

## WISCONSIN

**Joseph F. Spitzzeri, Esq.**  
**Genevieve M. LeFevour, Esq.**  
**Amber N. Lukowicz, Esq.**  
**JOHNSON & BELL, LTD.**  
33 West Monroe Street  
Suite 2700  
Chicago, Illinois 60603  
Phone: (312) 372-0770  
Fax: (312) 372-9818  
Web: [www.johnsonandbell.com](http://www.johnsonandbell.com)  
Email: [spitzzerij@jbltd.com](mailto:spitzzerij@jbltd.com)  
[lefevourg@jbltd.com](mailto:lefevourg@jbltd.com)  
[lukowicza@jbltd.com](mailto:lukowicza@jbltd.com)

### **I. AT- WILL EMPLOYMENT**

#### **A. Statute**

Wisconsin does not have a statute pertaining to employment at will.

#### **B. Case Law**

Wisconsin has adopted the employment-at-will doctrine. The doctrine recognizes that where employment is for an indefinite term, an employer may discharge an employee “for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong.” *Runzheimer Int’l, Ltd. v. Friedlen*, 2015 WI 45 (2015).

### **II. EXCEPTIONS TO AT-WILL EMPLOYMENT**

#### **A. Implied Contracts**

##### **1. Employee Handbooks/Personnel Materials**

In *Ferraro v. Koelsch*, 368 N.W.2d 666, 124 Wis. 2d 154 (1985), the Wisconsin Supreme Court held that an employer’s handbook that stated that employees would be discharged only for cause constituted a binding contract and acted to restrict the employer’s right to discharge employees. The court stated:

[W]e conclude that such a handbook may, and that in the present instance it did, convert the employment relationship into one that only could be terminated by adherence to contractual terms – that the acceptance by the employee Ferraro of the terms set forth in the handbook created an employment contract.

*Ferraro*, 368 N.W.2d at 668. The court also ruled, however, that the employee's actions in verbally and physically abusing a hotel guest constituted a breach of this contract set forth in the handbook, and that the hotel followed the procedures in the handbook regarding discharge. The court found that Ferraro was properly discharged for cause.

An employee handbook must contain some of the elements of the one in *Ferraro* for it to convert an at-will employment agreement into one based on contract. *Wolf v. F&M Banks*, 534 N.W.2d 877 (Wis. Ct. App. 1995). These express provisions included rules for employee conduct and agreements by employees that they would abide by the conduct rules in exchange for: "continued employment;" a progressive discipline structure; a layoff procedure based on seniority; a distinction between probationary and nonprobationary employees; and the fact that "a discharge would only be for 'just cause.'" *Bukstein v. Dean Health Sys.*, 2017 WI App 54. The court in *Bukstein* involved a Dean policy involved only one alternate route regarding employee discipline. In contrast, the handbook in *Ferraro* obligated the employer to, among other things, terminate employment only for just cause. The court saw this as a stark contrast and thus not an exception to at-will employment under Wisconsin law. *Bukstein* at ¶24.

There is no contract altering the normal at-will rule when the employee handbook merely sets forth guidelines and does not contain a hierarchy of rules or a for-cause requirement. *Mursch v. Van Dorn Co.*, 851 F.2d 990 (7th Cir. 1988).

## 2. Provisions Regarding Fair Treatment

Wisconsin does not recognize "fair treatment" as an exception to at-will employment.

## 3. Disclaimers

The presence of a disclaimer stating that no part of an employee handbook creates a contract is not dispositive of whether the parties modified an at-will employment agreement. *Clay v. Horton Mfg. Co.*, 493 N.W.2d 379 (Wis. Ct. App. 1992). It is possible for a company through its agents to modify an employment contract to include company policies notwithstanding the disclaimer, if both parties intend to do so. *Don-Rick, Inc. v. QBE Americas*, 995 F. Supp. 2d 863 (W.D. Wis. 2014).

In *Clay*, Plaintiff was laid off by his former employer although the employer conceded that Clay had seniority over two-thirds of the remaining employees. Clay claimed his termination was unlawful because his status as an at will employee was altered when Horton posted a policy stating that employees would be laid off based on seniority. Clay supported his argument with several statements from superiors to the effect that Clay had to obey the terms of the handbook and the posted policy. The court did not reach its merits because it was up for summary judgment, and the court held that the at-will employment could have been altered. It was remanded for a determination of the intent of the parties.

## 4. Implied Covenants of Good Faith and Fair Dealing

Wisconsin does not recognize the implied covenant of good faith and fair dealing as an exception to at-will employment.

## B. Public Policy Exception

### 1. General

The only public policy exception to at-will employment recognized in Wisconsin is the refusal to violate a law. This falls under “Refusing to Violate the Law,” Section I.B.3.

### 2. Exercising a Legal Right

See discussion below on “Refusing to Violate the Law.”

### 3. Refusing to Violate the Law

In *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834 (1983), Brockmeyer began working for Dun & Bradstreet in August of 1969 as a business analyst trainee. His career with the company was erratic in that he was on probation for a time in 1978 and his superiors were unsatisfied with certain aspects of his managerial performance. In February of 1980, Brockmeyer's superiors were informed that Brockmeyer went on vacation with one of his secretaries without authorization and he smoked marijuana in front of company personnel. He admitted to these transgressions and promised to change his behavior. Brockmeyer attempted to find another position for his secretary within the company but was unsuccessful. The secretary was fired and she filed a sex discrimination suit against the Dun & Bradstreet. Brockmeyer was asked to submit a report about the course of events leading to her resignation but he refused because he was afraid of becoming a scapegoat for the company. He also stated that if he was called to testify, he would tell the truth.

Dun settled the claim with the secretary and fired Brockmeyer three days later. Brockmeyer sued and was awarded by a jury \$250,000.00 in compensatory damages and \$250,000.00 in punitive damages. The court of appeals reversed the decision due to insufficient evidence. The Supreme Court of Wisconsin stated that the rationale of both lower courts was incorrect.

The court first “refuse[d] to impose a duty to terminate in good faith into employment contracts, . . . [because this] would subject each discharge to judicial incursions into the amorphous concept of bad faith.” *Brockmeyer*, 335 N.W.2d at 838, 113 Wis. 2d at 569 (citation omitted). The court next held that a public policy exception to the at-will employment doctrine should be adopted holding that a wrongful discharge is actionable when the termination clearly contravenes the public welfare and violates paramount requirements of public interest. An employee cannot be fired for refusing to violate a constitution or a statute. *Id* at 840, 113 Wis. 2d at 573. The court emphasized that the plaintiff must prove the dismissal violated a clear mandate of public policy. After explaining Wisconsin's narrow public policy exception to the at-will rule, the court found that Brockmeyer did not state a valid claim for relief. The actions of Dun & Bradstreet did not go against established policy and, thus, the court of appeals decision to reverse the initial judgment in favor of Brockmeyer was affirmed. *Id* at 842-43, 113 Wis. 2d at 578-79.

The case of *Winkelman v. Beloit Mem'l Hosp.*, 483 N.W.2d 211, 168 Wis. 2d 12 (1992), holds that “fundamental and well-defined public policy” may also be embodied in administrative rules enacted by agencies pursuant to legislative direction, and that the exception applied to circumstances that violate the “spirit” as well as the “letter” of legislative pronouncements. *Id* at 215, 168 Wis. 2d at 22. In *Winkelman*, the defendant hospital violated the public policy exception to the at-will doctrine when it discharged Winkelman, a nurse, for refusing to provide services which the court found she was not qualified to perform.

