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STATE

Littler on

Wisconsin Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in Wisconsin employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

DISCLAIMER

This publication is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. It also is not a do-it-yourself guide to resolving employment issues or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer, or attempt to address the numerous factual issues that arise in any employment-related dispute.

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1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see LITTLER ON CLASSIFYING WORKERS.

1.1(b) *State Guidelines on Classifying Workers*

In Wisconsin, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1).

The Wisconsin Department of Workforce Development (DWD) has entered into a partnership with the U.S. Department of Labor (DOL), Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts in order to reduce instances of misclassification of employees as independent contractors.[5]

Wisconsin also has a Joint Enforcement Task Force on Payroll Fraud and Worker Misclassification, which is charged with centralizing the investigation and enforcement of worker classification matters. The Task Force submits a report to the governor annually.[6]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	DWD, Equal Rights Division, Civil Rights Bureau	Common-law test, adopting the "economic realities" test or "hybrid" test, and noting that the employer's right to control "the means and manner" of the alleged employee's performance is the key factor.[7]

[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] U.S. Dep't of Labor, Wage and Hour Div. & State of Wis., *Partnership Agreement* (Dec. 23, 2014), *available at* https://www.dol.gov/whd/workers/MOU/wi.pdf. More information about the DOL Misclassification Initiative is available at https://www.dol.gov/whd/workers/misclassification/#stateDetails.

[6] *Executive Order 20*, signed by Governor Evers to create the Task Force, is available from the Wisconsin Department of Workforce Development at https://evers.wi.gov/Pages/Newsroom/Executive%20Orders/EO%20020%20-%20Worker%20Misclassification.pdf.

[7] In determining whether an individual was an employee under the Wisconsin Fair Employment Act, the Wisconsin Court of Appeals adopted the same standard used in federal cases brought under Title VII of the Civil Rights Act of

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Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		"Additional matters of fact that an agency or reviewing court must consider include, among others, (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the 'employer' or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated . . . ; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the 'employer'; (9) whether the worker accumulates retirement benefits; (10) whether the 'employer' pays social security taxes; and (11) the intention of the parties."[8]
Income Taxes	Wisconsin Department of Revenue	Internal Revenue Service (IRS) 20-factor test.[9]

1964 ("Title VII"). *Moore v. Labor & Indus. Review Comm'n*, 499 N.W.2d 288, 290-92 (Wis. Ct. App. 1993) (citing to the test as set forth in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979)). In addition, the DWD acknowledges that the statutory definitions of *employer* and *employee* in the Wisconsin Fair Employment Act are not adequate to help classify workers, and therefore, it looks to common law, which is discussed at length on the DWD's website by clicking through the pages. *See* Wisconsin Dep't of Workforce Dev., Equal Rights Div., *Civil Rights-Worker Classification: Is a Worker an "Employee" or a "Non Employee"?*, *available at* https://dwd.wisconsin.gov/worker-classification/er/civilrights/.

[8] *Moore*, 499 N.W.2d at 291-92 (quoting *Spirides*, 613 F.2d at 831-32).

[9] In one administrative decision, *Lentz v. Wisconsin Department of Revenue*, the Tax Appeals Commission cited to IRS Revenue Ruling 87-41 when concluding individuals were employees and not independent contractors, noting that the employer "was only able to demonstrate one of the elements characterizing the services performed by

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Unemployment Insurance	DWD, Unemployment Insurance Division	Statutory two-part test. If a worker has been "performing services for pay for an employing unit" the worker is presumed to be an employee rather than an independent contractor.[10] However, this presumption may be overcome if the employing unit demonstrates that the services performed by the individual are performed free from its control or direction. The following nonexclusive factors are considered in making this determination: "a. Whether the individual is required to comply with instructions concerning how to perform the services. b. Whether the individual receives training from the employing unit with respect to the services performed. c. Whether the individual is required to personally perform the services. d. Whether the services of the individual are required to be performed at times or in a particular order or sequence established by the employing unit. e. Whether the individual is required to make oral or written reports to the employing unit on a regular basis."[11] Additionally, the worker must meet at least six of the following nine statutory conditions: "a. The individual advertises or otherwise affirmatively holds himself or herself out as being in business.

[workers] as those of independent contractors and, therefore, was unable to overcome the presumption that the respondent's assessment was correct." 1994 WL 182751, at *5 (Tax Appeals Comm'n May 9, 1994).

[10] WIS. STAT. § 108.02(12)(a); *see also* Wisconsin Dep't of Workforce Dev., Unemployment Ins. Div., *Unemployment Insurance-Worker Classification: Is a Worker an "Employee" or an "Independent Contractor"?*, *available at* https://dwd.wisconsin.gov/worker-classification/ui/ (including links to assist various types of employers—general private, nonprofit, logging, state and local government, trucking, and Indian Tribal government—in locating appropriate worker classification tests under the unemployment law).

[11] WIS. STAT. § 108.02(12)(bm)(1).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		b. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services. c. The individual operates under multiple contracts with one or more employing units to perform specific services. d. The individual incurs the main expenses related to the services that he or she performs under contract. e. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work. f. The services performed by the individual do not directly relate to the employing unit retaining the services. g. The individual may realize a profit or suffer a loss under contracts to perform such services. h. The individual has recurring business liabilities or obligations. i. The individual is not economically dependent upon a particular employing unit with respect to the services being performed."[12]
Wage & Hour Laws	DWD, Labor Standards Bureau	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context.[13]
Workers' Compensation	DWD, Worker's Compensation Division	Statutory nine-part test.[14] To be considered an independent contractor rather than an

[12] WIS. STAT. § 108.02(12)(bm)(2).

[13] However, the DWD Labor Standards Bureau advises that in determining if a worker is an employee or independent contractor, the DOL's Wage and Hour Division interpretations will be applied; thus, the bureau may look to the federal FLSA "economic realities" test. *See* Wisconsin Dep't of Workforce Dev., Labor Standards Bureau, *Labor Standards: Is a Worker an "Employee" or an "Independent Contractor"?, available at* https://dwd.wisconsin.gov/worker-classification/er/laborstandards/ (discussing the "economic realities" test as applied by the Labor Standards Bureau at length).

[14] WIS. STAT. § 102.07(8); *see also* Wisconsin Dep't of Workforce Dev., Worker's Compensation Div., *Worker's Compensation-Worker Classification: Is a Worker an "Employee" or an "Independent Contractor"?, available at*

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		employee, all nine factors must be met and maintained. The alleged independent contractor: "1. Maintains a separate business with his or her own office, equipment, materials and other facilities. 2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year. 3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work. 4. Incurs the main expenses related to the service or work that he or she performs under contract. 5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service. 6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis. 7. May realize a profit or suffer a loss under contracts to perform work or service. 8. Has continuing or recurring business liabilities or obligations. 9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures."[15]

https://dwd.wisconsin.gov/worker-classification/wc/ (providing a detailed discussion of each of the nine statutory factors).

[15] WIS. STAT. § 102.07(8).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Workplace Safety	Not applicable	There are no relevant statutory definitions or case law identifying a test for independent contractor status in this context. Wisconsin does not have an approved state plan under the federal Occupational Safety and Health Act.

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the employee cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[16]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[17] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license

[16] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

[17] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[18]

For more information on these topics, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

Wisconsin does not have a generally applicable employment eligibility or verification statute. Therefore, private-sector employers in Wisconsin should follow federal law requirements regarding eligibility and verification.

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[19] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.
2. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in 1.3(b)(i). The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

For additional information on these topics, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

[18] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

[19] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

1.3(a)(ii) *State Guidelines on Employer's Use of Arrest Records*

Under Wisconsin's Fair Employment Law, Wisconsin employers are prohibited from discriminating against applicants and employees on the basis of their arrest records.[20] Unlawful discrimination includes: (1) requesting that an applicant or employee supply information regarding an arrest record, except for information about a pending charge; and (2) circulating any statement, advertisement, or publication, using an employment application, or making any inquiry in connection with prospective employment, which implies or expresses any limitation, specification, or discrimination on the bases of arrest or conviction records.[21] *Arrest record* broadly includes information that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor, or other offense by a law enforcement or military authority.[22]

However, it is not unlawful discrimination to refuse to employ, or suspend from employment, an individual who is subject to a pending charge, if the circumstances of the charge "substantially relate" to the circumstances of the particular job.[23] *Substantially related* is not defined in the law, but according to the Wisconsin Department of Workforce Development (DWD), the substantially-related test "looks at the circumstances of an offense, where it happened, when, etc.—compared to the circumstances of a job—where is this job typically done, when, etc. The more similar the circumstances, the more likely it is that a substantial relationship will be found."[24]

In regards to prospective employees, an employer may ask whether an applicant has any pending charges, as long as the employer makes clear that the charges will only be given consideration if the offenses are substantially related to the circumstances of the particular job.[25] The restrictions are stricter, however, for employees. An employer may not terminate an employee who is the subject of a pending criminal charge that *is* substantially related to the circumstances of the job unless and until the employee is convicted of the offense charged.[26]

It is not unlawful discrimination to request information regarding arrest records not limited to those records of pending charges, when employment depends on the bondability of the individual and the individual may not be bondable due to an arrest record.[27]

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[20] WIS. STAT. §§ 111.321, 111.325. Note, for the purposes of the Wisconsin Fair Employment Law, a franchisor as defined in 16 C.F.R. § 436.1(k), is *not* considered to be an employer of a franchisee as defined in 16 C.F.R. § 436.1(i), unless: (1) the franchisor has agreed in writing to be the employer; or (2) the franchisor has been found by the DWD to have exercised a type or degree of control over the franchisee or franchisee's employees that is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand. WIS. STAT. § 111.3205.

