



Minnesota Paid Family Medical Leave: Implementation Challenges in the First Two Months.

by Cory A. Genelin



As of this writing (March 5, 2026) Minnesota’s Paid Family Medical Leave (“PFML”) program (Minnesota Statutes Chapter 268B) has been in operation for two months. Here are some of the challenges our clients are seeing and how to overcome them or at least minimize them.

1. Private Plan Employees Applying to the State Program.

Yes, this is happening. A lot. Even employers who have complied with the notice requirement of Section 268B.10, Subdivision 13, are enrolling in private plans and telling their employees that they are enrolled in private plans, only to have those employees apply for benefits with the State program. In most cases, this leads to employees getting a denial notice from the State . . . and then getting very mad. In one case, the State approved—and PAID! —benefits for an employee enrolled in a private plan. According to this employer, when it notified the State that the employee was ineligible under the State plan, the State allowed the employee to keep the benefits paid! (Although, the State could be seeking reimbursement from the private plan.) These situations turn benefits into headaches for employees and employers.

The lesson here is simple: People don’t listen. It’s not enough to comply with the minimum posting requirements. You need to tell them, and show them, and tell them again, exactly how to apply for benefits. In fact, it would be best if you had one

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designated go-to person in your organization who can hold the applicants' hands as they apply.

2. High Use Rate Hurting Productivity.

One client, with 65 employees, currently has 7 employees on PFML. It's making do with 89% of its workforce. It gauges customer satisfaction weekly and has seen this drop from 89% to 76% in 2026. It has decided that the only solution is to add 3 staff to account for what appears to be a future with a sizable part of its workforce simply gone. Fortunately, it has the revenue to do that without risking the company and putting all 65 out of work.

A remedial measure I've been advising since the inception of PFML is robust cross training. Employers simply can't afford to be one-deep at any position. You need a plan as to how you will operate without a key employee for weeks on end. There should not be any password, program, or client in your company that only one employee knows.

3. "Top-Off"

Employers who wish to "top-off" an employee's benefits to their wage level, as allowed by Section 268.01, Subdivision 41, are having a difficult time getting confirmation of an employee's benefit amount. The State has not been consistent. For employees approved in January, the State was providing a concise breakdown of the benefit amount, while some employers approving leave in February received no such breakdown. I have yet to see any employer punished for making supplemental benefit payments that (when combined with PFM benefits) exceed the regular wage or salary, as is prohibited by Section 268.01, Subdivision 41(d). If the State has failed to identify the benefit amount, I can't see the State turning around and suing the employer. Employers in this situation should simply ask the employee what they are receiving and supplement accordingly.

4. Approvals Not Matching Medical Documentation.

More than one employer has reported that, for example, a doctor will remove an employee from work for 6-8 weeks, and the State will approve the employee for a full 12 weeks of PFML. This appears to be a misreading of the benefits documents. Remember that there is a difference between eligibility for benefits and eligibility for leave. It appears that the State is actually telling employers and employees that 12 weeks of benefits are available. If the employee is not medically

unable to work, they are not eligible for leave. Employers in this situation should contact the State and provide (or re-provide) the medical documentation showing the employee's actual work limitations and release to work date. Meanwhile, they should insist that the employee return to work or provide supplementary documentation.

5. Employees Choosing to Not Use PFML.

One of the most frustrating things I've had reported is that many employees are simply electing not to use PFML. This is mostly occurring with employers who continue to offer generous leave packages in addition to the State-mandated leave programs. Employers are hearing things like "the State program just seems like a lot of form and a lot of pain to get less than all of my pay." This is frustrating because money that would otherwise go to wages or profits is being paid to PFML, and the benefit isn't even being used.

Even if you or your employees don't like the new law, I encourage you to find ways to get your employees to use this benefit that you (and probably they) are paying for. Additional training to de-mystify the system may make use more likely.

Another option that employers are considering is pairing down PTO and other optional leave programs to get employees to use the PFML system that you have no choice but to pay for.

Remember, use of PFML is the employee's option. They may be shooting themselves in the foot by using PTO instead, but that is their choice.

6. Federal FMLA and Minnesota PFML Double Dipping

Remember, Minnesota employers with employees above the Federal FMLA threshold are subject to both Federal FMLA and Minnesota PFML. Much initial guidance from the State and from attorneys interpreting the Minnesota PFML indicated that Minnesota PFML and FMLA "leave run concurrently." Unfortunately, that's an oversimplification.