In *Reilly v. Waukesha County*, 535 N.W.2d 51, 193 Wis. 2d 527 (Wis. Ct. App. 1995), the court of appeals held that an employee may be lawfully terminated even though the employee was fired because she refused to obey an order that required violating a state administrative rule. When Reilly, a child-care worker employed by Waukesha County, was told that she would have to supervise both a secured and an unsecured female detention living unit because she was the only female staff member working at the time, she asked her supervisor to put the order in writing and to include a statement indemnifying her for violating an administrative rule that prohibited one person from supervising both units during the same time period. The supervisor responded that Reilly would have to either comply with the order or leave. Reilly was terminated two days later for “insubordination.”

In distinguishing *Winkelman*, the *Reilly* court held that, although child safety in the living units was a fundamental and well-defined public policy under *Winkelman*, the administrative rule in the case at bar was not such a policy because it was merely a “mechanism” meant to apply the policy. *Reilly*, 535 N.W.2d at 56, 193 Wis. 2d at 539. Using this distinction, the court held that an employee may be fired for refusing to comply with a superior's illegal order when the employer could reasonably conclude that the employee's refusal to comply with that order jeopardized significant lawful interests of either the employer or of the public. *Id* at 52, 193 Wis. 2d at 530. The Wisconsin Supreme Court has consistently refused to expand the scope of the public policy exception.

Similarly, in *Batteries Plus, LLC v. Mohr*, 628 N.W.2d 364, 244 Wis. 2d 559 (2001), the court addressed a situation in which an employer terminated an employee for refusing to reimburse the employer for travel expenses allegedly paid in error. The court held that the existence of a statute, WIS. STAT. § 103.455, which prohibits an employer from using economic coercion to recover work-related losses from employees, did not give rise to the public policy exception. *Id* at 373-74, 244 Wis. 2d at 579.

In *Goggins v. Rogers Mem'l Hosp.*, 683 N.W.2d 510, 274 Wis. 2d 754 (Wis. Ct. App. 2004), the Wisconsin Court of Appeals held that a registered nurse claiming wrongful discharge under the public policy exception of the employment at will doctrine failed to state an actionable claim. According to the court, the nurse could not demonstrate that she was discharged in connection with a recognized public policy exception to the doctrine. The nurse contended that her employer's unwillingness to take action against a doctor after the employee had reported patient abuse and neglect by the doctor created an intolerable situation and constituted constructive discharge from her employment. The court noted that in order to establish a wrongful discharge claim, the claimant must satisfy a two part test: (1) the claimant must identify a fundamental and well defined public policy sufficient to meet the narrow cause of action for wrongful discharge

under the public policy exception to the employment-at-will doctrine; and (2) the claimant must demonstrate that the discharge violates that fundamental and well defined public policy. *Id* at 514, 274 Wis. 2d at 762. Here, the court held that the public policy exception did not apply because she had an affirmative duty to report patient abuse and neglect and was not faced with the choice to “report and be terminated, or fail to report and be prosecuted.” *Id* at 517, 274 Wis. 2d at 768.

This was reiterated in *Lewis v. Bay Indus.*, 51 F. Supp. 3d 846 (E.D. Wis. 2014), where the court held that “[t]he intent is to provide relief for an employee who faces the “onerous burden of choosing between equally destructive alternatives: report and be terminated, or fail to report and be prosecuted.” *Id* at 858. However, in this case, Lewis failed to provide evidence of any statute that he was required to violate. Lewis was unable to establish that he was wronged like what had happened in *Strozinsky* and *Brockmeyer*.

#### 4. Exposing Illegal Activity (Whistleblowers)

Wisconsin does not have a general “whistleblower” statute, but does prohibit retaliation against employees who engage in certain types of protected activity. Pursuant to WIS. STAT. § 111.322(3), retaliation for activity covered by the Wisconsin Fair Employment Act is prohibited. Similarly, WIS. STAT. § 111.322(2m), prohibits retaliation against employees who have filed complaints under other statutes.

In *Repetti v. Sysco Corp.*, 730 N.W.2d 189 (Wis. Ct. App. 2007), the Wisconsin Court of Appeals, refused to create an exception to the employment-at-will doctrine for employees who complain of Securities and Exchange Commission reporting violations. The Court held that Sarbanes-Oxley, 18 U.S.C. § 1514A(c), provides adequate remedies for employees wrongfully discharged under those circumstances. *Id* at 192.

Section 146.997 of the Wisconsin Statutes protects health care employees who, in good faith, report quality of care concerns. In *Masri v. State Labor and Industry Review Com’n*, 850 N.W.2d 298, 356 Wis. 2d 405 (2014), the Wisconsin Supreme Court held that the plaintiff, an unpaid medical intern, was not an employee entitled to protections under the Health Care Worker Protection Statute for reporting clinical concerns.

### **III. CONSTRUCTIVE DISCHARGE**

There is no independent cause of action for constructive discharge. *Biedel v. Sideline Software, Inc.*, 2013 WI 56. The “doctrine is ancillary to an underlying claim in which an express discharge otherwise would be actionable.” *Id*; see, e.g., *Labarbera-Haines v. Boardwalk Investments, LLC*, 728 N.W.2d 374 (Wis. Ct. App. 2007) (“an employee may have a cause of action for wrongful discharge when an employer repeatedly requests that the employee participate in illegal conduct in the course of his or her employment, and the employee is compelled to resign as a result.”).

“Constructive discharge occurs when working conditions are so “difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.” *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st

Cir. 1977). “Application of this ‘reasonable person’ test involves complex questions of fact, including, inter alia, the nature of the working conditions, their difficulty or unpleasantness, and what a reasonable person would or would not do under such conditions.” *Bernstein v. Consolidated Foods Corp.*, 622 F. Supp. 1096, 1101 (N.D. Ill. 1984). Bourque and other subsequent cases have established that an employee who resigns based on an isolated violation of the discrimination statute is not acting reasonably. The employee must remain in his position unless it is an “aggravated situation” beyond “ordinary” discrimination. Constructive discharge claims have not succeeded where there has been a denial of a promotion or when low supervisor appraisals are given when they are deserved.”

*E.E.O.C. v. Miller Brewing Co.*, 650 F. Supp. 739, 746-47 (E.D. Wis. 1986) (citations omitted). Specific intent to cause an employee’s departure is not required to establish a constructive discharge. *Tennyson v. Sch. Dist.*, 606 N.W.2d 594, 232 Wis. 2d 267 (Wis. Ct. App. 2000). The Wisconsin Supreme Court has declined to extend the doctrine of constructive discharge to circumstances where an employee alleges he or she was “substantially terminated” but did not formally resign. *Beidel v. Sideline Software, Inc.*, 842 N.W.2d 240, 348 Wis.2d 360 (2013)(“[C]ourts have established the test for a constructive termination, and every Wisconsin case we have found that meets that test involves a resignation.”).

In *Goss v. Chippewa City*, 2018 Wisc. App. LEXIS 867 (Wis. Nov. 13, 2018), Goss concluded that she would be terminated after a fellow employee was terminated while on leave. *Id.* Goss claimed that she resigned because “she did not want to lose accrued benefits.” *Id.* at 13. The court found that on its face, this was not enough to support a constructive discharge claim because it does not relate to the work environment *Id.* Furthermore, the resignation was a calculated decision based on a potential loss of benefits. *Id.*

#### **IV. WRITTEN AGREEMENTS**

##### **A. Standard “For Cause” Termination**

In *Kernz v. J.L. French Corp.*, 667 N.W.2d 751, 266 Wis. 2d 124 (Wis. Ct. App. 2003), the Wisconsin Court of Appeals held that the term “just cause” contained in an employment contract was ambiguous because it was subject to two competing reasonable definitions. Therefore, the court concluded that the meaning of the term must be examined by reference to intrinsic evidence.