[21] WIS. STAT. §§ 111.322(2), 111.335(1)(c).

[22] WIS. STAT. § 111.32(1).

[23] WIS. STAT. § 111.335(1)(b).

[24] Wisconsin Dep't of Workforce Dev., Equal Rights Div., *Arrest and Conviction Record*, *What does it mean for an arrest or conviction to be substantially related to employment?*, *available at* https://dwd.wisconsin.gov/er/civilrights/discrimination/arrest.htm.

[25] Wisconsin Dep't of Workforce Dev., Equal Rights Div., *Arrest and Conviction Record*, *What can an employer ask regarding arrest and conviction records?*, *available at* https://dwd.wisconsin.gov/er/civilrights/discrimination/arrest.htm.

[26] WIS. STAT. § 111.335(1)(c).

[27] WIS. STAT. § 111.335(1).

Madison Ordinance. An ordinance in Madison, Wisconsin prohibits discrimination against an individual with respect to compensation, terms, conditions, or privileges of employment based on an individual's arrest or conviction record.[28] Discrimination includes failure or refusal to hire, or discharge of any individual.[29] However, discrimination based on an arrest or conviction record is not prohibited if:

- the individual is subject to a pending criminal charge and the circumstances of that charge substantially relate to the circumstances of the particular job;
- within the past three years, the individual has been placed on probation, paroled, released from incarceration, or paid a fine for a felony, misdemeanor, or other offense, the circumstances of which substantially relate to the circumstances of the particular job;
- the individual is not bondable where bondability is required for the job; or
- the individual is not eligible for a license or permit under state, federal, or local law due to a pending criminal charge or conviction for which the individual has not been pardoned, and that license or permit is required for the job.[30]

1.3(a)(iii) *State Guidelines on Employer's Use of Conviction Records*

Wisconsin's Fair Employment Law prohibits employers from discriminating against any applicant or employee on the basis of their conviction records.[31] However, it is not unlawful discrimination to refuse to employ any individual who: (1) has been convicted of any felony, misdemeanor, or other offense, the circumstances of which "substantially relate" to the circumstances of the particular job; or (2) makes the individual not bondable when bondability is required for the job.[32] *Conviction record* broadly includes information that an individual has been convicted of any felony, misdemeanor or other offense, adjudicated delinquent, less than honorably discharged, or placed on probation, fined, imprisoned, or paroled under a law enforcement or military authority.[33] *Substantially related* has the same meaning as discussed in **1.3(a)(ii)**.

The DWD takes the position that an employer *may* ask whether an applicant has any convictions, as long as the employer makes clear that any convictions will only be given consideration if the offenses are substantially related to the particular job. A conviction that is not substantially related to the particular job should not be given any consideration in the hiring process.[34] It is unlawful for an employer to establish a blanket rule that no person with a conviction record will be employed.[35] Moreover, co-worker and

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[28] MADISON, WIS., CODE OF ORDINANCES § 39.03(8)(a).

[29] MADISON, WIS., CODE OF ORDINANCES § 39.03(8)(a).

[30] MADISON, WIS., CODE OF ORDINANCES § 39.03(8)(i)(3).

[31] WIS. STAT. §§ 111.321, 111.325.

[32] WIS. STAT. § 111.335(1)(c).

[33] WIS. STAT. § 111.32(3).

[34] Wisconsin Dep't of Workforce Dev., Equal Rights Div., *Arrest and Conviction Record*, *Is it a violation of the law if the applicant's conviction record is only a part of the reason for not being hired?*, *available at* https://dwd.wisconsin.gov/er/civilrights/discrimination/arrest.htm.

[35] Wisconsin Dep't of Workforce Dev., Equal Rights Div., *Arrest and Conviction Record*, *What can an employer ask regarding arrest and conviction records?*, *available at* https://dwd.wisconsin.gov/er/civilrights/discrimination/arrest.htm.

customer preference may not be considered in refusing to hire or discharging an employee with a pending charge or conviction.[36]

With respect to current employees, the DWD cautions employers from discharging a current employee because of a pending criminal charge. Instead, the DWD suggests that the employer may lawfully suspend the employee if the offense giving rise to the pending criminal charge is substantially related to the circumstances of the particular job. Each job and record must be considered individually.[37]

Madison Ordinance. The Madison Ordinance also covers conviction records (see **1.3(a)(ii)**).

1.3(a)(iv) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

Wisconsin places no statutory restrictions on a private employer's use of sealed or expunged criminal records.

1.3(a)(v) *State Enforcement, Remedies & Penalties*

A person who believes they have been refused employment or discharged because of an arrest or conviction that is not substantially related to the job may file a complaint with the DWD, Equal Rights Division, Civil Rights Bureau.[38]

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[39] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[40] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be

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[36] Wisconsin Dep't of Workforce Dev., Equal Rights Div., *Arrest and Conviction Record*, *Can an employer refuse to hire or discharge a person with a pending charge or conviction because other workers or customers don't want the person with a conviction there?*, *available at* https://dwd.wisconsin.gov/er/civilrights/discrimination/arrest.htm.

[37] Wisconsin Dep't of Workforce Dev., Equal Rights Div., *Arrest and Conviction Record*, *Can an employer discharge a current employee because of a pending criminal charge?*, *available at* https://dwd.wisconsin.gov/er/civilrights/discrimination/arrest.htm.

[38] Wisconsin Dep't of Workforce Dev., Equal Rights Div., *Arrest and Conviction Record*, *What if an employer believes a pending charge or conviction is substantially related but the employee or applicant believes it is not?*, *available at* https://dwd.wisconsin.gov/er/civilrights/discrimination/arrest.htm.

[39] 15 U.S.C. §§ 1681 *et seq*.

[40] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[41]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

Wisconsin does not have a mini-FCRA law, and there are no additional state provisions specifically restricting a private employer's use of credit information and history.

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.
- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

[41] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

Wisconsin law prohibits an employer from requesting or requiring an applicant or employee, as a condition of employment, to disclose access information for the individual's personal internet account, or to otherwise grant access to or allow observation of that account.[42]

An employer is further prohibited from refusing to hire an applicant because the applicant refused to disclose access information, grant access to, or allow observation of, the applicant's personal internet account.[43] Additionally, an employer is prohibited from discharging or discriminating against an employee because the employee:

- refuses to disclose access information for their personal internet account;
- refuses to grant access to their personal internet account;
- refuses to allow observation of their personal internet account;
- opposes an unlawful request or requirement;
- files a complaint or attempts to enforce any protected right; or
- testifies or assists in any action or proceeding to enforce any right.[44]

Wisconsin's Fair Employment Law also covers discrimination or unlawful discharge based on protected activity, including filing a complaint or attempting to enforce rights under the social media law and testifying or assisting in proceedings to enforce any right created by the law.[45]

While covering private employers, the social media law does not apply to an employee covered by a collective bargaining agreement (CBA) in existence when the law took effect, April 10, 2014, that contains provisions inconsistent with the law, until the CBA expires or is extended, modified, or renewed, whichever occurs first.[46]

Exceptions. Employers are not prohibited from viewing, accessing, or using information about an applicant or employee that can be obtained without access information or that is available in the public domain.[47] Moreover, the law does not preclude an employer from complying with a duty to screen applicants or to monitor or retain employee communications that is created by state or federal law, rules, or regulations, or the rules of self-regulatory organizations.[48]

The law does not affect an employer's rights or obligations to conduct an investigation into any alleged unauthorized transfer of its proprietary or confidential information or financial data to an employee's

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[42] WIS. STAT. § 995.55(2)(a)(1).

[43] WIS. STAT. § 995.55(2)(a)(3).

[44] WIS. STAT. § 995.55(2)(a)(2).

[45] WIS. STAT. § 111.322(2m).

[46] WIS. STAT. § 995.55.

[47] WIS. STAT. § 995.55(2)(b)(6).

[48] WIS. STAT. § 995.55(2)(b)(5). For an employee that provides financial services, the restrictions do not apply to his/her personal internet account or electronic communications device if the account or device is used to conduct the employer's business subject to content, supervision, and retention requirements imposed by federal securities law and the rules of self-regulatory organizations. WIS. STAT. § 995.55(2)(c).

personal internet account, if the employer has reasonable cause to believe that the transfer occurred.[49] An employer can conduct an investigation or require an employee to cooperate in an investigation if the employer has reasonable cause to believe activity on the employer's personal internet account relates to: employment-related misconduct, violation of the law, or violation of the employer's work rules as specified in an employee handbook.[50] In conducting an investigation or requiring an employee to cooperate in an investigation, an employer may require an employee to grant access to or allow observation of the employee's personal internet account, but cannot require the employee to disclose access information for that account.[51]

An employer can discharge or discipline an employee for transferring the employer's proprietary or confidential information or financial data to the employee's personal internet account without the employer's authorization.[52]

An employer may also require or request that an employee disclose their personal email address.[53]

Rules for Employer-Provided Devices & Online Accounts. An employer can request or require an employee to disclose access information to the employer so the employer can: (1) gain access to or operate an electronic communications device supplied or paid for in whole or in part by the employer; or (2) gain access to an account or service provided by the employer, obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes.[54] The law also authorizes an employer to restrict or prohibit an employee's access to certain internet sites while using an electronic communications device supplied or paid for in whole or in part by the employer or while using the employer's network or other resources.[55]

An employer that inadvertently obtains access information for an employee's personal internet account through the use of an electronic device or program that monitors the employer's network or through an electronic communications device supplied or paid for in whole or in part by the employer is not liable for violating the prohibited requests or prohibited employment actions provisions by possessing that access information so long as the employer does not use that access information to access the employee's personal internet account.[56]

Additional Provisions. The social media law does not create a duty for employers to search or monitor activity of any personal internet account. Moreover, employers are not liable under the law for failing to request or require that an applicant or employee grant access to, allow observation of, or disclose information that allows access to or observation of the individual's personal internet account.[57]

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[49] WIS. STAT. § 995.55.

