,
SUBD. 8 (A-C)**

ALL UNIT MEMBERS: Every **120** calendar days beginning on 1/1/24, employer must provide to exclusive rep in Excel or other agreed upon format info for all bargaining unit employees:

- name;
- job title;
- worksite location, including location within facility when appropriate;
- home address;
- work telephone number;
- home and personal cell phone numbers on file with employer;
- date of hire; and work
- email address and personal email address on file with employer.

MPELRA AMENDMENTS 2023

BARGAINING UNIT INFORMATION

**MINN. STAT. 179A.07,
SUBD. 8 (A-C)**

NEW EMPLOYEES: Within **20** calendar days from date of hire of a bargaining unit employee, employer must provide following contact information to an exclusive rep in Excel or other agreed upon format:

- name;
- job title;
- worksite location, including location within facility when appropriate
- home address;
- work telephone number;
- home & personal cell phone numbers on file with employer;
- date of hire;
- work & personal email address on file with employer

**MPELRA
AMENDMENTS
2023**

**BARGAINING
UNIT
INFORMATION**

**MINN. STAT. 179A.07,
SUBD. 8 (A-C)**

SEPARATED EMPLOYEES:

Employer must notify
exclusive rep within **20**
calendar days of the
separation of employment or
transfer out of the bargaining
unit of a bargaining unit
employee.

**MPELRA
AMENDMENTS
2023**

ACCESS

**MINN. STAT.
179A.07,
SUBD. 9 (A-C)**

NEW EMPLOYEE ORIENTATION: Employer must allow exclusive rep to meet in person with newly hired employees, without charge to the pay or leave time of the employees, for 30 minutes, within 30 calendar days from date of hire, during new employee orientations or, if employer does not conduct new employee orientations, at individual or group meetings.

Exclusive rep shall receive no less than 10 days' notice in advance of an orientation, except that shorter notice may be provided where there is urgent need critical to operations of employer that was not reasonably foreseeable. Notice of and attendance at new employee orientations and other meetings must be limited to employer, the employees, the exclusive rep.

Meetings may be held virtually or for longer than 30 minutes only by mutual agreement of employer and exclusive rep.

**MPELRA
AMENDMENTS
2023**

ACCESS

**MINN. STAT.
179A.07,
SUBD. 9 (A-C)**

EMAIL USE: Employer must allow exclusive rep to communicate with bargaining unit members using their employer-issued email addresses regarding CBA, the investigation of grievances, other workplace-related complaints and issues, and internal matters involving the governance or business of the exclusive rep, consistent with employer's generally applicable technology use policies.

**MPELRA
AMENDMENTS
2023**

ACCESS

**MINN. STAT.
179A.07,
SUBD. 9 (A-C)**

ON SITE ACCESS: Employer must allow exclusive rep to meet with bargaining unit members in facilities owned or leased by employer regarding **bargaining, administration of CBA, grievances and other workplace-related complaints and issues, and internal matters involving the governance or business of the exclusive rep** provided the use does not interfere with governmental operations and the exclusive rep complies with worksite security protocols established by employer.

An exclusive rep conducting a meeting in a government building or other government facility may be charged for maintenance, security, and other costs related to the use of the government building or facility that would not otherwise be incurred by the government entity

UNION RELEASE TIME

- Contract Negotiations (negotiable – Employer may not pay)
- Meet and Confer
- Representing Employees (investigative interviews, grievance processing)
- Joint labor management committees
- New Employee Orientation
- Conduct the duties of the Exclusive Rep:

*A public employer must afford reasonable time off to elected officers or appointed representatives of the exclusive representative to conduct the duties of the exclusive representative and must, upon request, provide for leaves of absence to elected or appointed officials of the exclusive representative, to elected or appointed officials of an affiliate of an exclusive representative,
Minn. Stat. § 179A.07, subd. 6*

EARNED SICK AND SAFE TIME (ESST) - OVERVIEW

- Beginning January 1, 2024, Minnesota employers must provide employees with up to 48 hours of paid sick and safe leave for care of themselves, their family members, or another designee.
- Under the new law, an employee accrues “a minimum of one hour of earned sick and safe time for every 30 hours worked up to a maximum of 48 hours of earned sick and safe time in a year.”

Minnesota Session Law, Chapter 53, Section 12, to be codified at Minn. Stat. §§ 181.9445–181.9448.