In *Johnson v. Green Bay Packers*, 74 N.W.2d 784, 272 Wis. 149 (1956), the action was commenced by Clyde Johnson, a professional football player, against the Green Bay Packers for reformation of contract and recovery of damages for breach of an employment contract following Johnson’s termination and alleged failure to receive compensation. The court rejected the football team’s argument that the burden was on Johnson to prove that he was not discharged for cause under the terms of the contract. *Id.* at 790, 272 Wis. at 160-61.

In Wisconsin, employers have the burden of establishing cause for termination under the terms of a written employment agreement. “Under a contract providing for a fixed term of

employment, the employer has the burden of proving that the employee was discharged for cause, where the employer relies on such a discharge as a ground for terminating the contract prior to its expiration date in the absence of any special provision in the contract providing to the contrary.” *Id.*, citing *Boynton Cab Co. v. Giese*, 296 N.W. 630, 632, 237 Wis. 237, 243 (1941).

In *Karsten v. Terra Eng’g & Constr. Corp.*, 2017 Wisc. App. LEXIS 650 (Wis. Sep. 7, 2017) Karsten claimed unlawful termination. However, the court found that he was properly terminated for cause. *Id.* Karsten could be terminated by breaking any of the express covenants listed in the contract he signed. *Id.* Karsten breach one of the covenants, any thus was properly terminated for cause. *Id.*

#### B. Status of Arbitration Clauses

Although Section 788.01 of the Wisconsin Statutes establishes a procedure for the enforcement of arbitration clauses in written contracts, this procedure does not apply to contracts between employers and employees. Provided they are not unconscionable, however, arbitration clauses in employment contracts generally are enforceable under Wisconsin law. *Engedal v. Menard, Inc.*, 826 N.W.2d 123, 345 Wis. 2d 847 (Wis. Ct. App. 2012) (holding that an arbitration agreement between an employer and an employee was not unconscionable and therefore enforceable); *see also Menard, Inc. v. Dep’t of Workforce Dev.*, 2016 WI App 67 (3d. App. 2016).

### V. ORAL AGREEMENTS

#### A. Promissory Estoppel

In *Reimer v. Badger Wholesale Co.*, 433 N.W.2d 592, 147 Wis. 2d 389 (Wis. Ct. App. 1988), Reimer and Badger entered into an agreement whereby Reimer would receive a minimum wage base salary plus commission for selling wholesale goods in an exclusive territory. After accepting Badger's offer, Reimer quit his former employment and moved with his family to the new area. Reimer soon learned that other sales representatives had already handled 26 accounts in his supposedly “exclusive” area. Reimer was soon terminated for failing to make the necessary amount of sales. He filed suit claiming that his low sales record was due to Badger renegeing on its promise to provide him with an exclusive territory.

The Court of Appeals of Wisconsin held that an employee's at-will status does not relieve an employer from honoring promises made. *Reimer*, 433 N.W.2d at 594, 147 Wis. 2d at 393. The court stated:

[T]he at-will doctrine protects the employer from liability for the termination. Here, breaches were committed by Badger prior to Reimer's termination; the termination was merely one of the results brought about by the previous breaches.

*Id.* Reimer's claim was not dependent upon his at-will status and was a legitimate breach of contract case based on his reliance damages.

Promissory estoppel does not apply when a party relies on a promise to become an at-will employee. Furthermore, an employer is not liable for breach of an at-will employment contract for withdrawing an offer of employment before the plaintiff commences employment.

In *Heinritz v. Lawrence Univ.*, 535 N.W.2d 81, 194 Wis. 2d 606 (Wis. Ct. App. 1995), Heinritz applied for work with Lawrence University while employed elsewhere. When Lawrence offered Heinritz a position, he accepted. After Heinritz resigned from his other employment, Lawrence withdrew its offer. The court first held that, because the complaint failed to allege the additional consideration necessary for a permanent employment contract, Heinritz's contract was terminable at will.

In addressing Heinritz's promissory estoppel claim, the court reasoned:

Because the promise made by Lawrence was for employment terminable at will, Heinritz's alleged detrimental reliance was on becoming an at-will employee. Heinritz's reliance does not change the nature of Lawrence's promise, which was that the employment relationship could be terminated by either party at any time without cause.

*Heinritz*, 535 N.W.2d at 83-84, 194 Wis. 2d at 612. In his final claim, Heinritz asserted that Lawrence had breached its contract to employ him although he was never actually employed and the agreement would have been at-will. After noting that this was an issue of first impression in Wisconsin, the court looked to other jurisdictions and found persuasive the holding in *Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co.*, 344 S.W.2d 639, 642 (Mo. Ct. App. 1961), in which the court stated that if an employee under an oral contract of employment for an indefinite period is without remedy when fired without reason after commencing work, it is illogical to hold she is entitled to damages if the employer refused to allow her to commence work under the agreement. In rejecting Heinritz's breach of contract claim, the court noted, “[i]t stands to reason that an employee should not be afforded greater protections before commencing employment than after.” *Heinritz*, 535 N.W.2d at 84, 194 Wis. 2d at 614.

In *Skebba v. Kasch*, 2006 WI App 232, 724 N.W.2d 408 (Wis. Ct. App. 2006), the court held that the remedy of specific performance was available on a promissory estoppel claim. In that case, Skebba, a salesman, had been promised a payment of \$250,000 by his employer to induce him to turn down another job opportunity.

## B. Fraud

Wisconsin does not have case law of particular significance regarding fraud in the context of oral agreements.

## C. Statutes of Frauds

An oral employment agreement for an unspecified term is terminable at will. See *Marek v. Knab Co.*, 103 N.W.2d 31, 33, 10 Wis. 2d 390, 393 (1960); *Kirkpatrick v. Jackson*, 40 N.W.2d 372, 373-74, 256 Wis. 208, 212-213 (1949). The enforceability of an oral employment agreement

for a specific term is limited by the effect of the statute of frauds, WIS. STAT. § 241.02(1)(a), which requires a writing for “[e]very agreement that by its terms is not to be performed within one year from the making thereof.” See also *Brown v. Oneida Knitting Mills, Inc.*, 277 N.W. 653, 655, 226 Wis. 662, 666 (1938) (one-year period is measured from the commencement of the contract). In *Mursch v. Van Dorn Co.*, 851 F.2d 990 (7th Cir. 1988), the court ruled that a company vice president’s comments that, “[S]o long as you do your job you can be here until you’re a hundred,” failed as a matter of law to overcome the presumption under Wisconsin law in favor of employment-at-will status. *Id* at 998-99.

However, an employer’s oral representations may, under certain circumstances, create an employment agreement. In *Garvey v. Buhler*, 430 N.W.2d 616, 146 Wis. 2d 281 (Wis. Ct. App. 1988), the court of appeals ruled that the employee’s claim of an employer’s unwritten policy of firing employees upon receipt of three pink warning slips in a six-month period created a question of fact regarding whether an implied employment contract existed. *Id* at 619-20, 146 Wis. 2d at 289-90. The court reasoned, “The ultimate rule . . . is that contracts - regardless of their ilk - will be enforced in Wisconsin.” *Id* at 618, 146 Wis. 2d at 287.

## **VI. DEFAMATION**

### **A. General Rule**

#### **1. Libel**

A defamation claim requires: (1) a false statement; (2) communicated through speech, writing, or conduct to a person other than the person defamed; and (3) "the communication is unprivileged" and is defamatory—that is, the communication "tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her." *Lietz v. Frost*, 2018 Wisc. App. Lexis 450 (2d May 2, 2018).