[50] WIS. STAT. § 995.55(2)(b)(3).

[51] WIS. STAT. § 995.55(2)(b)(3).

[52] WIS. STAT. § 995.55(2)(b)(2).

[53] WIS. STAT. § 995.55(2)(b)(7).

[54] WIS. STAT. § 995.55(2)(b)(1).

[55] WIS. STAT. § 995.55(2)(b)(4).

[56] WIS. STAT. § 995.55(2)(d).

[57] WIS. STAT. § 995.55(5).

1.3(c)(iii) *State Enforcement, Remedies & Penalties*

An aggrieved employee or applicant may file a complaint with the DWD. If the DWD finds a violation occurred, it may order the employer to take action that will remedy the violation, including providing compensation in lieu of reinstatement or back pay. An employer that violates the provisions on requests and adverse action may be required to forfeit up to $1,000.[58]

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[59] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see LITTLER ON EMPLOYMENT TESTING.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

Wisconsin has declared that requiring employees or prospective employees to submit to lie detector tests or requesting that employees or prospective employees submit to lie detector tests without providing proper safeguards are unfair employment practices.[60] A *lie detector* is a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or other similar device that is used to render a diagnostic opinion about an individual's honesty or dishonesty.[61] *Polygraph* means an instrument that: (1) records

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[58] WIS. STAT. § 995.55(6).

[59] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

[60] WIS. STAT. § 111.31(4).

[61] WIS. STAT. § 111.37(1)(b).

continuously, visually, permanently, and simultaneously any changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and (2) is used to render a diagnostic opinion about an individual's honesty or dishonesty.[62]

Thus, under Wisconsin law, employers cannot:

- require, request, suggest, or cause an applicant or employee to take or submit to a lie detector test;
- use, accept, refer to, or inquire about the results of an applicant's or employee's lie detector test;
- discharge, discipline, discriminate against, deny employment or promotion to, or threaten to take any such action against an applicant or employee:
  - who refuses, declines or fails to take or submit to a lie detector test; or
  - on the basis of the results of a lie detector test; and
- discharge, discipline, discriminate against, deny employment or promotion to, or threaten to take any such action against, an applicant or employee because the individual has:
  - filed a complaint or instituted a proceeding under the law;
  - testified or is about to testify in a proceeding under the law; or
  - exercised any right under the law, individually or on behalf of another person.[63]

The polygraph provisions do not supersede, preempt, or prohibit provisions of a collective bargaining agreement that prohibit honesty testing or restrict the use of honesty testing to a greater extent than the law, or provide employees with more rights and remedies with respect to honesty testing than are provided under the law.[64]

Economic Loss or Injury Exemption. Employers can request that an employee submit to a polygraph test if all of the following conditions apply:

- the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, including theft, embezzlement, misappropriation and unlawful industrial espionage or sabotage;
- the employee had access to the property that is the subject of the investigation;
- the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation; and
- the employer executes a statement, provided to the individual before the test, setting forth with particularity the specific incident or activity being investigated and the basis for testing particular employees. The statement must: be signed by a person, other than a polygraph examiner, authorized legally to bind the employer; be kept for at least three years; and identify the specific economic loss or injury to the business of the employer, indicate that the

[62] WIS. STAT. § 111.37(1)(c).

[63] WIS. STAT. § 111.37(2).

[64] WIS. STAT. § 111.371(2).

employee had access to the property that is the subject of the investigation, and describe the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.[65]

However, with respect to employers that are exempt under this provision, the following restrictions are applicable. The investigation exemption does not apply if an employee is discharged, disciplined, denied employment, denied promotion, or otherwise discriminated against on the basis of an analysis of a polygraph test chart or a refusal to take a polygraph test without additional supporting evidence. The evidence required above may serve as additional supporting evidence.[66] Moreover, certain other requirements apply to employers with respect to the investigations exemption, including detailed requirements for who conducts the polygraph test and how the test is administered.[67]

Other Exemptions. An employer may administer a lie detector test on a prospective employee that will be involved with the business of providing security, armored car activities, or will be engaged in the design, installation and maintenance of security alarm systems. This exemption only applies, however, if the employee will be involved with: (1) facilities, materials, or operations with a significant impact on the health, safety or welfare of the State of Wisconsin or the United States; or (2) currency, negotiable securities, precious commodities or instruments, and proprietary instruments.[68]

An employer authorized to manufacture, distribute, or dispense a controlled substance may also require lie detector tests of prospective employees who will have direct access to the manufacture, storage, distribution, or sale of these substances, or to a current employee in connection with an ongoing investigation of criminal or other misconduct involving the controlled substances by that employer, if the employee had access to the person or property that is the subject of the investigation.[69]

The security services and drug manufacturer exemptions do not apply if an analysis of a polygraph chart is used, or a refusal to take a polygraph test is used, as the sole basis upon which adverse employment is taken.[70] Moreover, certain other requirements apply, including detailed requirements for who conducts the polygraph test and how the test is administered.[71]

Confidentiality. No person other than the individual who underwent the polygraph test can disclose information obtained during the test. However, the polygraph examiner may disclose information obtained during a polygraph test to the examinee or to any other person the examinee specifically designates in writing.[72]

Required Notice of Protections. Each employer that administers lie detector tests, or that has lie detector tests administered to its employees, must post and maintain a notice prepared by the Wisconsin Department of Workforce Development in conspicuous places on its premises where notices to

[65] WIS. STAT. § 111.37(5)(a).

[66] WIS. STAT. § 111.37(6)(a).

[67] *See* WIS. STAT. § 111.37(6)(c).

[68] WIS. STAT. § 111.37(5)(b).

[69] WIS. STAT. § 111.37(5)(c).

[70] WIS. STAT. § 111.37(6)(b).

[71] *See* WIS. STAT. § 111.37.

[72] WIS. STAT. § 111.37(7).

employees and applicants for employment are customarily posted.[73] Information provided to new hires and details of the posting requirement are discussed in **2.1(b)** and **3.1(a)(ii)**, respectively.

The rights, remedies, and procedures provided by Wisconsin's polygraph law cannot be waived by contract or otherwise, unless by waiver that is part of a written settlement agreed to and signed by the parties to an action or complaint under the polygraph law.[74]

1.3(d)(iii) *State Enforcement, Remedies & Penalties*

In addition to rights and remedies available under the Wisconsin Fair Employment Law, any employer that violates the polygraph provisions may be required to forfeit up to $10,000.[75]

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[76] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[77] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

Wisconsin law contains no express provisions regulating preemployment drug or alcohol screening by private employers.

1.3(f) *Additional State Guidelines on Preemployment Conduct*

1.3(f)(i) *State Restrictions on Job Application Fees, Deductions, or Other Charges*

Employers may not require employees or applicants to pay the cost of medical examinations required as a condition of employment.[78]

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[73] WIS. STAT. § 111.37(3).

[74] WIS. STAT. § 111.37(8)(b).

[75] WIS. STAT. § 111.37(8)(a).

[76] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[77] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[78] WIS. STAT. § 103.37.

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[79] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[80] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.[81] The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[82]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[83]

[79] 26 U.S.C. § 36B.

[80] 42 U.S.C. § 18071.

[81] 29 U.S.C. § 218b.

[82] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[83] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[84]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[85] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[86] Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[87]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the

[84] 29 C.F.R. § 2590.606-1.

[85] 29 C.F.R. § 825.300(a).

[86] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

[87] 29 C.F.R. § 825.300(a).

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[88] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[89]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[90]
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[91]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents	No notice requirement located.
Fair Employment Practices Documents	No notice requirement located.

[88] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[89] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[90] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[91] 29 C.F.R. § 531.59.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Grooming & Dress Notification	Employers must, at the time of hiring, notify each employee about any hairstyle, facial hair, or clothing requirement.[92]
Polygraph Testing Documents	Wisconsin restricts the use of polygraph or similar testing (see 1.3(d)(ii)). Where testing is permitted, employers must provide certain information to prospective employees before a test is administered. Employers must inform the candidate, orally and in writing, of the following: • the date, time, and location of the test, and of the examinees right to obtain and consult with legal counsel or an employee representative before each phase of the test; • the nature and characteristics of the tests and of the instruments involved; • whether or not the testing area contains a two-way mirror, a camera, or any other device through which the test can be observed; • whether or not any device other than the polygraph, including any device for recording or monitoring the test, will be used; and • that the employer or the examinee may, after so informing the examinee, make a recording of the test.[93]
Tax Documents	All employees must provide, on or before employment begins, a signed withholding exemption certificate.[94]
Wage & Hour Documents	No notice requirement located.

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[95] State new hire reporting laws must include these minimum requirements:

[92] WIS. STAT. § 103.14. Employers must create their own form to satisfy this requirement, as needed.

[93] WIS. STAT. § 111.37; *see also* WIS. ADMIN. CODE DWD § 142.02. Employers must create their own form to satisfy this requirement, as needed.

[94] WIS. STAT. § 71.66. Wisconsin's withholding certificate, Form WT-4, is available at https://www.revenue.wi.gov/TaxForms2017through2019/w-204f.pdf and other withholding forms are available at https://www.revenue.wi.gov/Pages/Form/with-home.aspx.

[95] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[96]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

[96] 42 U.S.C. § 653a.

Table 4. Multistate Employer New Hire Information	
Contact By Mail or Fax	**Contact Online**
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[97] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of Wisconsin's new hire reporting law.