Remember that any leave taken for the purposes of Federal FMLA can be designated as FMLA by the employer. Once the leave is taken, notice from the employer starts the FMLA 12-week calendar counting. However, remember that it's the employee's option whether or not to take Minnesota PFML. Particularly when the reason for leave is baby leave, the employee has considerable room to structure leave creatively (compared to leave for a medical disability with an uncertain

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date of onset and date of recovery). Employee can take, and have been taking, 12 weeks of FMLA baby leave, and then applying for—and receiving—12 weeks of Minnesota PFML. This may or may not have been what the Minnesota Legislature intended, but it is allowed under the plain language of the statute.

7. Employers Being “Increasingly Selective” About Hiring.

Many clients and employers have told me some version of the same thing in the context of PFML: “Going forward, we’re just going to be increasingly selective about who we hire, keep, and promote.” You are free to think thoughts like that; but never ever speak them to anyone but your attorney!

You are absolutely prohibited from taking adverse employment action based on use of PFML, your assumptions about future use of PFML, an employee’s medical condition, or your guesses about an employee’s medical condition.

8. The 90 Day Question.

Section 268B.09 Subdivision 6(a) governs reinstatement and broadly says that “(a) On return from leave . . . employee is entitled to return to the same position . . .” Section 268B.09, Subdivision 6(a) says nothing about when this right of reinstatement arises. Section 268B.09, Subdivision 6(h) says “Ninety calendar days from the date of hire, an employee has a right and is entitled to reinstatement as provided under this subdivision for any day for which:” (1) employee has been deemed eligible; or (2) employee is eligible or applied in good faith.

So, the question is, if an employee who has worked for less than 90 days is given PFML that takes her beyond the 90-day window, is that employee entitled to reinstatement? Stated otherwise: Does the right to reinstatement arise on the 90th day of employment without leave, or simply the 90th day?

The specific question of one client was: “we have an employee who worked for us for 15 days and was then taken off of work for 12 weeks, which is 84 days, so he’ll return on day 99. Does he have a right to reinstatement, or can we fire him?” According to the plain language of the statute, the employer certainly can’t fire him on day 90, but can it fire him on day 89 or earlier?

The question is: what would be the reason for this termination? Section 268B.09, Subdivision 1(a) says an employer can’t fire “for requesting or obtaining benefits or leave[.]” So the

employer certainly can’t fire him because he took PFML. What legal reasons would the employer have for firing him? When he has exhausted ESST and any other leave, termination is generally allowed with continued absence (subject to ADA/MNHRA analysis). But he hasn’t exhausted all leave—he has PFML.

The statute does not clearly answer this question. A Fact Sheet put out by DEED says, “If someone has worked at their job for at least 90 days, their job will be protected when they return from leave.” But a fact sheet is not law.

Ultimately, while it’s an extremely close call, I think an employer could terminate before the 90 days. If I had to defend an employer in that situation, I would argue that while Section 268B.09, Subdivision 6(h) is terribly worded, it must mean something, and it can only mean that an employee who has not worked 90 days has no right to return and thus may be fired.

9. Will Minnesota Paid Family Leave Act be Declared Unconstitutional?

And finally, there is reason to believe that all of this will go away. It’s fairly complicated so here’s the short version: Article IV, Section 17 of the Minnesota State Constitution requires that “No law shall embrace more than one subject, which shall be expressed in its title.” Minnesota PFML was passed in House File 5247, also known as 2024 Session Law Chapter 127. The portion of Chapter 127 that states its “one subject” is 312 words long and refers to highway bonds, unions, veterinary licenses, machine guns, taxes, and the Minnesota PFML.

A separate portion of Chapter 127 has already been struck down as being passed in violation of the “Single Subject Clause” of the State Constitution. That was a trial court decision so it will be a while before the Minnesota Supreme Court rules on it, but the Minnesota Supreme Court has struck down legislation for this reason before. It may only be a matter of time before PFML meets the same fate.

10. Conclusion.

The Minnesota PFML was a sprawling mess of legislation. Meanwhile, State employees are tasked with running a system that is new to the State, to employers, and to employees. These growing pains were guaranteed. Employers should remain engaged and not leave employees to navigate this system alone.



