

1981 Assembly Bill 322

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## CHAPTER 360 , Laws of 1981

AN ACT to repeal 101.06; to amend 101.02 (15) (a); and to create 101.02 (15) (jm), 101.055, 101.222 (4) and 230.45 (1) (g) of the statutes, relating to public employe occupational safety and health and granting rule-making authority.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

SECTION 1. 101.02 (15) (a) of the statutes is amended to read:

101.02 (15) (a) The department has such supervision of every employment, place of employment and public building in this state as is necessary adequately to enforce and administer all laws and all lawful orders requiring such employment, place of employment or public building to be safe, and requiring the protection of the life, health, safety and welfare of every employe in such employment or place of employment and every frequenter of such place of employment, and the safety of the public or tenants in any such public building. This paragraph shall not apply to rural school buildings ~~and, after October 31, 1975, where issues of employer-employe relationship are covered by federal standards enforced by the~~ or, after June 29, 1975, to occupational safety and health issues covered by standards established and enforced by the federal occupational safety and health administration.

SECTION 2. 101.02 (15) (jm) of the statutes is created to read:

101.02 (15) (jm) Paragraphs (a) to (j) do not apply to public employe occupational safety and health issues covered under s. 101.055.

SECTION 3. 101.055 of the statutes is created to read:

**101.055 Public employe safety and health.** (1) **INTENT.** It is the intent of this section to give employes of the state, of any state agency and of any political subdivision of this state rights and protections relating to occupational safety and health equivalent to those granted to employes in the private sector under the occupational safety and health act of 1970 (5 USC 5108, 5314, 5315 and 7902; 15 USC 633 and 636; 18 USC 1114; 29 USC 553 and 651 to 678; 42 USC 3142-1 and 49 USC 1421).

(2) **DEFINITIONS.** In this section, unless the context requires otherwise:

(a) "Agency" means an office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, and includes the legislature and the courts.

(b) "Public employe" or "employe" means any employe of the state, of any state agency or of any political subdivision of the state.

(c) "Public employe representative" or "employe representative" means an authorized collective bargaining agent, an employe who is a member of a workplace safety committee or any person chosen by one or more public employes to represent those employes.

(d) "Public employer" or "employer" means the state, any state agency or any political subdivision of the state.

(3) **STANDARDS.** (a) The department shall adopt, by administrative rule, standards to protect the safety and health of public employes. The standards shall provide protection at least equal to that provided to private sector employes under standards promulgated by the federal occupational safety and health administration, but no rule may be adopted by the department which defines "toxic substance" as a substance solely because it is listed in the latest printed edition of the national institute for occupational safety and health registry of toxic effects of chemical substances. The department shall revise the safety and health standards adopted for public employes as necessary to provide protection at least equal to that provided to private sector employes under federal occupational safety and health administration standards, except as otherwise provided in this paragraph. Notwithstanding ss. 35.93 and 227.025, if the standards adopted by the department are identical to regulations adopted by a federal agency, the standards need not be duplicated as provided in ss. 35.93 and 227.025 if the identical federal regulations are made available to the public at a reasonable cost, promulgated in accordance with ch. 227, except s. 227.025, and distributed in accordance with s. 35.84.

(b) Standards adopted by the department shall contain appropriate provisions for informing employes about hazards in the workplace, precautions to be taken and emergency treatment practices to be used in the event of an accident or overexposure to a toxic substance. Standards shall include provisions for providing information to employes through posting, labeling or other suitable means. Where appropriate, standards adopted by the department shall contain provisions for the use of protective equipment and technological procedures to control hazards.

(c) Standards adopted by the department relating to toxic substances or harmful physical agents, such as noise, temperature extremes and radiation, shall assure to the extent feasible that no employe will suffer material impairment of health or functional capacity through regular exposure. Where appropriate, standards adopted by the department relating to toxic substances and physical agents shall require the monitoring and measuring of employes' exposure to the substance or agent.