Who Must Be Reported. Employers must report all employees who are newly hired to work or individuals rehired after an unpaid absence of more than 90 days.[98]

Report Timeframe. Employers must report within 20 days after the new hire starts work. If submitted magnetically or electronically, then reports may be made twice per month not less than 12 nor more than 16 days apart.[99]

Information Required. Employers must report the employee's name, address, date of birth, date work commenced, and Social Security number, as well as the employer's name, payroll address, and federal employer identification number.[100]

Form & Submission of Report. An employer may submit the federal Form W-4, the Wisconsin withholding exemption certificate (WT-4), or printed lists containing the required information. The report may be submitted by mail, disk, magnetic tape, fax, telephone, or electronically.[101]

Location to Send Information.

Wisconsin New Hire Reporting
P.O. Box 14431
Madison, WI 53708
(800) 300-4473
(800) 277-8075 (fax)
https://wi-newhire.com/

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[97] HHS offers the form online at http://www.acf.hhs.gov/programs/css/resource/multistate-employer-registration-form-instructions.

[98] WIS. STAT. § 103.05(2).

[99] WIS. ADMIN. CODE DWD § 142.03(3).

[100] WIS. ADMIN. CODE DWD § 142.03(1).

[101] WIS. ADMIN. CODE DWD § 142.03(2).

Multistate Employers. If the employer employs individuals in Wisconsin and another state, the employer may designate, to the Secretary of HHS, a state other than Wisconsin for the purpose of providing this information. An employer also must notify the Wisconsin Department of Workforce Development of any such designation made to the Secretary of HHS.[102]

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after their employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[103] As such, the DTSA for the first time provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

The enforceability of noncompete agreements is governed by statute and common law in Wisconsin.[104] Wisconsin law provides that to be enforceable, a noncompete agreement must be reasonably necessary for the protection for the employer:

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[102] WIS. STAT. § 103.05(2)(b); *see also* WIS. STAT. § 103.001(3).

[103] 18 U.S.C. §§ 1832 *et seq.*

[104] WIS. STAT. § 103.465.

> 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 section, 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.[105]

Wisconsin courts generally disfavor noncompete agreements and closely scrutinize them, viewing their restrictions as *prima facie* suspect.[106] Such agreements will not be construed beyond what is proper, nor will they be interpreted more broadly than the language of the contract absolutely requires, and are to be construed in favor of the employee.[107]

At common law, for a noncompete agreement to be enforceable in Wisconsin, the agreement must:

1. be necessary for the protection of the employer; that is, the employer must have a protectable interest justifying the restriction imposed on the activity of the employee;
2. provide a reasonable time limit;
3. provide a reasonable territorial limit;
4. not be harsh or oppressive as to the employee; and
5. not be contrary to public policy.[108]

Whether a restraint is reasonably necessary for the protection of the employer is determined by considering the nature and character of such information, the extent to which the information is vital to the employer's ability to conduct business, the extent to which the employee actually had access to such information, and the extent to which such information could be obtained through other sources.[109] Legitimate employer interests include protecting customer goodwill and confidential customer information.[110]

As to the duration of the covenant, Wisconsin courts typically uphold temporal restrictions of two years or less.[111] The factors considered are: (1) the nature of the employee's work; (2) the time necessary for the employer to train a new employee; and (3) the time necessary for customers to become familiar with

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[105] WIS. STAT. § 103.465.

[106] *Streiff v. American Family Mut. Ins. Co.*, 348 N.W.2d 505 (Wis. 1984); *see also Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 904 (Wis. 2009). However, the *Star Direct* court later acknowledged that, "though they are disfavored at law, our task is still to rightly and fairly interpret non-compete agreements as contracts." 767 N.W.2d at 912.

[107] *Star Direct, Inc.*, 767 N.W.2d at 905.

[108] 767 N.W.2d at 904. Furthermore, "[f]lat rules of reasonableness do not exist for restrictive covenants." *Fields Found., Ltd. v. Christensen*, 309 N.W.2d 125, 132 (Wis. Ct. App. 1981). Rather, the reasonableness of the employment agreement turns on the totality of the facts and circumstances surrounding it. *Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton*, 304 N.W.2d 752 (Wis. 1981).

[109] *Rollins Burdick Hunter*, 304 N.W.2d at 757.

[110] 304 N.W.2d at 757; *Chuck Wagon Catering, Inc. v. Raduege*, 277 N.W.2d 787, 792-93 (Wis. 1979); *General Med. Corp. v. Kobs*, 507 N.W.2d 381, 386 (Wis. Ct. App. 1993).

[111] *Techworks, L.L.C. v. Wille*, 770 N.W.2d 727, 731, 734 (Wis. Ct. App. 2009).

the new employee or the time necessary to obliterate the identification between the employer and the employee in the minds of the employer's customers.[112]

The propriety of a territorial restriction must be considered in connection with the circumstances of the parties and the activities of the employee.[113] The geographic constraint in a covenant not to compete generally is reasonable if it is limited to the customers or territory actually served.[114] Further, the enforceability of a restrictive covenant also depends upon the extent to which the restraint actually inhibits the employee's ability to pursue a livelihood in that enterprise, as well as the particular skills, abilities, and experience of the employee sought to be restrained.[115] Lastly, as to the public interest, the court may consider whether the restriction creates a shortage of workers in a certain type of business, eliminates competition, or creates a monopoly.[116]

Nonsolicitation covenants are considered under the same standards as noncompete agreements, so that they must be reasonably necessary to protect an employer's legitimate interests.[117]

Enforceability Following Employee Discharge. There is no case law or statutory provision regarding the enforceability of a noncompete following an employee's termination.

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with "consideration" in return for the agreement to be binding. Providing *consideration* means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

In Wisconsin, if the noncompete agreement is executed prior to or simultaneous with an employee's acceptance of employment, the best consideration is the employment itself.[118] The continuation of employment without other consideration is also sufficient consideration under Wisconsin law.[119]

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[112] *See, e.g.*, *Nalco Chem. Co. v. Hydro Techs., Inc*., 984 F.2d 801, 803 (7th Cir. 1993) (absence of a time restriction in nondisclosure clause rendered it void and unenforceable, unless the confidential information qualified as a trade secret); *Rollins Burdick Hunter*, 304 N.W.2d 752 (restrictive covenant specifying two-year time limit without territorial limit may be permissible under the statute).

[113] *Wisconsin Ice & Coal Co. v. Lueth*, 250 N.W. 819, 820 (Wis. 1933).

[114] *Pollack v. Calimag*, 458 N.W.2d 591 (Wis. Ct. App. 1990).

[115] *Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton*, 304 N.W.2d 752, 757 (Wis. 1981).

[116] *See, e.g.*, *Chuck Wagon Catering, Inc. v. Raduege*, 277 N.W.2d 787, 793 (Wis. 1979).

[117] *Manitowoc Co., Inc. v. Lanning*, 906 N.W.2d 130 (Wis. 2018) (finding that Wis. Stat. § 103.465 applies to nonsolicitation covenants); *Equity Enters., Inc. v. Milosch*, 633 N.W.2d 662 (Wis. Ct. App. 2001).

[118] *Wisconsin Ice & Coal Co.*, 250 N.W. at 819-20 (a promise of initial employment is sufficient consideration for a restrictive covenant even if the employment is at will).

[119] *Runzheimer Int'l Ltd. v. Friedlen and Corp. Reimbursement Servs., Inc.*, 862 N.W.2d 879, 889-90 (Wisc. 2015). *But see NBZ, Inc. v. Pilarski*, 520 N.W.2d 93, 97 (Wis. Ct. App. 1994) (continued employment was not sufficient consideration because it was not conditioned on signing the covenant).

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

In Wisconsin, whether an agreement is subject to the statutory or common-law analysis of restrictive covenants is an important distinction, as the statute will void an entire restrictive covenant even if only part of the restraint is unreasonable.[120] It may not be blue penciled—meaning it cannot be modified and enforced to the extent it is reasonable, even if it contains terms that are otherwise severable.[121] In contrast, restraints governed by the common law benefit from the rule of partial enforcement, such that a partially unreasonable restraint will be enforced to the extent it is reasonable.[122] In addition, although Wisconsin courts will not rewrite overly broad covenants, the Wisconsin Supreme Court has held that an agreement's customer and nonsolicitation provisions may still be enforced (where separate and divisible) even if the noncompete provision is considered invalid.[123]

2.3(b)(iv) *State Trade Secret Law*

In 1986, the Wisconsin legislature adopted the Uniform Trade Secrets Act. The Trade Secrets Act defines what information is a trade secret, prohibits the misappropriation of trade secrets, and provides for remedies in the event of misappropriation.[124]

Definition of a Trade Secret. Under the act, a *trade secret* is defined as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique or process, to which the following apply:
>
> 1. the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> 2. the information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.[125]

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[120] WIS. STAT. § 103.465 ("Any covenant … 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."); *see also General Med. Corp. v. Kobs*, 507 N.W.2d 381, 385 (Wis. Ct. App. 1993).

[121] WIS. STAT. § 103.465; *General Med. Corp. v. Kobs*, 507 N.W.2d 381, 385 (Wis. Ct. App. 1993).

[122] *H&R Block E. Tax Servs., Inc. v. Vorpahl*, 255 F. Supp. 2d 930, 933 (E.D. Wis. 2003).

[123] *Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898 (Wis. 2009).

[124] WIS. STAT. § 134.90.

[125] WIS. STAT. § 134.90(1)(c).