Slander or libel that is actionable *per se* is limited to the following four categories: (1) imputation of certain crimes' to the plaintiff; (2) imputation ... of a loathsome disease' to the plaintiff; (3) 'imputation ... of unchastity to a woman' plaintiff; or (4) defamation 'affecting the plaintiff in his business, trade, profession, or office. *Id* at ¶18.

In *Lietz*, Lietz’s claims of slander were reversed because it was determined that the remarks were slander *per se*, and special damages did not need to be proved. *Id*. Defendant alleged that plaintiff had peeked into defendant’s window while defendant was engaging in a sexual act. *Id*. This imputed that plaintiff had committed a crime, thus not requiring plaintiff to prove special damages. *Id*.

In *Zinda v. La. Pac. Corp.*, 440 N.W.2d 548, 149 Wis. 2d 913 (1989), a discharged worker sued former employer for defamation based on a statement concerning discharge in the company newsletter. A communication is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or deter persons from associating or dealing with him. *Id* at 554, 149 Wis. 2d at 926-27. However, not all defamations are actionable. Some defamations fall within a class of conduct which the law terms privileged.

## 2. Slander

Wisconsin does not distinguish between libel and slander. See preceding entry.

### B. References

Section 895.487(2) of the Wisconsin Statutes provides a defense to employers who provide a reference in response to an employee's request. Pursuant to this statute, an employer which provides a reference is presumed to be acting in good faith and is immune from civil liability unless lack of good faith is shown by clear and convincing evidence. The statute states as follows:

An employer who, on the request of an employee or a prospective employer of the employee, provides a reference to that prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from all civil liability that may result from providing that reference. The presumption of good faith under this subsection may be rebutted only upon a showing by clear and convincing evidence that the employer knowingly provided false information in the reference, that the employer made the reference maliciously or that the employer made the reference in violation of § 111.322.

*Id.*

In *Gibson v. Overnite Transp. Co.*, 671 N.W.2d 388, 267 Wis. 2d 429 (Wis. Ct. App. 2003), the Wisconsin Court of Appeals held that in order to rebut the presumption of good faith, an employee need not establish that an employer's statements were made with actual malice (with knowledge of falsity or with reckless disregard for the truth). Instead, only express malice is required (requiring only a showing of ill will, bad intent, envy, spite, hatred, revenge or other bad motives against the person defamed).

### C. Privileges

The defense of privilege has developed under the public policy that certain conduct which would otherwise be actionable may escape liability because the defendant is acting in furtherance of some interest of societal importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff. *Zinda*, 440 N.W.2d at 552, 149 Wis. 2d at 922. Privileged defamation may be either absolute or conditional. Absolute privileges give complete protection without any inquiry into the defendant's motives. This privilege has been extended to judicial officers, legislative proceedings and to certain governmental executive officers. *Id.*

The *Zinda* case concerned the conditional privilege of common interest, i.e., one is entitled to learn from his associates what is being done in a matter in which he or she has an interest in common. Thus, defamatory statements are privileged when made in furtherance of common property, business or professional interests. The court concluded the common privilege attached to the employer-employee relationship, and was not abused. *Id.*

In a defamation action brought against a former employer by terminated employees, the Court of Appeals held that the employer's publications to remaining employees and to the local community (through the local press) were subject to a conditional privilege because they affected a sufficiently important interest that was lawfully protected through the recipient's knowledge of a defamatory matter. *Olson v. 3M Co.*, 523 N.W.2d 578, 586, 188 Wis. 2d 25, 46 (Wis. Ct. App. 1994). In that case, 3M had an interest in letting the community know that it took seriously its obligation to provide a harassment-free workplace. *Id.*

A conditional privilege also applies to statements made by former employers to prospective employers in response to a reference check. An employer may give a critical appraisal concerning a former employee so long as the appraisal was made for the valid purpose of enabling a prospective employer to evaluate the employee's qualifications. *Hett v. Ploetz*, 121 N.W.2d 270, 272-73, 20 Wis. 2d 55, 59 (1963).

#### D. Other Defenses

##### 1. Truth

Truth is an absolute defense to defamation. See *Denny v. Mertz*, 381 N.W.2d 141, 106 Wis. 2d 636 (1982); see also *Torgerson v. Journal/Sentinel, Inc.*, 563 N.W.2d 472, 210 Wis. 2d 524 (1997) (stating that if alleged statements as a whole are not capable of a false and defamatory meaning, or are substantially true, then an action for defamation cannot be maintained).

##### 2. No Publication

Publication to a third-party is an essential element of a defamation claim. See *Voit v. Madison Newspapers, Inc.*, 341 N.W.2d 693, 116 Wis. 2d 217 (1984). Further, the third-party must understand the communication's defamatory significance. *Id.* See also preceding entry.

##### 3. Self-Publication

In Wisconsin, defamation is not actionable based a theory of self-publication. See *Suick v. Krom*, 177 N.W. 20, 121 Wis. 254 (1920); see also *Bettinger v. Field Container Co.*, 221 Wis. 2d 221, 584 N.W.2d 233, Wis. App 1998 (Wis. Ct. App. July 7, 1998) (discussing *Suick* and holding that it closes the door on the tort of defamation by self-publication).

##### 4. Invited Libel

There is no Wisconsin law on this topic.

##### 5. Opinion

See the preceding entries, generally.

#### E. Job References and Blacklisting Statutes

Section 895.487(2) of the Wisconsin Statutes provides a defense to employers who provide a reference in response to an employee's request. Pursuant to this statute, an employer which provides a reference is presumed to be acting in good faith and is immune from civil liability unless lack of good faith is shown by clear and convincing evidence. See Section VI.B. Wisconsin has a statute which prohibits the blacklisting and coercion of employees. See WIS. STAT. § 134.02. The statute prohibits two or more persons from:

- (a) Preventing any person seeking employment from obtaining employment.
- (b) Procuring or causing the discharge of any employee by threats, promises, circulating blacklists or causing blacklists to be circulated.
- (c) After having discharged any employee, preventing or attempting to prevent the employee from obtaining employment with any other person, partnership, company or corporation by the means described in par. (a) or (b).
- (d) Authorizing, permitting or allowing any of their agents to blacklist any discharged employee or any employee who has voluntarily left the service of his or her employer.
- (e) Circulating a blacklist of an employee who has voluntarily left the service of any employer to prevent the employee's obtaining employment under any other employer.
- (f) Coercing or compelling any person to enter into an agreement not to unite with or become a member of any labor organization as a condition of his or her securing employment or continuing therein. *Id*

F. Non-Disparagement Clauses

Wisconsin does not have relevant case law on this topic.

**VII. EMOTIONAL DISTRESS CLAIMS**

A. Intentional Infliction of Emotional Distress

Under Wisconsin law, an action for the intentional infliction of emotional distress arising in the scope of employment is barred by the Workers' Compensation Act ("WCA"). See *Jenson v. Employers Mut. Cas. Co.*, 468 N.W.2d 1, 8-9, 161 Wis. 2d 253, 270-71 (1991). However, under certain circumstances surrounding termination of employment, the WCA may not preclude an action. Compare *Keenan v. Foley Co.*, 35 Fair Empl. Prac. Cas. (BNA) 937 (E.D. Wis. 1984) (exclusivity provision of WCA did not preclude action for emotional distress in context of termination), with *Zabkowicz v. W. Bend Co.*, 789 F.2d 540, 545 n.3 (7th Cir. 1986) (emotional distress claim barred).