(4) **VARIANCES.** (a) *Procedure.* A public employer may apply to the department for a temporary variance under par. (b), an experimental variance under par. (c) or a permanent variance under par. (d) to any standard adopted under sub. (3) by filing a petition with the department specifying the standard for which the public employer seeks a variance and the reasons for which the variance is sought. In addition, the public employer seeking the variance shall provide a copy of the application to the appropriate

public employe representatives and post a statement at the place where notices to employes are normally posted. The posted statement shall summarize the application, specify a place where employes may examine the application and inform employes of their right to request a hearing. Upon receipt of a written request by the employer, an affected employe or a public employe representative, the department shall hold a hearing on the application for a variance and may make further investigations. If a hearing has been requested, the department may not issue a variance until a hearing has been held. A variance issued under par. (b), (c) or (d) shall prescribe the methods and conditions which the employer must adopt and maintain while the variance is in effect.

(b) *Temporary variance.* The department may grant a temporary variance before a standard goes into effect if the public employer complies with par. (a) and establishes that it is unable to comply with a standard by the standard's effective date because of unavailability of professional or technical personnel or of necessary materials or equipment or because necessary construction or alteration of facilities cannot be completed by the effective date. The employer shall also show that it is taking all available steps to safeguard employes against the hazard covered by the standard from which the variance is sought and shall possess and describe a program for coming into compliance with the standard as quickly as possible. If a hearing is requested, the department may state in writing that noncompliance with the standard is permitted for 180 days or until a decision is made after the hearing, whichever is earlier. A temporary variance shall be in effect for the period of time needed by the employer to achieve compliance with the standard or for one year, whichever is shorter. A temporary variance may be renewed no more than twice, and only if the public employer files an application for renewal at least 90 days before expiration of the temporary variance and complies with this paragraph and par. (a).

(c) *Experimental variance.* The department may grant an experimental variance if the public employer complies with par. (a) and the department determines that the variance is necessary to permit the employer to participate in an experiment approved by the department to demonstrate or validate new or improved techniques to safeguard the health or safety of employes.

(d) *Permanent variance.* The department may grant a permanent variance if the public employer complies with par. (a) and the department finds the employer has demonstrated by a preponderance of the evidence that the conditions and methods the employer uses or proposes to use provide employment or a place of employment which is as safe and healthful as that provided under the standard from which the employer seeks a permanent variance. A permanent variance may be modified or revoked upon application by the employer, an affected employe, a public employe representative or the department and after opportunity for a hearing, but not sooner than 6 months after issuance of the permanent variance.

(5) **INSPECTIONS.** (a) A public employe or public employe representative who believes that a safety or health standard or variance is being violated, or that a situation exists which poses a recognized hazard likely to cause death or serious physical harm, may request the department to conduct an inspection. The department shall provide forms which may be used to make a request for an inspection. If the employe or public employe representative requesting the inspection so designates, that person's name shall not be disclosed to the employer or any other person, including any state agency except the department. If the department decides not to make an inspection, it shall notify in writing any employe or public employe representative making a written request. A decision by the department not to make an inspection in response to a request under this subsection is reviewable by the department under sub. (6) (a) 3 and is subject to judicial review under sub. (6) (a) 4.

(b) An authorized representative of the department may enter the place of employment of a public employer at reasonable times, within reasonable limits and in a reasonable manner to determine whether that employer is complying with safety and health standards and variances adopted under subs. (3) and (4) or to investigate any situation which poses a recognized hazard likely to cause death or serious physical harm to a public employe regardless of whether a standard is being violated. No public employer may refuse to allow a representative of the department to inspect a place of employment. If an employer attempts to prevent a representative of the department from conducting an inspection, the department may obtain an inspection warrant under s. 66.122. No notice may be given before conducting an inspection under this paragraph unless that notice is expressly authorized by the secretary or is necessary to enhance the effectiveness of the inspection.