ESST – ELIGIBLE EMPLOYEES



“Employee” means any person employed by an employer including temporary and part-time employees. (Does not include independent contractors)



Employees must work at least 80 hours in a calendar year to be eligible for ESST



For purposes of calculating the 80 hours, a “year” is defined under ESST as “a regular and consecutive 12-month period, as determined by an employer and clearly communicated to each employee.” (*i.e.* calendar year, fiscal year, or year based on the employee’s work anniversary date)

ESST AND BARGAINING

- ESST statute does not “limit the right of parties to a CBA to bargain and agree with respect to earned sick and safe time policies or to diminish the obligation of an employer to comply with any CBA, or any employment benefit program or plan that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements provided in” the ESST statute.

Collective Bargaining

UNION DEMANDS TO BARGAIN ESST

- Many employers have received a demand to engage in impact bargaining regarding the implementation of ESST.
 - ❑ In some cases, union's position is that ESST use is at the discretion of employees (*i.e.* cannot be cross-designated) so that employee can “save” ESST time for ESST-specific reason.
- Some employers have received proposed MOA proposing changes to CBA language wherein:
 - ❑ New ESST bank is added;
 - ❑ Sick Leave article is renamed Earned Sick and Safe Time making all sick leave ESST eligible; or
 - ❑ Employees would be allowed to choose whether to designate time as ESST or not.

PAID FAMILY MEDICAL LEAVE (PFML)

- Beginning 1/1/26, employers will be required to pay into state fund providing employees for partial wage replacement for 12-20 weeks (in a 52 week period) for:
 - Medical leave;
 - Bonding with a new child;
 - Caring for a family member;
 - Safety leave; or
 - Qualifying exigency leave
- Employee will receive partial pay for leave when “unable to perform regular work due to a serious health condition, a qualifying exigency, safety leave, family care, bonding, or medical care related to pregnancy.”