"One who by extreme and outrageous conduct intentionally causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it." *Kroeger v. Brautigam*, 2016 Wisc. App. LEXIS 570 (Aug. 30, 2016). Such a claim requires that the plaintiff demonstrate four elements: "(1) the defendant intended to cause emotional distress by his or her conduct; (2) that the conduct was extreme and outrageous; (3) that the 'conduct was a cause-in-fact of the plaintiff's emotional distress; and (4) that the plaintiff suffered an extreme disabling response to the defendant's conduct.'" *Id.* Occasional harsh words, gestures, or rude looks are not enough to support a claim for emotional distress. *Id.*

#### B. Negligent Infliction of Emotional Distress

The Wisconsin courts are reluctant to allow a claim for negligent infliction of emotional distress without evidence of an actual injury. In *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis.2d 627, 517 N.W.2d 432 (1994), the court did not disallow these claims. Instead, it concluded that combining the traditional elements of a tort action with public policy considerations for limiting liability would be set as the framework for such a claim. *Id.* at 652.

The courts distinguished this in *Rabideau v. City of Racine*, 2001 WI 57, 243 Wis. 2d 486, 627 N.W.2d 795. An off-duty police officer shot and killed plaintiff's dog in front of her. *Id.* The court concluded that this does not meet the threshold for emotional distress because a dog is only property under the law. *Id.* Because public policy bars recovery from emotional distress due to damages caused to property, *Rabideau* could not recover as a bystander. *Id.*

### VIII. PRIVACY RIGHTS

#### A. Generally

Wisconsin has a general right of privacy law. See WIS. STAT. § 995.50. This law is not limited to employment relationships, and gives rise to a cause of action for its breach. In addition, § 111.37 of the Wisconsin statutes prohibits employers from using honesty testing devices in employment situations. Similarly, and unless an exemption applies, an employer may not require an employee to submit to a lie detector test (including a polygraph, deceptograph, voice stress analyzer, psychological stress analyzer, or similar device). WIS. STAT. § 111.37(2).

There is an exception to the general prohibition if: (1) the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business; (2) the employee had access to the property that is the subject of the investigation; (3) the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation; and (4) the employer executes a statement to the examinee before the test that sets forth with particularity the specific incident or activity being investigated and the basis for testing the employee. WIS. STAT. § 111.37(5)(a).

Section 111.37(5)(b) does not prohibit the administration of polygraph tests on prospective employees who would provide security, or be engaged in the design, installation and maintenance of security alarm systems.

B. New Hiring Processing

1. Eligibility Verification & Reporting Procedures

Wisconsin does not have unique eligibility verification requirements. Wis. Stat. § 103.05 requires employers to provide information regarding new employees to the Department of Workforce Development. Wis. Admin. Code ch. DWD 142 contains the administrative rules pertaining to Wisconsin's new-hire reporting system. New hires must be reported generally within 20 days of the employee's first day of work. There is an exception for multistate employers who elect to file new-hire reports in only one state.

2. Background Checks

Wisconsin requires background checks for caregivers in child care centers, nursing homes, hospitals and certain other care facilities. See Wis. Stat. §§ 48.685, 50.065.

C. Other Specific Issues

1. Workplace Searches

Wisconsin does not have a statute governing workplace searches.

2. Electronic Monitoring

Wisconsin does not have a statute governing the electronic monitoring of employees.

3. Social Media

Wisconsin employers are prohibited from requesting an employee or applicant, as a condition of employment, to disclose access information for, grant access to, or allow observation of an individual's personal social media account. Wis. Stat. § 995.55(2). Employers are also prohibited from discharging, refusing to hire, or discriminating against an individual for exercising its rights under the statute. *Id.*

4. Taping of Employees

Wisconsin does not have a statute governing the taping of employees.

5. Release of Personal Information on Employees

Wisconsin recognizes the right to privacy (Wis. Stat. § 995.50). Wis. Stat. § 134.98 provides protection against the disclosure of personal information, which is defined to include forms of information sometimes maintained by employers such as social security numbers, driver's license numbers, etc.

Employees have a right to access their personnel files. (Wis. Stat. §103.13). Under Wisconsin law, every employee, including a former employee, can inspect and receive copies of any personnel document used by an employer, including documents used to assess qualifications for employment, promotion, transfer, and/or additional compensation, documents used to make decisions regarding termination or other disciplinary action, and employee medical records. If an employer maintains information, the employer is legally required to provide copies of the documents upon written request. Employers are not required to provide records relating to the investigation of possible criminal offenses committed by an employee, letters of reference, test documents, materials used by the employer for staff management planning, and information of a personal nature about a person other than the employee, if disclosure of the information would constitute an invasion of the other person's privacy.

## 6. Medical Information

Section 146.82 of the Wisconsin Statutes provides for the confidentiality of patient health care records.

## **IX. WORKPLACE SAFETY**

### A. Negligent Hiring

Wisconsin recognizes a cause of action for negligent hiring. See *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233, 219 Wis. 2d 250 (1998). This was reiterated in *Hansen v. Tex. Roadhouse, Inc.*, 2013 WI App 2:

[In] negligent hiring, training or supervision ... the causal question is whether the failure of the employer to exercise due care was a cause-in-fact of the wrongful act of the employee that in turn caused the plaintiff's injury. In other words, there must be a nexus between the negligent hiring, training, or supervision and the act of the employee. This requires two questions with respect to causation. The first is whether the wrongful act of the employee was a cause-in-fact of the plaintiff's injury. The second question is whether the negligence of the employer was a cause-in-fact of the wrongful act of the employee.

(citing *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233). It equates to the elements required for general negligence.

### B. Negligent Supervision/Retention

See Section IX.A.

### C. Interplay with Worker's Compensation Bar

The exclusive remedy provision of the Wisconsin Workers' Compensation Act, WIS. STAT. § 102.03(2), constitutes a bar to a claim by an employee against an employer for an injury based on negligent hiring, training and supervision. See *Peterson v. Arlington Hospitality Staffing*,

*Inc.*, 689 N.W.2d 61, 276 Wis. 2d 746 (Wis. Ct. App. 2004). However, the exclusivity provision of the Act permits injured employees to pursue tort actions against co-employees.

D. Firearms in the Workplace

WIS. STAT. § 175.60 allows individuals with training and registration to carry concealed weapons in most settings, including work places, unless employers implement specific prohibitions. The law provides that an employer may prohibit employees from carrying concealed weapons in the course of employment. Thus, employers are allowed to prohibit employees from carrying concealed weapons in a work place, or while they are on duty. The law protects the right of an employee to store a weapon in his/her own motor vehicle, even if the vehicle is used in the course of employment or parked on the employer's property.

E. Use of Mobile Devices

Wisconsin does not have a unique law regarding the use of mobile devices.

**X. TORT LIABILITIES**

A. Respondeat Superior Liability

An employer is strictly liable for the employee's torts as long as an employment relationship exists, even if the employer is not at fault. *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 273 Wis. 2d 106 (2004). Under the doctrine of respondeat superior, employees can be held vicariously liable for the negligent acts of their employees while they are acting within the scope of their employment. *Kraft v. Steinhafel*, 2015 WI App 62. It arises due to the employer's control or right of control over the employee; because of this control or right of control, the negligence of the employee is imputed to the employer in certain circumstances. *Id.*

B. Tortious Interference with Business/Contractual Relations

The elements of a claim for tortious interference with a contract are: "(1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant was not justified or privileged to interfere." *Travel Servs., Inc. v. Ferris*, 2013 Wisc. App. LEXIS 784.

A terminated employee may bring an action against a third party for tortious interference with performance of a contract. One who, without privilege to do so, induces a third person not to perform a contract with another, is liable to the other for the harm caused. See *Cudd v. Crownhart*, 364 N.W.2d 158, 160, 122 Wis. 2d 656, 659 (Ct. App. 1985); *Segall v. Hurwitz*, 339 N.W.2d 333, 341, 114 Wis. 2d 471, 487 (Wis. Ct. App. 1983); *Liebe v. City Fin. Co.*, 295 N.W.2d 16, 19, 98 Wis. 2d 10, 15 (Wis. Ct. App. 1980).