(c) A representative of the employer and a public employe representative shall be permitted to accompany a representative of the department on an inspection made under this subsection to aid in the inspection and to notify the inspector of any possible violation of a safety and health standard or variance or of any situation which poses a recognized hazard likely to cause death or serious physical harm to a public employe. The public employe representative accompanying the representative of the department on an inspection shall, with respect to payment received or withheld for time spent accompanying the department representative, receive treatment equal to that afforded to any representative of the employer who is present during an inspection, except that a public employer may choose to allow only one public employe representative at a time to accompany the department representative on an inspection without a reduction in pay. If a representative of the employer does not accompany the representative of the department on an inspection, at least one public employe representative shall be allowed to accompany the representative of the department on the inspection without a loss of pay. Where no public employe representative accompanies the representative of the department on an inspection, the representative of the department shall consult with a reasonable number of employes concerning matters of employe safety and health. The department shall keep a written record of the name of any person accompanying the department representative during the inspection, the name of any employe consulted and the name of any authorized collective bargaining agent notified of the inspection by the public employer under sub. (7) (e).

(d) When making an inspection, a representative of the department may question privately any public employer or employe. No public employe shall suffer a loss in wages for time spent responding to any questions under this paragraph.

(e) A representative of the department shall have access to the records required under sub. (7) (a) and (b) and to any other records maintained by a public employer which are related to the purpose of the inspection.

(6) ENFORCEMENT. (a) *Orders.* 1. 'Issuance.' If, as a result of inspection, the department finds a violation of a safety and health standard or variance or a condition which poses a recognized hazard likely to cause death or serious physical harm to a public employe, the department shall issue an order to the employer. A public employer who is in compliance with any standards or variances is deemed to be in compliance to the extent of the condition, practice, means, method, operation or process covered by that standard. The order shall describe the nature of the violation and the period of time within which the employer shall correct the violation. The department shall send a copy of the order to the top elected official of the political subdivision of which the public employer is a part and to the appropriate collective bargaining agent for the employes affected by the violation cited in the order, if a collective bargaining agent exists. If the order is issued as a result of an inspection requested by an employe or public employe representative, the department shall also send a copy of the order to that employe or public employe representative. Upon receipt of an order, the employer shall post the order at or near the site of

violation for 3 days, or until the violation is abated, whichever is longer. The order shall be posted regardless of whether there has been a petition for a variance under sub. (4) or for a hearing under subd. 3. The employer shall ensure that the order is not altered, defaced or covered by other materials.

2. 'Decision not to issue.' If the department decides not to issue an order in response to a request for inspection filed under sub. (5) (a), it shall mail written notice of that decision to the public employe or public employe representative who requested the investigation. A decision under this subdivision is reviewable by the department under subd. 3.

3. 'Review by department.' A public employer or employe affected by an order or decision issued by the department under subd. 1 or 2 or sub. (5) (a) may obtain review of the order or decision by filing with the department a petition requesting a hearing and specifying the modification or change desired in the order or decision. A petition for a hearing must be filed with the department not later than 30 days after the order is issued or the written notification is mailed. If the department denies the request for a hearing, the denial shall be in writing and shall state the reasons for denial. If the department holds a hearing, it shall issue an order affirming, vacating or modifying the order or decision under subd. 1 or 2 or sub. (5) (a), within 30 days after the close of the hearing.

4. 'Judicial review.' Orders and denials of requests for hearings under subd. 3 are subject to judicial review under ch. 227.

(b) *Injunction.* Whenever a hazard exists in a public employer's place of employment which could reasonably be expected to cause death or serious physical harm before other procedures under this section can be carried out, the department may seek relief through an injunction or writ of mandamus as provided in chs. 783 and 813. If the department seeks an injunction or writ of mandamus, it shall notify the affected public employer and public employes of the hazard for which relief is being sought.

(7) **EMPLOYER OBLIGATIONS FOR RECORDKEEPING AND NOTIFICATION.** (a) A public employer shall maintain records of work-related injuries and illnesses and shall make reports of these injuries and illnesses to the department at time intervals specified by rule of the department. These records shall be available to the department, the employer's employes and the employes' representatives. This paragraph does not authorize disclosure of patient health care records except as provided in ss. 146.82 and 146.83.