In determining whether information constitutes a trade secret, the Wisconsin courts also consider the six factors set forth in the Restatement (First) of Torts.[126] The six factors are:

1. the extent to which the information is known outside of the business;
2. the extent to which it is known by employees and others involved in the business;
3. the extent of measures taken to guard the secrecy of the information;
4. the value of the information to the business and its competitors;
5. the amount of effort or money expended in developing the information; and
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.[127]

Whether information constitutes a trade secret is a mixed question of law and fact.[128]

Misappropriation of a Trade Secret. Even if a trade secret and a duty not to use or disclose the trade secret exist, the trade secret must be misappropriated for the disclosing party to be liable. The Wisconsin Act defines *misappropriation* to include improper acquisition regardless of whether or not there is disclosure, and improper disclosure regardless of proper acquisition. The law prohibits a person from misappropriating or threatening to misappropriate a trade secret by doing the following:

1. Acquiring the trade secret of another by means which the person knows or has reason to know constitute improper means.
2. Disclosing or using without express or implied consent a trade secret of another if the person did any of the following:
    a. Used improper means to acquire knowledge of the trade secret.
    b. At the time of disclosure or use, knew or had reason to know that he or she obtained knowledge of the trade secret through any of the following means:
        i. Deriving it from or through a person who utilized improper means to acquire it.
        ii. Acquiring it under circumstances giving rise to a duty to maintain its secrecy or limit its use.
        iii. Deriving it from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.
        iv. Acquiring it by accident or mistake.[129]

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[126] *See Minuteman, Inc. v. Alexander*, 434 N.W.2d 773, 777-78 (Wis. 1989) ("although all six elements of the Restatement's test are no longer required, the Restatement requirements still provide helpful guidance in deciding whether certain materials are trade secrets under our new definition").

[127] RESTATEMENT (FIRST) OF TORTS § 757, cmt. b (1939); *cf.* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995) ("a trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others").

[128] *Medical Educ. Serv. v. Health Educ. Network*, 581 N.W.2d 594 (Wis. Ct. App. 1998).

[129] WIS. STAT. § 134.90(2).

The Trade Secrets Act defines *improper means* to include "espionage, theft, bribery, misrepresentation and breach or inducement of a breach of duty to maintain secrecy."[130] An employer that acquires a trade secret from its employee's former employer may be sued for misappropriation under the theory that it induced a breach of the duty to maintain secrecy. Misappropriation will not be found where there is evidence that the former employee took the information believing that they were entitled to keep it.[131]

A defendant is liable for misappropriation of a trade secret if "substantially the same device used by the defendant is derived from the plaintiff's secret in breach of a relationship of trust and confidence."[132] Where a former employee develops an intimate knowledge of confidential information in a narrow field such that it would not be possible for them to "forget" or refrain from relying upon confidential information, the former employer may argue that inevitable disclosure should bar the employee from working for a competitor.[133]

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

Wisconsin does not have statutory guidelines addressing ownership of employee inventions and ideas.

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 50 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[134]
Equal Employment Opportunity (EEO) Act	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[135]

[130] WIS. STAT. § 134.90(1)(a).

[131] *Nalco Chemical Co. v. Hydro Tech., Inc.*, 149 F.R.D. 686, 694 (E.D. Wis. 1993).

[132] *M. Bryce & Assoc., Inc. v. Gladstone*, 319 N.W.2d 907 (Wis. Ct. App. 1982).

[133] *See, e.g.*, *La Calhene, Inc. v. Spolyar*, 938 F. Supp. 523 (W.D. Wis. 1996) (applying the Minnesota Uniform Trade Secrets Act).

[134] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[135] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
("EEO is the Law" Poster)	
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[136]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[137]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language common to migrant or seasonal agricultural workers who are not fluent or literate in English.[138]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[139]
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[140]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits.

[136] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[137] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

[138] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[139] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[140] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[141]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[142] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[143]
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[144]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[145]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is

[141] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[142] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

[143] 41 C.F.R. §§ 60-300.44, 60-741.44.

[144] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[145] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	visible to prospective employees and all employees who are verified through the system.[146]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[147]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[148]
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[149]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[150] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing

[146] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[147] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[148] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[149] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[150] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[151]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[152]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[153]

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

[151] 29 C.F.R. § 13.5.

[152] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[153] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: Bone Marrow & Organ Donation Leave	Employers with 50 or more employees must post official notice informing employees of their legal right to take leave to serve as a bone marrow or organ donor.[154] Employers with 25 or more employees must post notice describing any employer policy regarding this type of leave.[155]
Benefits & Leave: Cessation of Health Care Benefits	Employers with 50 or more employees must post conspicuous notice, where posters are normally displayed, informing employees of their right to advance notice if an employer decides to cease providing health care benefits.[156]
Benefits & Leave: Family & Medical Leave	Employers with 50 or more employees must post official notice informing employees of their rights under the state family and medical leave law.[157] Employers with 25 or more employees must post notice describing any employer policy regarding family and medical leave.[158] For additional information on the posting requirement, see **3.9(a)(ii)**.
Child Labor: Hours & Days of Work	Employers that employ minors must post conspicuous notice summarizing the state restrictions on child labor. As a substitute for posting, the employer may provide a copy of the poster directly to each employee subject of its terms.[159]
Fair Employment Practices: Fair Employment Law	All employers must prominently display notice summarizing the Wisconsin Fair Employment Law and its prohibition against discrimination in employment.[160]

[154] WIS. STAT. § 103.11. This poster is available in English at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-18114-p.pdf and in Spanish at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-18114-s-p.pdf.

[155] WIS. STAT. § 103.11. Employers must create their own forms to satisfy this posting requirement.

[156] WIS. STAT. § 109.075. This poster is available at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-11054-p.pdf.

[157] WIS. STAT. § 103.10. This poster is available in English at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-7983-p.pdf and in Spanish at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-7983-s-p.pdf.

[158] WIS. STAT. § 103.10. Employers must create their own forms to satisfy this posting requirement.

[159] WIS. ADMIN. CODE DWD §§ 270.03, 272.09. This poster is available in English at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-9212-p.pdf and in Spanish at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-9212-s-p.pdf.

[160] WIS. ADMIN. CODE DWD § 218.23. This poster is available in English at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-4531-p.pdf and in Spanish at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-4531-s-p.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Fair Employment Practices: Polygraph/Honesty Testing Restrictions	If an employee uses honesty testing (*i.e.*, polygraph or lie detector testing), employers must post conspicuous notice informing employees of applicable restrictions and their legal rights.[161]
Human Trafficking Resource Center (Recommended)	The Wisconsin Department of Justice recommends that certain employers post notice concerning the National Human Trafficking Resource Center and its hotline. Notice is recommended for gas stations, hotels, adult entertainment establishments, salons at which hair or nail services are provided, places at which employers engage employees to perform agricultural labor, hospital or other medical centers, places at which athletic or sporting events occur, establishments that operate as a massage parlor or spa, alternative health clinics, expositions conducted by a county or agricultural society, courthouses, rest areas, and public and private transit stations.[162]
Unemployment Compensation	All employers covered by Wisconsin's Unemployment Insurance Law must post notice in suitable locations (*i.e.*, on bulletin boards, near time clocks, and in other places where all employees will readily see them) informing employees about applying for unemployment benefits. The poster is available online at the state website, and "may be posted on an employer's work website that is accessible by all employees or distributed by electronic mail."[163]
Wages, Hours & Payroll: Minimum Wage Rates (Recommended)	Employers are encouraged to post notice summarizing the various wage rates as well as allowances for board and lodging.[164]

[161] WIS. STAT. § 111.37. This poster is available at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-10861-p.pdf.

[162] WIS. STAT. § 165.71. Posters are available in English and Spanish, and in different sizes, along with other resources, at https://www.doj.state.wi.us/ocvs/human-trafficking.

[163] WIS. ADMIN. CODE DWD § 120.01. This poster is available in English at https://dwd.wisconsin.gov/dwd/publications/ui/ucb-7-p.pdf and in Spanish at https://dwd.wisconsin.gov/dwd/publications/ui/ucb-7-s-p.pdf. It is also available in Hmong and in other languages at https://dwd.wisconsin.gov/dwd/publications/ui/notice.htm.

[164] This poster is available in English at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-9247-p.pdf and in Spanish at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-9247-s-p.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Wages, Hours & Payroll: Sub-Minimum Wage Rates	Employers operating under a special license to pay less than the minimum wage (for example, for workers with disabilities or student learners) must post conspicuous notice—where it can be readily observed by workers, their guardians, and other employees—explaining the conditions under which the special wage rate may be paid.[165]
Whistleblower Protections for Health Care Workers	All employers that are health care providers or own or manage a health care facility must post conspicuous notice, where posters are normally displayed, informing employees that they are protected from retaliation for good faith reporting of certain potential violations.[166]
Wisconsin Business Closing/Mass Layoff Law	Employers with 50 or more employees must post official notice informing employees of their rights under the state business closing/mass layoff law. For more information on that law, see 4.1(b).[167]
Workplace Safety: Smoking Prohibited or Permitted	Wisconsin law prohibits indoor smoking in all places of employment. Where smoking is prohibited, employers must post signs indicating the ban and including any other appropriate information.[168]

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth;	At least 3 years from the date of entry.

[165] WIS. ADMIN. CODE DWD 272.09. This poster is available at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-9116-p.pdf.

[166] WIS. STAT. § 146.997. This poster is available in English at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-12210-p.pdf and in Spanish at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-12210-s-p.pdf.

[167] WIS. STAT. § 109.07; WIS. ADMIN. CODE DWD § 279.07. This poster is available in English at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-9006-p.pdf and in Spanish at https://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd-9006-s-p.pdf.