Meet New Senior Associate Jason J. Bartlett

Gislason & Hunter LLP welcomes Jason Bartlett as a Senior Associate Attorney. Bartlett will practice primarily out of the Mankato, MN office.

Bartlett will focus his practice on employment law and litigation. He brings extensive experience advising employers on a wide range of labor and employment matters. His practice includes guiding businesses through complex workplace issues, providing practical compliance advice, and helping employers navigate challenging personnel situations with confidence.

Bartlett graduated from St. Cloud State University with a Bachelor of Science, Summa Cum Laude in Applied Psychology in 2001. He received his Juris Doctor from William Mitchell College of Law, Cum Laude in 2004.

Employers of Non-Union Employees: Don't Forget About the NLRA

by Jason J. Bartlett

Employers of non-unionized workforces are sometimes unaware that federal labor relations laws may apply to their employees. For example, the National Labor Relations Act (“NLRA”) applies to both union-represented and non-union-represented workers, providing them with substantial protections for workplace advocacy and organizing activities. It is important for all employers to have an understanding of these employee protections.

The NLRA is a federal law that regulates labor relations for most private sector employers. The NLRA’s definition of “employee” broadly includes “any employee” without limiting coverage to just unionized workers. However, certain categories of workers are excluded from NLRA coverage, including public sector employees (employees of state, federal and local governments and their subdivisions), agricultural laborers, domestic workers, supervisors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and independent contractors.

The National Labor Relations Board (“NLRB”) is the federal government agency responsible for enforcing the NLRA. Alleged violations of the NLRA can be filed with the NLRB in the form of unfair labor practices charges, which are investigated by the NLRB.

Section 7 of the NLRA protects the rights of employees to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from such activities. These are commonly referred to as Section 7 rights.

Employees can engage in protected concerted activity when they act individually or collectively to address workplace concerns that benefit other employees or seek to induce group action. Additionally, the NLRA protects these rights by prohibiting employer interference, discrimination, and retaliation.

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So What Does This Mean for Employers?

The NLRA's application to non-union workplaces creates significant compliance obligations for employers. Below are a few key strategies for avoiding NLRA violations:

- Before disciplining or discharging an employee, evaluate whether the employee's conduct at issue could constitute protected concerted activity under the NLRA, and should therefore not result in discipline or discharge. For example, was the employee's conduct at issue a complaint about working conditions made on social media? Such conduct can be protected concerted activity even when the employee included profanity and criticism of management in the social media post. If you are unsure whether the employee conduct might be considered protected concerted activity, consult your labor relations counsel prior to issuing any discipline.
- Periodically review your employee handbook provisions and employment policies to ensure they do not contain language that has a reasonable tendency to chill employees from engaging in protected concerted activities such as discussing wages, benefits, and workplace safety issues. For example, non-solicitation and non-distribution policies can be overbroad and unlawful if they apply during non-work time and in non-work areas. Employee handbook and policy language should be narrowly tailored to specific, legitimate business needs.

- Enforce workplace policies consistently. If you allow employees to post notices about fundraisers and local events on the break room bulletin board, you cannot prohibit them from including union meeting notices.

Additionally, it is important for employers to be aware of the common unfair labor practice pitfalls that can occur during union organizing campaigns. The following actions may result in charges of unfair labor practices against employers and must be avoided:

- Threats of reprisal if the employees vote for a union or engage in protected concerted activities. A classic example is threatening to close the plant if employees vote in favor of union representation.
- Promises of benefits to employees to defeat union organizing efforts or discourage union support.
- Interrogating or questioning employees about their union activities or sympathies.
- Surveillance or creating an impression of surveillance regarding employees' union activities.
- Transferring, laying off, terminating, assigning employees more difficult work tasks or otherwise punishing employees because they engaged in protected concerted activities.





What Are “Wages” Under Minn. Stat. § 181.13?

by Adam N. Froehlich



Most HR professionals and business owners probably know—or need to know—that Minnesota Statutes section 181.13(a) makes a discharged employee’s “wages or commissions actually earned and unpaid at the time of discharge” immediately due and payable upon the employee’s demand. Failing

to pay wages or commissions within 24 hours after the demand carries a penalty equal to the employee’s average daily earnings for each day the wages or commissions are unpaid, up to 15 days.¹ But what constitutes “wages”?