The fact that an employment contract is terminable at will does not defeat a claim for tortious interference. *Harman v. La Crosse Tribune*, 344 N.W.2d 536, 540, 117 Wis. 2d 448, 455

(Wis. Ct. App. 1984); *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 279 N.W.2d 493, 496-97, 90 Wis. 2d 97, 104 (Wis. Ct. App. 1979).

Apart from a claim against the corporate entity, an employee may attempt to hold its officers personally liable. An agent is not relieved from liability simply because he is acting on behalf of his principal. He must be exercising a privilege. *Lorenz v. Dreske*, 214 N.W.2d 753, 760, 62 Wis. 2d 273, 287 (1974). When the officers or directors of a corporation authorize the breach of a contract between the corporation and a third party, their actions are protected from personal liability by a conditional privilege if they acted in good faith for the protection of the corporation's interests and in the course of their official duty. *Harman*, 344 N.W.2d at 540, 117 Wis. 2d at 455. This protection has also been extended to doctors on the staff of a hospital. *Hale v. Stoughton Hosp. Ass'n Inc.*, 376 N.W.2d 89, 96-97, 126 Wis. 2d 267, 281-83 (Wis. Ct. App. 1985).

On the other hand, if the plaintiff can demonstrate wrongful motive on the part of the defendant, then the privilege will be destroyed and an officer may be personally liable. *Harman*, 344 N.W.2d at 540, 117 Wis. 2d at 455. One does not need to allege malice in order to show wrongful motive. *Lorenz*, 214 N.W.2d at 760, 62 Wis. 2d at 287. Additionally, one cannot be held liable for tortious interference with a contract if one transmits only truthful information in response to a request. *Liebe*, 295 N.W.2d at 18, 98 Wis. 2d at 13; *Hale*, 376 N.W.2d at 96-97, 126 Wis. 2d at 282. In *Porcelli v. Joseph Schlitz Brewing Co.*, 397 F. Supp. 889 (E.D. Wis. 1975), *aff'd*, 530 F.2d 980 (7th Cir. 1976), a diversity tort action was brought against the brewing company and several of its employees to recover damages for alleged wrongful termination of plaintiff's employment as a district sales manager. The district court held Plaintiff's employment was terminable at will. The court further noted that Wisconsin law recognized a cause of action for unlawful interference with an at-will employment contract. *Porcelli*, 397 F. Supp. at 892. However, the employer showed their conduct was privileged because they were acting to further the interests of Schlitz by terminating Plaintiff for inadequate job performance. No improper collateral motive was established in the record. *Id* at 893.

## **XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS**

### **A. General Rule**

Restrictive covenants are enforceable in Wisconsin provided that they are not unreasonable in scope and specify reasonable time and territorial limits. Restrictive covenants in employment contracts are governed by WIS. STAT. § 103.465, which provides: A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint. *Id*.

Wisconsin courts apply a five-part test in assessing the enforceability of non-compete agreements: (i) the agreement must be necessary for the employer's protection; (ii) it must provide a reasonable time period; (iii) it must cover a reasonable territory; (iv) it must not be unreasonable

as to the employee; and (v) it must not be unreasonable as to the general public. See generally *Lakeside Oil Co. v. Slutsky*, 98 N.W.2d 415, 8 Wis. 2d 157 (1959). See also *H.R. Block Enterprises v. Swenson*, 745 N.W.2d 421 (Wis. Ct. App. 2007) (“In examining restrictive covenants, we apply the following canons of construction: (1) they are prima facie suspect; (2) they must withstand close scrutiny to pass legal muster as being reasonable; (3) they will not be construed to extend beyond their proper import or further than the language of the contract absolutely requires; and (4) they are to be construed in favor of the employee.” citing *Heyde Companies, Inc. v. Dove Healthcare, LLC*, 654 N.W.2d 830 (Wis. 2002)).

The promise of at-will employment at the commencement of the employment relationship is lawful consideration to support a restrictive covenant agreement. *Wisconsin Ice & Coal Co. v. Lueth*, 250 N.W. 819, 213 Wis. 42 (1933). Similarly, the promise of continued employment constitutes lawful consideration to support a restrictive covenant entered into by existing at-will employees provided that the continuation of employment is conditioned on the employee’s execution of the agreement. *Runzheimer v. Friedlen*, 862 N.W.2d 879, 2015 WI 45.

In *Tatge v. Chambers & Owen, Inc.*, 579 N.W.2d 217, 219 Wis. 2d 99 (1998), the court refused to extend the public policy exception to a situation where an employee had been discharged for refusing to sign a non-disclosure/non-compete agreement. The employee alleged the agreement was unreasonable and therefore unenforceable under Wisconsin law. The court held that the attempt by an employer to bind an employee to an unenforceable non-compete agreement did not trigger an exception to the employment-at-will doctrine. *Id* at 222, 219 Wis. 2d at 110.

Most recently, the Wisconsin Supreme Court in *Manitowoc Company, Inc. v. Lanning*, 2018 WI 6, determined that a non-solicitation provision was overbroad and unenforceable because the employer did not have a protectable interest justifying the restriction placed on the employee. In so ruling, the Court observed that “[t]he plain language of [the employee’s] non-solicitation of employees provision create[d] a sweeping prohibition that prevent[ed] [the employee] from encouraging any [company] employee, no matter the employee’s job or location, to terminate his or her employment with [the company] for any reason, or soliciting any [company] employee to take any position with any competitor, supplier or customer of [the company].” According to the Court, the restriction was also faulty because it contained “no limitations based upon the nature of the employee’s position” with the company, “based upon [the employee’s] personal familiarity with or influence over a particular employee,” or “based upon the geographical location in which the employee works.” Nevertheless, despite invalidating this particular non-solicitation provision, the Court emphasized that employee non-solicitation provisions can be enforceable if drafted appropriately and narrowly.

## B. Blue Pencil

As evident from the last sentence of WIS. STAT. § 103.465, Wisconsin does not permit courts to blue pencil or otherwise modify unenforceable covenants not to compete in order to make them enforceable. However, in the case of *Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 319 Wis. 2d 274 (2009), the Wisconsin Supreme Court held that covenants in an agreement that are divisible from unenforceable covenants may be enforced.

### C. Confidentiality Agreements

In Wisconsin, confidentiality agreements have been held to be in the nature of covenants not to compete and subject to the reasonableness requirements of § 103.465 of the Wisconsin Statutes. See *Gary VanZeeland Talent, Inc. v. Sandas*, 267 N.W.2d 242, 84 Wis. 2d 202 (1978); see also *Sysco Food Servs. Of E. Wis., LLC v. Zicarelli*, 445 F. Supp. 2d 1039, 2006 U.S. Dist. LEXIS 62764 (E.D. Wis. 2006)(holding that a confidentiality and non-solicitation clause was invalid due to lack of a definite territory and the subject that was considered confidential was not a trade secret and no confidentiality was required).

### D. Trade Secrets Statute

Wisconsin has adopted the Uniform Trade Secrets Act, codified at WIS. STAT. § 134.90, which provides for injunctive relief and damages. In addition, theft of trade secrets a Class E felony in Wisconsin. See WIS. STAT. § 943.205. The statute offers injunctive relief, damages (compensatory, punitive, attorney's fees), preservation on secrecy, and does not encroach on other civil remedies.