[168] WIS. STAT. § 101.123. *Smoking* means burning or holding, or inhaling or exhaling smoke from a lighted cigarette, cigar, pipe, or any other lighted smoking equipment. WIS. STAT. § 101.123(1)(h).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
(ADEA): Payroll Records	• occupation; • rate of pay; and • compensation earned each week.[169]	
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[170]	At least 1 year from the date of the personnel action to which any records relate.
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[171]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and	At least 1 year from the date the records were made, or from the date of the personnel action involved,

[169] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[170] 29 C.F.R. § 1627.3(b).

[171] 29 C.F.R. § 1627.3(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• selection for training or apprenticeship.[172]	whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[173]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[174]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct	At least 3 years following the date on which the polygraph examination was conducted.

[172] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[173] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[174] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[175]	
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[176]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[177]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[178]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins;	3 years from the last day of entry.

[175] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[176] 29 U.S.C. § 1027.

[177] 29 C.F.R. § 1620.32(a).

[178] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[179] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the	

[179] 29 C.F.R. §§ 516.2, 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[180]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[181]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and	At least 3 years from the last effective date.

[180] 29 C.F.R. § 516.28.

[181] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• sales and purchase records.[182]	
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[183]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:*	At least 3 years.

[182] 29 C.F.R. § 516.5.

[183] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[184]	

[184] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[185]	At least 4 years after the date the tax is due or paid, whichever is later.
Immigration	Employers must retain all completed Form I-9s.[186]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.

[185] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[186] 8 C.F.R. § 274a.2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[187]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[188]	4 years after the return is due or the tax is paid, whichever is later.
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[189]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:*	At least 4 years after the later of the date the tax

[187] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[188] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[189] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[190]	is due or paid for the period covered by the return.
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a	At least 30 years.

[190] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[191]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[192]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information	At least 30 years.

[191] 29 C.F.R. § 1910.1020(d).

[192] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
and Exposure Records	collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[193]	
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[194]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[195]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract

[193] 29 C.F.R. § 1910.1020(d).

[194] 29 C.F.R. §§ 1904.33, 1904.44.

[195] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[196]	of at least $150,000, the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[197]	Until final disposition of the complaint, compliance review or action.

[196] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[197] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[198]	3 years.
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee	During the course of the covered contract as well as after the end of the contract.

[198] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	to provide, including copies of any certification or documentation provided by an employee; • any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[199]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[200]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage;	At least 3 years from the completion of the work records

[199] 29 C.F.R. § 13.25.

[200] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[201]	containing the information.
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[202]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the state record-keeping requirements. Additional requirements may apply to public works contractors, which are not covered here.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Employment Practices	An employer may make and keep records to determine the age, race, color, creed, sex, nation origin, ancestry, or marital status of applicants and employees.[203]	None specified.

[201] 29 C.F.R. § 4.6.

[202] 41 C.F.R. § 50-201.501.

[203] WIS. ADMIN. CODE DWD § 218.22.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Unemployment Compensation	*Each employing unit must maintain true and accurate records, for each individual performing services. Records must include:* • full name, address, and Social Security number; • dates on which each individual performed services; • weekly wages earned by each individual; • dates on which wages are paid to each individual; and • other records that show payments for personal services.[204]	6 years from the date the individual last performed services for employer.
Wages, Hours & Payroll: General Payroll Records	*Every employer must make and keep payroll records, for each employee and student learner, including:* • name and address; • date of birth; • date of entering and leaving employment; • time of beginning and ending of work each day; • time of beginning and ending of meals periods when required or to be deducted from work time; • total number of hours worked per day and per week; • rate of pay and wages paid each pay period; • amount and reason for each deduction; and • output of employee if paid on other than time basis. Employers are not required to keep records of hours of employment for exempt employees.[205]	At least 3 years.
Wages, Hours & Payroll: Sub-Minimum Wage Rate Records—Workers with Disabilities & Student Learners	*If the employer has a license to employ workers with disabilities at less than the minimum wage:* • verification of worker's disability; • evidence of the productivity of each worker with a disability; • the prevailing wage paid to a worker who does not have a disability for the work performed and who is employed in industry in the vicinity for the same type of work; and • the production standards and supporting documentation for workers without disabilities for each job being performed by a worker with a disability under a special license.	3 years.

[204] WIS. STAT. § 108.21; WIS. ADMIN. CODE DWD §§ 110.02, 110.03.

[205] WIS. STAT. § 104.09; WIS. ADMIN. CODE DWD § 272.11.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	Additional records must be kept if the worker is employed by a recognized nonprofit rehabilitation facility and is working in the residential establishment.[206] *If the employer has a license to employ a student learners at less than minimum wage, it must keep records for each student, including:* • all general payroll records, as listed above;[207] • payroll records showing student's occupation and pay rate; and • a copy of the license and training agreement.[208]	
Workers' Compensation: Insured Employers	*Employers covered by the workers' compensation law, or those with three or more persons performing services, must keep records of all accidents causing death or disability of an employee in the course of employment, including:* • name, address, age, and wages of the deceased or injured employee; • time and causes of the accident; • nature and extent of the injury; and • any other information required by the department.[209]	None specified.
Workers' Compensation: Uninsured Employers	*An employer whose liability is not insured, must keep records of:* • all payments made under the workers' compensation statute and • the time and manner of making the payments.[210]	None specified.
Workplace Safety: Material Safety Data Sheets	Employers must retain any material safety data sheets (MSDS) relating to toxic substances, or maintain written lists of any toxic substances present in the workplace, including the dates present.[211]	30 years after the date upon which the employer last received the toxic substance.

[206] WIS. ADMIN. CODE DWD § 272.09(11).

[207] *See* WIS. ADMIN. CODE DWD § 272.11.

[208] WIS. ADMIN. CODE DWD § 272.09(15).

[209] WIS. STAT. § 102.37.

[210] WIS. STAT. § 102.38.

[211] WIS. STAT. § 101.583.

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

In Wisconsin, employees and former employees must make a written request to view their personnel file.[212] Under the statute, *personnel documents* mean records used to determine an employee's qualifications for employment, promotion, additional compensation, termination, and other disciplinary action. Personnel documents may contain medical records unless the employer believes that disclosure would have a detrimental effect on the employee.[213] Employees are not allowed to view personnel records related to:

- records relating to the investigation of possible criminal offenses committed by that employee;
- letters of reference for that employee;
- any portion of a test document, except that the employee may see a cumulative total test score for either a section of the test document or for the entire test document;
- materials used by the employer for staff management planning, including judgments or recommendations concerning future salary increases and other wage treatments, management bonus plans, promotions and job assignments or other comments or ratings used for the employer's planning purposes;
- information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy; and
- records relevant to any other pending claim between the employer and the employee which may be discovered in a judicial proceeding.[214]

Requests for Personnel Files. Any employee or former employee may make a written request to view their personnel file. Employers must comply with the request within seven days. The inspection must take place at a location reasonably near to the employee's place of employment during normal working hours. If an inspection during normal working hours would require an employee to take time off from work, the employer may provide some other reasonable time for the inspection. The employer may allow the inspection to take place at a time other than working hours or at a place other than where the records are maintained if that time or place would be more convenient for the employee.[215]

If an employee is involved in a current grievance against the employer, the employee may designate in writing a representative to inspect the records that may have a bearing on the grievance.[216] An employee

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[212] WIS. STAT. § 103.13.

[213] WIS. STAT. § 103.13(2). An employer should also be aware, however, of potential restrictions on medical records under the federal Health Insurance Portability and Accountability Act (HIPAA).

[214] WIS. STAT. § 103.13(6).

[215] WIS. STAT. § 103.13(2).

[216] WIS. STAT. § 103.13(3).

may make or request copies of the employee's personnel file. An employer may charge a reasonable fee for copies, not to exceed the actual cost of reproduction.[217]

Disputes about Personnel Files. If an employee disagrees with any information in their personnel record, the employee and employer may agree to remove or correct the information. If an agreement cannot be reached, the employee may submit a written statement explaining the employee's position along with any supporting evidence. The statement must be attached to the disputed item and be included whenever the disputed portion is released to a third party.[218]

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see **1.2(b)**.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

For more information on state law related to background screening of current employees, see **1.3**.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see **1.3(e)(i)**.

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

Wisconsin law contains no express provisions regulating drug or alcohol testing by private employers.

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[219]

3.2(c)(ii) *State Guidelines on Marijuana*

Wisconsin has no private-employer-related provisions regarding marijuana use.

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to

[217] WIS. STAT. § 103.13(7).

[218] WIS. STAT. § 103.13(4).

[219] 21 U.S.C. §§ 811-12, 841 *et seq*.

include the value of the identity protection services in the employee's gross income and wages.

- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[220]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or
- proceeds received under an identity theft insurance policy.[221]

3.2(d)(ii) *State Data Security Breach Guidelines*

Wisconsin law requires that when a covered entity becomes aware of a computer security breach involving unencrypted personally identifiable information, the entity must make reasonable efforts to notify each affected person.[222]

Covered Entities & Information. Any entity that conducts business in Wisconsin and maintains personal information in the ordinary course of business, licenses personal information, maintains a resident for a deposit account, or lends money to a resident of the state is a covered entity.[223] Under the statute, *personal information* means an individual's last name and the individual's first name or first initial, in combination with and linked to any of the following elements, if the element is not publicly available information and is not encrypted, redacted, or altered in a manner that renders the element unreadable:

- Social Security number;
- driver's license number or state identification number;
- number of the individual's financial account number, including a credit or debit card account number, or any security code, access code, or password that would permit access to the individual's financial account;
- individual's DNA profile; and
- the individual's unique biometric data, including fingerprint, voice print, retina or iris image, or any other unique physical representation.[224]

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[220] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

[221] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

[222] WIS. STAT. § 134.98(2)(a).