PFML: ELIGIBLE USE/REASONS FOR LEAVE

Employee's
own serious
health condition

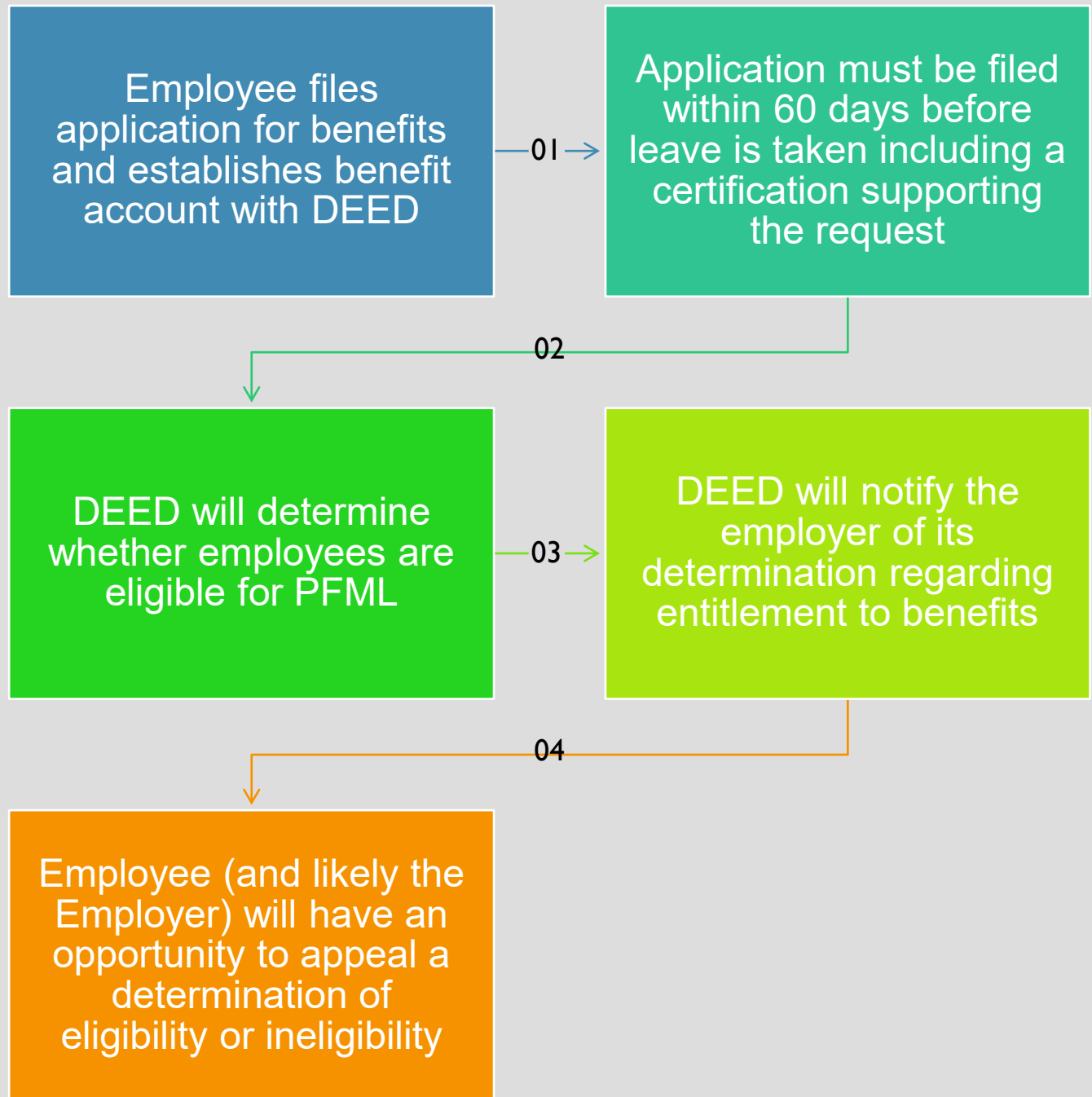
Bonding leave

Family Care
Leave

Safety Leave

Qualifying
Exigency

PFML: DETERMINATION OF ELIGIBILITY



PFML: AMOUNT OF LEAVE

12 Weeks for Serious Health Condition

- An employee may take up to 12 weeks of paid leave for their own serious health condition.

12 Weeks for Bonding, Family Care, Safety, or Qualifying Exigency

- An employee may take up to 12 weeks of paid leave for bonding, family care, safety, or a qualifying exigency.

Additional 8 Weeks (20 Total) Under Certain Circumstances

- If an employee has exhausted their 12 weeks due to a serious health condition, they may take an additional 8 weeks for bonding, family care, safety, or qualifying exigency, and vice versa.

Intermittent Leave Permissible

- Leave may be taken intermittently, but the employer may elect to limit intermittent leave to 480 hours in any 12-month period.

PFML: NOTICE TO EMPLOYERS AND SCHEDULING LEAVE

Notice of Leave

- If the need for leave is foreseeable, an employee must provide at least 30 days' advance notice.
- If notice is "not practicable because of lack of knowledge" of when the leave will begin, not must be given "as soon as practicable."
- Employers may require employees to abide by the employer's "customary notice and procedural requirements for requesting leave," unless "unusual circumstances" do not allow the employee to do so.

Scheduling Leave

- An employee taking leave for a serious health condition intermittently are required to provide employers with a "schedule of needed workdays off as soon as practicable."
- Employees taking leave intermittently must also make efforts to schedule leave in a way that does not "disrupt unduly the operation of the employer."
- If the leave will unduly disrupt the employer's operations, the employer may require the employee to change their leave schedule to "accommodate the employer."

PFML: HOW PREMIUMS ARE PAID



Employer Contribution:

Beginning 1/1/26, employers required to pay premiums on taxable wages paid to each employee into family and medical benefit insurance account on quarterly basis:

- (1) 0.7% for employer participating in both family and medical benefit programs
- (2) 0.4% for employer participating in only medical benefit programs with an approved private plan for family benefit program
- (3) 0.3% for employer participating in only family benefit program with an approved private plan for medical benefit program

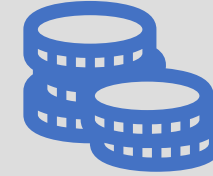


Employee Contribution:

Employers must pay at least half of the annual premiums

Employees, through a wage deduction, pay remaining premium, if any not paid by employer.

These deductions cannot result in employee falling below minimum wage required by law.



Small Business Exception:

Employers with fewer than 30 employees, amount of wages upon which premium rate is based is reduced by premium rate to be paid by employer multiplied by the lesser of:

- (1) \$12,500 multiplied by the number of employees; or
- (2) \$120,000

For each employee over 20 employees, the exclusion is reduced by \$12,500

NEW LAW: MINNESOTA PAY HISTORY BAN

- Effective January 1, 2024, you may not:
 - Inquire into
 - Consider
 - Require disclosure of the pay history of an **external or internal** applicant for employment for the purpose of determining wages, benefits, or other compensation for that applicant (MN Stat. § 363.08.8)
- According to the MDHR website, “The law applies to all job applicants, including current employees seeking an internal promotion or transfer and full and part time employees.”
- This could impact employers internal promotion processes.