“[S]ection 181.13(a) is a timing statute that does not create a substantive right to recover compensation[.]”² An employee’s right to compensation must arise under some other legal authority, such as an employment contract (including, but not limited to, a unilateral contract created by an employee handbook), for section 181.13(a) to apply.³ In other words,

Section 181.13(a) does not determine what an employee is owed, only when an employee is owed. For example, an employee cannot recover payment for accrued but unused PTO unless the employee handbook governing their employment provides for such a payment.⁴

I. Bonuses

Whether a bonus constitutes “wages . . . actually earned and unpaid at the time of discharge” depends largely on whether the bonus is discretionary, and whether the employer awarded the bonus prior to discharge of the employee. The question of whether a bonus is “wages” is determined by the employee’s contractual arrangement with the employer, not Minn. Stat. § 181.13(a). If the employee was entitled to receive their bonus before they were discharged, generally the bonus will be “wages”. If the employee was not entitled to receive their bonus before they were discharged, generally the bonus will not be “wages”

A discretionary bonus which has not been awarded at the time of discharge likely is not “wages” under Minn. Stat. § 181.13(a). In *Chambers v. Travelers Companies, Inc.*, 668

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¹ Minn. Stat. § 181.13(a).

² *Hall v. City of Plainview*, 954 N.W.2d 254, 271 (Minn. 2021).

³ *Id.*

⁴ *Id.* (“Hall cannot recover his accrued PTO under section 181.13(a) without a valid contract entitling him to payment. Thus, whether Hall can now recover for breach of a contractual obligation under section 181.13(a) depends on whether he established in district court, on remand, that 1) a contract exists and 2) he satisfied the requirements of the Handbook’s PTO payment provision and is owed payment for his accrued PTO under that contract.”) (citation modified)

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F.3d 559 (8th Cir. 2012), the court determined that an unpaid \$30,000 bonus was not “wages” because all of the employer’s documents “clearly state that the awarding of bonuses is within the discretion of” the employer.⁵ The employee in Chambers had received a bonus of \$32,000 the prior year, and the employee had received a “Total Compensation Summary” for the year in which she was discharged, listing a \$30,000 bonus.⁶ The employee also received positive marks on her written performance review earlier in the year.⁷ Despite those facts, the court held the bonus was not “wages . . . actually earned and unpaid”, because (1) the “Total Compensation Summary” “prominently stated that it was for informational purposes, did not create a contract, and did not alter any existing contract”, (2) the bonus was discretionary, and nothing indicated that payment of the bonus was mandatory, and (3) the employer’s “policy provided that an employee would be eligible for a bonus only if she was employed on the date bonuses were distributed”, and the employee in Chambers was not employed when bonuses were paid.⁸ Similarly, in *Knutson v. Schwan’s Home Service, Inc.*, 711 F.3d 911 (8th Cir. 2013), the employee was not entitled to a bonus because the company policy required the employee to be “employed when the bonus was determined”, and the employee was not employed at that time.⁹

But, where an employee has contracted for a bonus, and that bonus is not discretionary, the bonus likely is “wages” under Minn. Stat. § 181.13(a). In *Kvidera v. Rotation Engineering and Mrg. Co.*, 705 N.W.2d 416 (Minn. App. 2005), the employee entered into a contract providing for an annual bonus as part of his overall compensation based upon certain criteria.¹⁰ There, the court noted that the bonus was not “subject solely to the employer’s discretion” or “gratuitous”, and held “when an employee contracts for a bonus in exchange for his services to the employer, and the right to that bonus vests prior to the employee’s termination”, the employer must pay that bonus in accordance with Minn. Stat. § 181.13(a).¹¹ The bonus was “wages” because the employee had an undisputed right to



receive a bonus.¹² The court in *Kvidera* held that the bonus had to be paid within 24-hours of the employee’s demand, even though the amount of the bonus had not been determined.¹³ *Kvidera* presents a potentially dangerous pitfall for an employer who guarantees a bonus in an uncertain amount, and there is significant risk and room for dispute regarding the calculation of a bonus following termination of an employee, particularly if the bonus amount is based on subjective criteria, in which miscalculating a bonus could lead to a violation of Minn. Stat. § 181.13(a).