[223] WIS. STAT. §134.98(1)(a).

[224] WIS. STAT. § 134.98(1)(b).

Content & Form of Notice. The entity must provide notice by mail or by a method the entity has previously used to communicate with individuals. If an entity cannot with reasonable diligence determine the mailing address of the subject of the personal information, and if the entity has not previously communicated with the subject, the entity must provide notice by a method reasonably calculated to provide actual notice to the subject of the personal information.[225]

The following covered entities are exempt from the statutory notice requirements:

- a covered entity that is subject to and in compliance with the privacy and security requirements of the Gramm-Leach-Bliley Act;
- a covered entity that has a policy in effect concerning breaches of information security; and
- a covered entity subject to and compliant with the reporting requirements of the federal Health Insurance Portability and Accountability Act (HIPAA).[226]

Timing of Notice. An entity must provide notice within a reasonable time, not to exceed 45 after the entity learned of the breach.[227]

Additional Provisions. If more than 1,000 individuals will be notified of a security breach, then the information holder must also notify all nationwide consumer reporting agencies of the timing, distribution, and content of the notices.[228]

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

As a general rule, federal wage and hour laws do not preempt state laws.[229] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[230]

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[225] WIS. STAT. § 134.98(3)(b).

[226] WIS. STAT. § 134.98(3)(m).

[227] WIS. STAT. § 134.98(3).

[228] WIS. STAT. § 134.98(2).

[229] 29 U.S.C. § 218(a).

[230] 29 U.S.C. § 206.

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[231]

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[232]

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[233] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.3(b) *State Guidelines on Minimum Wage Obligations*

3.3(b)(i) *State Minimum Wage*

The Wisconsin Minimum Wage Act[234] is generally patterned after the FLSA. The minimum wage in Wisconsin is currently $7.25 per hour for most nonexempt employees.[235]

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. If an employee earns tips, an employer may take a maximum tip credit of up to $4.92 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.33 per hour. Note that if an employee does not make $4.92 in tips per hour, an employer must make up the difference between the wage actually made and the minimum wage, which is currently $7.25 per hour.[236] An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[237]

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

The definition of *employee* under the Minimum Wage Act does not include:

- any individual engaged in the house to house delivery of newspapers to the consumer or engaged in direct retail sale to the consumer;
- independent contractors;
- individuals exempt from the FLSA's minimum wage requirements, or individuals not considered employees under the FLSA;

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231 29 U.S.C. §§ 203, 206.

232 29 U.S.C. § 3(m)(2)(B).

233 29 U.S.C. § 207.

234 WIS. STAT. §§ 104 *et seq.*

235 WIS. STAT. § 104.035; WIS. ADMIN. CODE DWD § 272.03.

236 WIS. ADMIN. CODE DWD §§ 272.01(11), 272.03(2).

237 WIS. ADMIN. CODE DWD § 272.03(2).

- state employees who are not subject to civil servant laws and who work for an elected official; and
- outside salespeople.[238]

In addition, employees under the age of 20 may be paid a training wage of $5.90 per hour for the first 90 days of employment.[239]

Wisconsin employers may, in some circumstances, pay workers with a disability a wage lower than that prescribed by the Wisconsin minimum wage laws. A *worker with a disability* is defined as an individual, whose earnings or productive capacity is impaired by a physical or intellectual disability, including those relating to age or injury, for the work to be performed.[240] In such cases, the employer may apply for a license to pay the employee at a rate of pay lower than the minimum wage.[241]

3.3(c) *State Guidelines on Overtime Obligations*

Similar to the federal overtime requirements, Wisconsin law also requires that employers pay nonexempt employees one and one-half times the employee's regular rate for all hours worked in excess of 40 hours in any given workweek.[242]

3.3(d) *State Guidelines on Overtime Exemptions*

Wisconsin has a number of classes of employees who are covered by the Minimum Wage Act, but are exempt from Wisconsin's overtime requirements. Wisconsin does not require overtime pay to:

- drivers, driver's helpers, loaders, or mechanics of motor carriers covered under the federal Motor Carrier Act;
- employees operating common carriers by rail subject to the federal Interstate Commerce Act;
- employees of air carriers subject to the federal Railway Labor Act;
- taxicab drivers;
- sales personnel, parts persons, service managers, service writers, or mechanics selling or servicing automobiles, trucks, farm implements, trailers, boats, motorcycles, snowmobiles, recreational vehicles or aircraft, who are employed by nonmanufacturing establishments engaged primarily in selling vehicles to ultimate purchasers;
- employees of amusement or recreational establishments that do not operate more than seven months per year, or if average receipts for six months of the previous year were no more than 33.3% greater than average receipts for the other six months of that year;
- agricultural employees;
- movie theater employees;

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238 WIS. STAT. § 104.01(2)(b).

239 WIS. ADMIN. CODE DWD §§ 272.01(11), 272.03(1).

240 WIS. ADMIN. CODE DWD § 272.09(1).

241 WIS. ADMIN. CODE DWD § 272.09(2).

242 WIS. ADMIN. CODE DWD § 274.03. Notably, the Wisconsin statute itself does not discuss overtime requirements; it is the administrative code that establishes the parameters of overtime.

- drivers and driver's helpers who make local deliveries and are paid on a trip basis or pursuant to certain other delivery plans;
- funeral establishment employees; and
- forestry or lumbering employees, who plant or tend trees, cruise, survey, or fell timber, or prepare or transport logs or other forestry products, if the total number of employees is eight or fewer.[243]

Also exempt from Wisconsin's overtime provisions are executive, administrative, and professional employees, certain computer professionals, commissioned salespersons, and outside salespersons. These exemptions, discussed in further detail below, are intended to be interpreted in a manner consistent with the federal FLSA.[244]

Before turning to some of the overtime exemptions under Wisconsin law, it is important to reiterate that federal wage and hour laws do not preempt state laws[245] and that the law most beneficial to the employee will apply. Therefore, even if an employee meets one of the exemptions discussed below under state law, if the employee does not meet the requirements of the federal exemption (or vice versa), including the salary thresholds, then the employee will not qualify as exempt.

3.3(d)(i) *Executive Exemption*

Under Wisconsin law, an employee is covered by the executive exemption if the employee meets all of these requirements:

- the employee's primary duty consists of the management of the employing enterprise, or of a customarily recognized department of subdivision thereof;
- the employee customarily and regularly directs the work of two or more other employees;
- the employee has the authority to hire or fire other employees, or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees are given particular weight;
- the employee customarily and regularly exercises discretionary powers;
- the employee does not devote more than 20% of hours in a workweek to activities that are not directly and closely related to performing the above-referenced work (no more than 40% if employed in a retail or service establishment), unless the employee is in sole charge of an independent establishment or a physically separated branch establishment, or those that own at least a 20% interest in the employing enterprise; and
- the employee is paid on a salary basis at least $700 per month.[246]

3.3(d)(ii) *Administrative Exemption*

An employee is covered by the administrative exemption under Wisconsin law if the employee meets all of these requirements:

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[243] WIS. ADMIN. CODE DWD § 274.04.

[244] WIS. ADMIN. CODE DWD § 274.04.

[245] 29 U.S.C. § 218(a).

[246] WIS. ADMIN. CODE DWD § 274.04(1)(a).

- the employee's primary duty consists of performing office or nonmanual work directly related to management policies or general business operations of the employer or its customers, or customarily and regularly exercises discretion and independent judgment;
- the employee either:
  - regularly and directly assists a proprietor, or an employee employed in a *bona fide* executive or administrative capacity;
  - performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or
  - executes under only general supervision special assignments and tasks.
- the employee does not devote more than 20% of hours in a workweek to activities that are not directly and closely related to performing the above-referenced work (or no more than 40% if employed in a retail or service establishment); and
- the employee is paid on a salary or fee basis at least $700 per month.[247]

3.3(d)(iii) *Professional Exemption*

Under Wisconsin law, an employee is covered by the professional exemption if the employee meets all the following requirements:

- the employee's primary duty consists of the performance of:
  - work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study (as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes); or
  - work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the employee's invention, imagination, or talent;
- the work requires the consistent exercise of discretion and judgment in its performance;
- the work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
- the employee does not devote more than 20% of workweek to activities that are not an essential part of and necessarily incidental to the work described above; and
- the employee is paid on a salary or fee basis at least $750 per month.[248]

[247] WIS. ADMIN. CODE DWD § 274.04(1)(b).

[248] WIS. ADMIN. CODE DWD § 274.04(1)(c).

3.3(d)(iv) *Computer Professional Exemption*

Certain computer professionals are also exempt from Wisconsin's overtime requirements. Unlike the federal requirements, state law does not specify to whom the exemption does *not* apply, nor does it address the potential applicability of the executive and/or administrative exemptions to these employees.

An employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker is exempt from overtime if:

- the employee's primary duty is either:
  - the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
  - the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  - the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
  - a combination of the above duties, the performance of which requires the same level of skills; and
- if paid on an hourly basis, the employee receives at least $27.63 per hour.[249]

3.3(d)(v) *Commissioned Sales Exemption*

The Wisconsin overtime provisions do not apply to "higher paid" commissioned employees of retail and service establishments if:

- 50% of the employee's earnings comes from commission; and
- the employee receives one and one-half times the state minimum wage for all hours worked.[250]

3.3(d)(vi) *Outside Sales Exemption*

The Wisconsin overtime provisions do not apply to individuals whose primary duty is making sales per 29 U.S.C. § 203(k) or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer, and who are customarily and regularly engaged away from the employer's place of business in performing that primary duty per 29 C.F.R. § 541.502.[251]

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last

[249] WIS. ADMIN. CODE DWD § 274.04(15).