(b) A public employer shall maintain records of employe exposures to toxic materials and harmful physical agents which are required by safety and health standards adopted under sub. (3) to be monitored or measured. A representative of the department and any affected public employe and his or her public employe representative shall be permitted to observe the monitoring and measuring and shall have access to the employer's records of the monitoring and measuring. This paragraph does not authorize disclosure of patient health care records except as provided in ss. 146.82 and 146.83.

(c) A public employer shall promptly notify a public employe who has been or is being exposed to any toxic material or harmful physical agent at a level which exceeds that prescribed by the safety and health standards of the department and shall inform that public employe of any corrective action being taken.

(d) A public employer shall notify its employes of their protections and rights under this section by posting a summary of these protections and rights in the place of employment where notices to employes are usually posted.

(e) When a representative of the department enters a public employer's place of employment to make an inspection, the employer shall notify an appropriate representative of any collective bargaining unit which represents the employer's employes. The employer shall give the name of the collective bargaining unit representatives notified of the inspection to the department representative making the inspection.

(8) **PROTECTION OF PUBLIC EMPLOYEES EXERCISING THEIR RIGHTS.** (a) No public employer may discharge or otherwise discriminate against any public employe it employs because the public employe filed a request with the department, instituted or caused to be instituted any action or proceeding relating to occupational safety and health matters under this section, testified or will testify in such a proceeding, reasonably refused to perform a task which represents a danger of serious injury or death or exercised any other right related to occupational safety and health which is afforded by this section.

(b) A state employe who believes that he or she has been discharged or otherwise discriminated against by a public employer in violation of par. (a) may file a complaint with the personnel commission alleging discrimination or discharge, within 30 days after the employe received knowledge of the discrimination or discharge. A public employe other than a state employe who believes that he or she has been discharged or otherwise discriminated against by a public employer in violation of par. (a) may file a complaint with the division of equal rights of the department alleging discrimination or discharge, within 30 days after the employe received knowledge of the discrimination or discharge.

(c) Upon receipt of a complaint, the personnel commission or the division of equal rights, whichever is applicable, shall investigate the complaint and shall determine whether there is probable cause to believe that a violation of par. (a) has occurred. If the personnel commission or the division of equal rights finds probable cause it shall attempt to resolve the complaint by conference, conciliation or persuasion. If the complaint is not resolved, the personnel commission or the division of equal rights shall hold a hearing on the complaint within 60 days after receipt of the complaint unless both parties to the proceeding agree otherwise. Within 30 days after the close of the hearing, the personnel commission or the division of equal rights shall issue its decision. If the personnel commission or the division of equal rights determines that a violation of par. (a) has occurred, it shall order appropriate relief for the employe, including restoration of the employe to his or her former position with back pay, and shall order any action necessary to ensure that no further discrimination occurs. If the personnel commission or the division of equal rights determines that there has been no violation of par. (a), it shall issue an order dismissing the complaint.

(d) Orders of the personnel commission and the division of equal rights under this subsection are subject to judicial review under ch. 227.

(9) **COORDINATION OF STATE SAFETY AND HEALTH PROGRAMS.** The department shall coordinate state safety and health programs and shall plan and conduct comprehensive safety and health loss prevention programs for state employes and facilities.

(10) **EXCEPTION FOR CERTAIN POLITICAL SUBDIVISIONS.** The department is not required to expend any resources to enforce this section in political subdivisions having 10 or less employes unless it has received a complaint.

**SECTION 4.** 101.06 of the statutes is repealed.

**SECTION 5.** 101.222 (4) of the statutes is created to read:

101.222 (4) The division shall review complaints of discrimination against public employes exercising their rights with respect to occupational safety and health matters, under 101.055 (8).

**SECTION 6.** 230.45 (1) (g) of the statutes is created to read:

230.45 (1) (g) Receive and process complaints of discrimination pertaining to occupational safety and health under s. 101.055 (8).

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