In order to ensure that bonuses are not “wages . . . actually earned and unpaid” and therefore subject to Minn. Stat. § 181.13(a), employers should ensure that their bonus policies are clear that bonuses are discretionary and that employees are eligible for bonuses only if they are employed on the date bonuses are distributed. If certain criteria are provided for bonus calculation, employers should be clear that those criteria are merely guidelines, and that the ultimate decision as to whether to pay a bonus is up to the employer’s discretion. Employers should also ensure that when discussing bonus potential with employees, or prospective employees, they are clear that bonuses are paid out in accordance with company policies, or the employee’s employment contract, and that the potential for a bonus does not guarantee a bonus or alter

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⁵ Chambers, 668 F.3d at 565.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Knutson*, 711 F.3d at 917.

¹⁰ *Kvidera*, 705 N.W.2d at 418, 423.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* (“While the amount respondent would receive and the appropriate evaluation criteria remained questions of fact, respondent’s right to the undetermined amount vested as of July 1, 2002, the day after the expiration of the 2001 contract”).

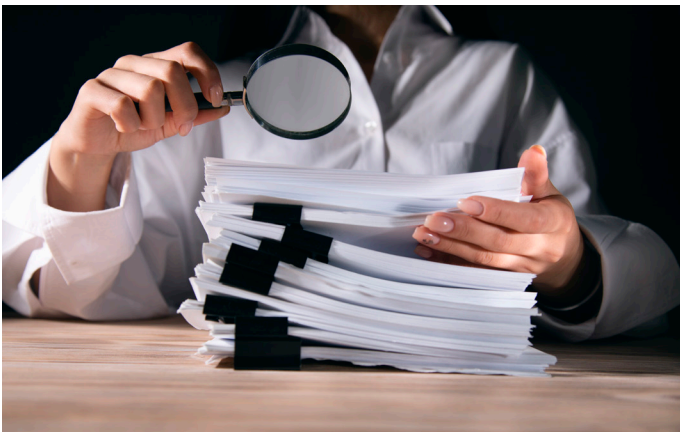
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the company policies or contract. Even still, there may be circumstances in which a bonus may be considered “wages . . . actually earned and unpaid”, where the right to payment accrued before the employee’s discharge. If a bonus is not discretionary, the amount of the bonus should be pre-determined, or subject to only simple, objective criteria, to prevent a potential trap for employers at the end of the employee’s tenure.

II. Paid Time Off

An employer’s liability for vacation time, like bonuses is also “wholly contractual”¹⁴ but unlike a bonus, vacation time generally accrues as an employee works. In most cases, then, where an employee’s contract or an employer’s handbook provides that accrued but unused vacation time or paid time off will be paid out to the employee, the payout is considered “wages” under Minn. Stat. § 181.13(a). In fact, the Minnesota Supreme Court has unequivocally stated “paid time off or vacation pay constitutes wages for purposes of section 181.13(a).”¹⁵ But, the court has maintained that the right to such pay is determined by contract. In *Lee v. Fresenius Medical Care, Inc.*, the employment contract provided that an employee terminated for misconduct is not entitled to payment of earned but unused PTO.¹⁶ Because the employee was terminated for misconduct, and because state law does not require payment for earned but unused paid time off, the court determined that the



employee had no right to payment for her unused PTO and there was no violation of Minn. Stat. § 181.13(a).¹⁷

If Earned Sick and Safe Time had been available in *Lee*, however, the outcome may have been different, to the extent that the employee sought payment for unused ESST. Like with most paid time off, ESST is accrued with time worked, up to a cap.¹⁸ “[E]mployers must permit an employee to carry over accrued but unused sick and safe time into the following year” up to 80 hours per year, unless the employer front-loads 80 hours or front-loads 48 hours and pays the employee for accrued but unused sick and safe time at the end of a year.¹⁹ In the latter situation, where the employer pays out unused sick and safe time at the end of a year, the ESST payout qualifies as wages. But unlike the PTO payout in *Lee*, there is a separate statutory right to receive the ESST payout under Minn. Stat. § 181.9446(b)(2). Accordingly, even though the employment contract in *Lee* provided that no unused PTO would be paid out if the employee is terminated for misconduct, the employee likely would have a right to have her unused ESST paid out. It is likely that any employer who front-loads 48 hours of ESST and pays out the unused ESST at the end of the year must pay out the unused ESST subject to Minn. Stat. § 181.13(a). The question that remains unanswered is whether an employee has “earned” the right to have the ESST paid out at any point during the year, if the payout only occurs at the end of the year. Minnesota courts will likely determine that an employee’s right to an ESST payout is “earned” at the beginning of each year when the employer front-loads the 48 hours of ESST, and therefore an employer must pay out the unused portion of that 48 hours upon termination, regardless of when in the year the employee is terminated.