### E. Fiduciary Duty and Other Considerations

Officers and directors, as well as some key employees, owe a fiduciary duty of loyalty to their employers. *Burbank Grease Services, LLC v. Sokolowski*, 717 N.W.2d 781, 294 Wis. 2d 274 (2006).

Choice of law provisions specifying the law of another state (and choice of forum provisions) are generally not enforceable because of Wisconsin's strong public policy regarding covenants not to compete. WIS. STAT. § 103.465; *Beilfuss v. Huffy Corp.*, 685 N.W.2d 373, 274 Wis. 2d 500 (Wis. Ct. App 2004); but see *Martin v. Stassen Ins. Agency, Inc.*, 763 N.W.2d 248, 316 Wis. 2d 357 (Wis. Ct. App. 2008)(distinguishing *Beilfuss* and upholding an Illinois choice of law provision).

Agreements by employers not to hire each other's employees are generally unenforceable unless acknowledged and consented to by the employees. See *Heyde Companies, Inc. v. Dove Healthcare, LLC*, 654 N.W.2d 830, 258 Wis. 2d 28 (2002). Covenants not to compete are regarded with suspicion because the law seeks to encourage the mobility of workers. See *Gary Van Zeeland Talent, Inc. v. Sandas*, 267 N.W.2d 242, 84 Wis. 2d 202 (1978).

Although section 103.465 of the Wisconsin Statutes requires a territorial limit, Wisconsin courts will permit reasonable limitations on customer contact to serve as a substitute for a territorial limit. See *Farm Credit Servs. of N. Cent. Wis., ACA v. David Wysocki*, 627 N.W.2d 444, 243 Wis. 2d 305 (2001).

## **XII. DRUG TESTING LAWS**

### A. Public Employers

Beyond any applicable federal laws, Wisconsin has no laws addressing employee drug testing.

B. Private Employers

Wisconsin has no laws addressing employee drug testing.

**XIII. STATE ANTI-DISCRIMINATION STATUTE(S)**

A. Employers/Employees Covered

The Wisconsin Fair Employment Act, WIS. STAT. § 111.31 et seq. (“WFEA”), applies to any person engaging in any activity, enterprise or business “employing at least one individual.” WIS. STAT. § 111.32(b)(a).

B. Types of Conduct Prohibited

The WFEA protects employees against unlawful discrimination. Specifically, the statute prohibits discrimination in employment based on age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, membership in the national guard, state defense force or any reserve component of the military forces of the U.S. or the state, use or non-use of lawful products off the employer's premises during non-working hours, or declining to attend a meeting or to participate in any communication about religious or political matters.

The fact that an employer was able to accommodate an individual’s disability by providing reduced work hours for a period of eight months is evidence that provision of such a reduced work schedule did not constitute a hardship for the employer. *Hutchinson Tech., Inc. v. Labor & Indus. Review Comm’n*, 682 N.W.2d 343, 273 Wis. 2d 394 (2004).

In one case, it was held that the employer should have recognized that the employee, who suffered from sleep apnea, needed an accommodation consisting of refraining from firing her when she fell asleep on the job. *Target Stores v. Labor & Indus. Review Comm’n*, 576 N.W.2d 545, 217 Wis. 2d 1 (Ct. App. 1998).

In *Stoughton Trailers, Inc. v. Labor & Indus. Review Comm’n*, 2007 WI 105, 735 N.W.2d 477 (2007), the court held that the employer, by failing to extend clemency and forbearance to the employee in the form of temporarily tolerating his absences while a pending medical procedure was underway to help resolve the problem of his disability-related absences, failed to reasonably accommodate employee's disability, and employer therefore violated WFEA. *Id* at ¶ 67, 735 N.W.2d at 496.

The WFEA provides a cause of action based on sexual harassment, even when the allegedly conduct does not create a hostile work environment so as to support a constructive discharge claim. *Jim Walter Color Separations v. Labor & Indus. Review Comm’n*, 595 N.W.2d 68, 226 Wis. 2d 334 (Wis. Ct. App. 1999).

C. Administrative Requirements

Complaints charging discrimination must be filed not more than three hundred (300) days after the occurrence of the alleged event. The Wisconsin Equal Rights Division will conduct an investigation. In the event the Equal Rights Division finds probable cause to believe that any discrimination has occurred (and after being unable to eliminate the practice by conference, conciliation or persuasion), it will issue a written notice of hearing. See generally WIS. STAT. §§ 111.31 et seq.

D. Remedies Available

After a hearing, if the examiner finds that the employer has engaged in discrimination, the examiner may award reinstatement, with or without back pay. Compensation in lieu of reinstatement may be awarded under certain circumstances. Back pay liability may not accrue from a date more than two years prior to the filing of the complaint with the Department. Decisions of the examiner are subject to appeal to the Labor and Industry Review Commission within 21 days. See generally WIS. STAT. §§ 111.31 et seq.

**XIV. STATE LEAVE LAWS**

A. Jury/Witness Duty

An employer is not obligated to pay an employee while on jury duty. An employer cannot terminate or discipline an employee for serving on a jury. Section 756.255 of the Wisconsin Statutes provides, in part:

An employer shall grant an employee a leave of absence without loss of time and service for the period of jury service. For the purpose of determining seniority or pay advancement, the status of the employee shall be considered uninterrupted by the jury service. No employer may use absence due to jury service as a basis for discharging an employee or for any disciplinary action against the employee.

*Id;* see also WIS. STAT. § 103.87 (no employee may be discharged for responding to a subpoena to testify in a criminal proceeding).

B. Voting

Employees have the right to be absent from work while the polls are open for a period not to exceed three successive hours to vote. The employer may designate the time of day for the absence. The employee is obligated to provide the employer notice prior to the election day of the intended absence. WIS. STAT. § 6.76. No employee may be penalized for taking time off to vote. WIS. STAT. § 12.07.

C. Family/Medical Leave

The Wisconsin Family and Medical Leave Act, WIS. STAT. § 103.10 (Wisconsin FMLA), applies to employers engaged in any business, activity or enterprise in Wisconsin that employs at least 50 individuals on a permanent basis. The Wisconsin FMLA protects employees who have been employed by the same employer for more than 52 consecutive weeks and who worked for that employer for at least 1,000 hours during the 52-week period. An employee may take up to six weeks of family leave for the birth or adoption of a child and up to two weeks of family leave to care for a parent, spouse or child who has a serious health condition. An employee may take up to two weeks of leave for the employee's own serious health condition. A “spouse” under the Wisconsin FMLA means an employee’s legal husband and wife, which now includes legally married same-sex spouses. *See Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) cert. denied sub nom. *Walker v. Wolf*, 135 S. Ct. 316 (2014) (finding Wisconsin’s constitutional amendment banning same-sex marriage unlawful).

The Wisconsin FMLA does not entitle an employee to be paid during the family or medical leave. However, the employee may substitute paid or unpaid leave of another type provided by the employer. The employee must fulfill certain obligations with regard to notice and certification of serious health conditions and has rights to certain benefits during the leave and upon return to work.

D. Pregnancy/Maternity/Paternity Leave

Pregnancy, maternity and paternity leave are available under the Wisconsin Family and Medical Leave Act, WIS. STAT. § 103.10. See Section XIV.C. Employers who permit disability leave must permit employees with pregnancy-related disabilities to take leave on the same basis. Under Wisconsin law, employers are prohibited from discriminating against any woman on the basis of pregnancy, childbirth, maternity leave or related medical conditions by engaging in any of the actions prohibited under the law, including, but not limited to, actions concerning fringe benefit programs covering illnesses and disability.