III. Reimbursement and Per Diem

Per diem, defined as “[a] monetary allowance, usu[ally] to cover expenses” is not considered wages under Minn. Stat. § 181.13(a).²⁰ Similarly, reimbursements, in the absence of a

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¹⁴ *Brown v. Tonka Corporation*, 519 N.W.2d 474, 477 (Minn. App. 1994); *Tynan v. KSTP, Inc.*, 247 Minn. 168, 177, 77 N.W.2d 200, 206 (1956); *Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117, 123 (Minn. 2007).

¹⁵ *Lee*, 714 N.W.2d at 125.

¹⁶ *Id.*

¹⁷ *Id.* at 125–30.

¹⁸ Minn. Stat. § 181.9446(a) (“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.”)

¹⁹ Minn. Stat. § 181.9446(b)

²⁰ *Schreder v. DC & D Enterprises, LLC*, No. A-15-1140, 2016 WL 687493, at *3 (Minn. App. Feb. 22, 2016)

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contractual right to reimbursement, are not “wages”.²¹

IV. Severance payments

Money due to a former employee only after their separation from a company likely are not “wages”.²² The statutory language is clear that “wages” are monies payable for “time worked at the employee’s regular rate of pay.” Minn. Stat. § 181.13(a). Severance payments are not paid for “time worked”, nor are they necessarily connected to an employee’s regular rate of pay. Furthermore, they are owed only after an employee has separated from a company. In *Cole v. Holland Neway Intern., Inc.*, the court noted that severance benefits, even if they accrue with length of service, are not “owing” until the employee is terminated.²³ Thus, even if a severance was “wages”, it would not be “actually earned and unpaid at the time of discharge.” Similarly, in *Nanninga v. Best Buy Co.*, compensation owed under a severance agreement was not “wages” because the agreement was not signed until after the employee’s last day of employment, and therefore could not “be considered wages at the time of his discharge.”²⁴ *Nanninga*, however, leaves open the possibility that payments under a severance agreement entered into before an employee’s last day of work may be “wages” because the payment was “earned” before the end of the employment relationship. However, this risk can likely be mitigated by specifying a date for payment of severance amounts. By doing so, the employer would ensure that the employee does not have a right to payment until the contracted-

for date, and therefore no grounds to demand payment prior to that date.



V. Conclusion

In many cases, determining what constitutes “wages . . . actually earned and unpaid at the time of discharge” will be relatively straightforward: what would the employee have been paid for the days they worked, plus what are they entitled to under the employer’s policies for PTO payouts and bonuses. The most nuance comes into play with bonuses, based upon the level of discretion provided and when the right to payment vests. As with many employment law issues, ensuring that you have straightforward and robust policies in place regarding payments upon separation from employment will protect the company from mistakes leading to violations of Minnesota Statutes section 181.13(a). While this article discusses many common types of payments to employees, it does not cover all possible situations, and consulting with counsel is always recommended. Commissions also present a nuanced situation for purposes of Minnesota Statutes section 181.13(a), depending on how the commissions are structured, which this article does not address.

²¹ *Knutson*, 711 F.3d at 916–17 (providing that an employee is not entitled to reimbursement if subject to supervisor approval and that approval is not received).

²² See *Cole v. Holland Neway Intern., Inc.*, No. A03-609, 2004 WL 503751, at *3 (Minn. App. Mar. 16, 2004); *Nanninga v. Best Buy Co.*, No. 04-882, 2005 WL 8163318, at *14 (D. Minn. Aug. 10, 2005) (payment due under separation agreement signed after former employee’s last day of work “cannot be considered wages earned at the time of his discharge”).

²³ *Cole*, 2004 WL 503751, at *3.

²⁴ *Nanninga*, 2005 WL 8163318, at *14.

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