E. Day of Rest Statutes

Wisconsin has a “one of rest in seven” requirement. See WIS. STAT. § 103.85. Employers operating any factory or mercantile establishment (with certain exceptions) are obligated to provide at least 24 hours of consecutive rest to employees in any seven consecutive days.

F. Military Leave

Wisconsin law grants reemployment rights under specified circumstances to individuals who complete military service or service in the National Guard, state defense force or public health emergency service. WIS. STAT. §§ 21.79 and 21.80.

**XV. STATE WAGE AND HOUR LAWS**

A. Current Minimum Wage in State

The current minimum wage in Wisconsin is \$7.25. Wis. Admin. Code §§ DWD 272.03(1), DWD 272.12(1) require employers to pay nonexempt employees the minimum wage for all hours worked. Opportunity employees receive \$5.90 per hour minimum. Tipped employees may be paid \$2.33 per hour as long as they reach the state minimum wage once tips are included.

B. Deductions from Pay

WIS. STAT. § 103.455 -- Deductions for faulty workmanship, loss, theft or damage. Defective or faulty workmanship, lost or stolen property, or damage to property does not permit an employer to make a deduction from an employee's due or earned wages unless one of the following conditions is met: (1) the employee authorizes the employer in writing to make the deduction, after the loss occurs and before the deduction is made; (2) the employer and the employee's representative determine that such defective or faulty work, loss or theft, or damage is the result of the employee's negligence, carelessness, or willful and intentional conduct; or (3) the employee is found guilty or held liable in a court of competent jurisdiction by reason of the employee's negligence, carelessness, or willful and intentional conduct.

C. Overtime Rules

Wis. Admin. Code §§ DWD 274.03 requires the payment to nonexempt employees of overtime pay at a rate of at least one and one-half times the employee's regular rate of pay for all hours worked in excess of 40 hours.

D. Time for Payment Upon Termination

Employees who quit or who are terminated must generally be paid in full by the date on which the employee would have been paid under the employer's established payroll schedule. WIS. STAT. § 109.03(2).

E. Breaks and Meal Periods

Only minors are required to be given breaks for meal time. Minors cannot work longer than six consecutive hours without receiving at least a 30-minute duty free meal period.

Other than for minors, Wisconsin has no laws addressing mandatory break time. Wis. Stat. § DWD 274.02 recommends break times, but none are required.

**XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES**

A. Smoking in the Workplace

Wisconsin has a Smoking Prohibited Statute, Wis. Stat. § 101.123, that prohibits smoking in any enclosed place that is a place of employment.

B. Health Benefit Mandates for Employers

Beyond applicable federal laws, Wisconsin does not currently require employers to provide health plans. However, if a plan is provided through an insurance company, certain minimum levels of coverage are required. Wis. Stat. §§ 632.87, 632.88, 632.885, 632.895, 632.89.

C. Immigration Laws

Wisconsin does not have unique immigration requirements.

D. Right to Work Laws

Section 111.04 of the Wisconsin Statutes prohibits any person from negotiating a union contract that requires, as a condition of obtaining or continuing employment, an individual to (1) refrain or resign from membership or voluntary affiliation with a labor organization; (2) become or remain a member of a labor organization; (3) pay dues or other fees to a labor organization; or (4) pay any third party an amount that is in place of, equivalent to, or a portion of dues or other charges required by members of a labor organization. The law only applies to collective bargaining agreements that are executed, renewed, modified, or extended on or after March 11, 2015.

E. Lawful Off-Duty Conduct (including lawful marijuana use)

Wisconsin does not have a lawful off-duty conduct statute. However, an employer may not discriminate against any individual based on the use or nonuse of lawful products off the employer's premises during nonworking hours, subject to one exemption and five narrow exceptions. Wis. Stat. §§ 111.321. The lawful off-duty product statute does not apply to nonprofit corporations that, as one of their primary purposes or objectives, encourages or discourages the general public from using a lawful product. Wis. Stat. § 111.35.

Additionally, it is not employment discrimination for an employer to discriminate against an individual because of their use or nonuse of lawful products off the employer's premises during nonworking hours if such use (1) impairs the individual's ability to undertake adequately his or her job-related responsibilities, (2) creates a conflict of interest, or the appearance of a conflict of interest, with job-related responsibilities; (4) constitutes a violation of the prohibition under Section 254.92(2) against minor's purchase or possession of tobacco products; or (5) conflicts with any federal or state statute, rule or regulation. *Id*

F. Gender/Transgender Expression

Wisconsin has no laws addressing gender/transgender expression. However, several cities and counties have enacted non-discrimination ordinances that prohibit discrimination on the basis of gender identity, including the City of Madison, City of Milwaukee, Dane County, and Milwaukee County.

G. Other Key State Statutes

No employee in Wisconsin may be discharged for getting injured on the job. This provision obligates an employer to rehire an employee when the employee is able to return to work following a work-related injury. WIS. STAT. § 102.35(3).

No employee in Wisconsin may be discriminated against for refusing to participate in an abortion on moral or religious grounds when the employee states his or her objections in writing. WIS. STAT. § 253.09(1).

No employee in Wisconsin may be discharged or disciplined for testifying in a proceeding under this law regarding toxic substances or for refusing to work with toxic substances about which the employee has requested but not received information. WIS. STAT. § 101.595.

No employee in Wisconsin may be discharged or discriminated against for filing a complaint or participating in a proceeding under a variety of listed employment-related laws. WIS. STAT. § 111.322(2m).

An employer must notify new employees at the time of hiring of any requirements concerning hairstyle, facial hair or clothing. WIS. STAT. § 104.14.

In addition to the federal Worker Adjustment and Retraining Notification Act (WARN), Wisconsin employers are governed by the state plant-closing and layoff law, the Wisconsin Business Closing and Mass Layoff Law. Wisconsin requires all employers that employ 50 or more persons in the state to give 60 days' notice to employees affected by a business closing or mass layoff. A business closing is defined as "a permanent or temporary shutdown of an employment site or of one or more facilities or operating units at an employment site or within a single municipality that affects 25 or more employees, not including new or low-hour employees." WIS. STAT. § 109.07. A mass layoff is a reduction in the size of the work force that affects one of the following: (a) at least 25% of the employer's work force or twenty-five (25) employees, whichever is greater, or (b) at least 500 employees. An employer may, under special circumstances identified in the statute, be exempt from the notice requirements. *Id*

It is a criminal offense to require or administer a polygraph or similar test without the prior written and informed consent of the person being tested. WIS. STAT. § 942.06 WIS. STAT. § 111.372(4) prohibits employers from requiring a genetic test of any person as a condition of employment.

An employer may not require a test for the presence of human immunodeficiency virus (HIV). WIS. STAT. § 252.12 permits an employee to consent to an HIV test. WIS. STAT. § 103.15.

Wisconsin has a number of other employment laws and statutes, including the Employees' Right to Know Law, WIS. STAT. §§ 101.58-101.599, and WIS. STAT. § 103.13, which details when and what kinds of records are open to employees.

In a June 2018 holding, the Wisconsin Supreme Court, in *Tetra Tech EC, Inc., v. Wis. Dep't of Revenue*, 2018 WI 75, ended its practice of affording deference to administrative agencies'

interpretations of law. In the wake of this decision, the Wisconsin legislature amended statutes concerning agency review to comport with this decision. Under Wis. Stat. §227.57 the legislature created Wis. Stat. §227.57(11) which reads: “Upon review of an agency action or decision, the court shall accord no deference to the agency’s interpretation of law.” Additionally, under Wis. Stat. §227.10 the legislature created Wis. Stat. §227.10(2g) which reads: “No agency may seek deference in any proceeding based on the agency’s interpretation of any law.” This holding and the statutory changes may increase the amount of challenges brought to agency decisions.