[250] WIS. ADMIN. CODE DWD § 274.04(3).

[251] WIS. STAT. § 104.01(2)(b)(5); WIS. ADMIN. CODE DWD § 274.04(2).

30 minutes or more) are not considered "hours worked" and can be unpaid.[252] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[253]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[254] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[255] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[256] Exemptions apply for smaller employers and air carriers.[257]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[258] Lactation is considered a related medical condition.[259] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[260] For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

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[252] 29 C.F.R. § 785.19.

[253] 29 C.F.R. § 785.18.

[254] 29 U.S.C. § 218d.

[255] 29 U.S.C. § 218d(b)(2).

[256] 29 U.S.C. § 218d(a).

[257] 29 U.S.C. § 218d(c), (d).

[258] 42 U.S.C. § 2000gg–1.

[259] 29 C.F.R. § 1636.3.

[260] 29 C.F.R. § 1636.3.

3.4(b) *State Meal & Rest Period Guidelines*

3.4(b)(i) *State Meal & Rest Periods for Adults*

Meal Periods. There are no generally applicable meal period requirements for adults in Wisconsin. However, the state's wage and hour regulations "recommend" that employers allow adult employees to take at least 30 minutes for each meal period, reasonably close to the usual meal period time (6:00 A.M., 12:00 noon, 6:00 P.M., or 12:00 midnight) or near the middle of a shift. Shifts of more than six consecutive hours without a meal period should be avoided.[261]

Where an employer does provide meal periods, the state regulations set forth guidelines for determining whether meal periods are compensable. *Bona fide* meal periods of 30 minutes or more are not considered work time. *Bona fide* meal periods do not include coffee breaks or time for snacks, which are considered rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a *bona fide* meal period. The employee is not relieved if the employee is required to perform any duties, whether active or inactive, while eating.[262] On-duty meal periods are to be counted as work time and must be paid. An *on-duty meal period* is a meal period where the employer does not provide at least 30 minutes free from work. Any meal period where the employee is not free to leave the premises of the employer will also be considered an on-duty meal period.[263]

Rest Periods. There are no generally applicable rest period requirements for adults in Wisconsin. However, the state wage and hour regulations provide that "[r]est periods of short duration, running less than 30 minutes are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time."[264]

Meal & Rest Period Waiver. If a collective bargaining agreement governs the employment relationship, the Wisconsin Department of Workforce Development (DWD) is allowed to consider a written request for a modification to its regulations concerning meal and rest period compensability based on an employer's practical difficulties or unnecessary hardship in complying with the rules. The DWD must determine that granting a waiver or modification will not be dangerous or prejudicial to employees' life, health, safety, or welfare.[265]

3.4(b)(ii) *State Meal & Rest Periods for Minors*

Minors under age 18 must be allowed a meal period of at least 30 minutes, which must begin reasonably close to the usual meal period time (namely, 6:00 A.M., 12:00 noon, 6:00 P.M., or 12:00 midnight, or approximately midway of any work period, or at times that the DWD deems reasonable). Minors cannot be permitted to work more than six consecutive hours without a meal period.[266]

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[261] WIS. ADMIN. CODE DWD § 274.02(2).

[262] WIS. ADMIN. CODE DWD § 272.12.

[263] WIS. ADMIN. CODE DWD § 274.02(3).

[264] WIS. ADMIN. CODE DWD § 272.12.

[265] WIS. ADMIN. CODE DWD § 274.05.

[266] WIS. STAT. § 103.68; WIS. ADMIN. CODE DWD § 270.11.

There are no rest period requirements specific to minors in Wisconsin. Employers should refer to the guidelines for adult employees.

3.4(b)(iii) *State Enforcement, Remedies & Penalties*

Violation of the meal period requirement for minors may result in a civil penalty of $25 to $1,000 for the first offense and $250 and $5,000, 30 days' imprisonment, or both, for the second or subsequent offense within five years.[267]

3.4(b)(iv) *Lactation Accommodation Under State Law*

In Wisconsin, a mother may breast feed her child in any public or private location where the mother and child are otherwise authorized to be.[268] Although the statute does not reference employment, it can be construed to include places of employment.

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[269] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[270]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

Wisconsin defines *hours worked* as all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of

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[267] WIS. STAT. § 103.82.

[268] WIS. STAT. § 253.165.

[269] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29 U.S.C. § 203(g).

[270] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

the employer's business."[271] If an employer has reason to know that an employee is working, the time is counted as compensable time. All hours worked count towards an employer's overtime obligation.[272]

There are a number of issues considered when determining whether activities constitute work. This publication looks more closely at pay requirements for reporting time, on-call time, and travel time. Wisconsin law addresses the compensability of on-call and travel time.

On-Call Time. Under Wisconsin law, if employees are required to remain on call on the employer's premises or so close to the employer's premises that they cannot use the time effectively for their own purposes, the on-call time is compensable. However, if employees are permitted to leave the employer's premises, and are merely required to leave word at their home or with company officials where they may be reached, the on-call time is not compensable.[273]

Travel Time. Any time, unless for an emergency, that the employee spends traveling to and from the location of the employee's job does not constitute time worked for minimum wage and overtime purposes.[274] This remains true even where the worksite is not the normal place of work, as long as the worksite remains in the same city as the normal worksite. An example of an emergency under which travel time would constitute time worked is if an employee who has gone home after a day of work is later called out at night to travel a substantial distance to perform an emergency job for a customer.[275] Any travel the employee completes during the normal workday (travel that is "all in a day's work"), on the other hand, constitutes compensable time worked for purposes of minimum wage and overtime.[276] Time spent traveling to another city, or when the employer requires an overnight stay by the employee, constitutes compensable time worked.[277] The detailed travel provisions contained in Wisconsin's Administrative Code should be consulted for more information.

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[278] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an

[271] WIS. ADMIN. CODE DWD § 272.12(1).

[272] WIS. ADMIN. CODE DWD § 272.12(2).

[273] WIS. ADMIN. CODE DWD § 272.12(2).

[274] WIS. ADMIN. CODE DWD § 272.12(2).

[275] WIS. ADMIN. CODE DWD § 272.12(2).

[276] WIS. ADMIN. CODE DWD § 272.12(2).

[277] WIS. ADMIN. CODE DWD § 272.12(2).

[278] 29 C.F.R. §§ 570.36, 570.50.

employment or age certificate indicating an acceptable age for the occupation and hours worked.[279] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

General Restrictions. Wisconsin law places comprehensive restrictions on the hours and types of jobs that minors under the age of 18 may work. Minors cannot work at any employment or in any place of employment dangerous or prejudicial to their life, health, safety, or welfare, or where the employment of the minor may be dangerous or prejudicial to the life, health, safety or welfare of other employees or frequenters.[280] Table 9 summarizes the state restrictions on type of employment by age.

Table 9. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 18	*Minors under 18 cannot work in the following establishments or occupations:* • adult bookstores; • amusement parks, ski hills, street carnivals, and traveling shows; • operating, assisting, erecting, dismantling, setting up, adjusting, repairing, oiling, or cleaning rides or machinery, or the loading and unloading of passengers, in the operation of amusement park rides, ski hills, or traveling shows; • occupations or duties involving exposure to asbestos, chrysotile, amosite, tremolite, anthophyllyte, or actinolite; • the following duties related to the operation of power-driven bakery machines: operating, assisting to operate, setting up, adjusting, repairing, oiling, or cleaning any horizontal or vertical dough mixer, batter mixer, bread dividing, rounding, or molding machine, doughbrake, dough sheeter, combination bread slicing and wrapping machine, or cake cutting band saw, setting up or adjusting a cookie or cracker machine; • conducting or assisting in operating a bingo game; • brick, tile, or similar product manufacturing; • jobs in confined space (*i.e.*, duties in an environment which has limited openings for entry and egress, has unfavorable natural ventilation, could reasonably be believed to have dangerous air contaminants or contain materials that may produce dangerous air contaminants, and is not intended for human occupancy); • coal mines; • excavation; • exotic dancing; • in or about plants or establishments manufacturing or storing explosives or articles containing explosive components (*except* a minor may be employed in a retail establishment in which explosives are sold); • work operating an elevator, crane, derrick, hoist, or high-lift truck;

[279] 29 C.F.R. § 570.6.

[280] WIS. ADMIN. CODE DWD § 270.12.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• work involving riding on a man lift or freight elevator (with several exceptions); • duties involving exposure to certain infectious agents; • lifeguards, swimming instructors, and aides (but minors age 16 and 17 *can* perform such duties if they have successfully completed a *bona fide* life-saving course); • establishments where liquor is present (subject to exceptions); • occupations involving exposure to lead; • logging; • saw, lath, shingle and cooperage-stock mills; • meat processing; • operating power-driven machinery (subject to exceptions); • mining; • occupations involving exposure to radioactive substances or ionizing radiation; • roofing; • wrecking, demolition, and ship-breaking; • occupations or activities, including picketing, performed in or on the premises of any establishment where a strike or lockout is in active progress; or • motor vehicle driver or outside helper on any public road or highway, with certain exceptions.[281]
Under Age 16	*In addition to the restrictions for minors under age 18, the following employment is prohibited to minors under age 16:* • work in or about a landing strip or taxi or maintenance apron at an airport; • work in a boiler or engine room; • work in connection with cars and trucks, including the use of pits, racks, or lifting apparatus, or involving the inflation of any tire mounted on a rim equipped with a removable retaining ring; • work in communications or public utilities; • construction; • certain farming occupations; • work at gun clubs; • work in patient care at hospitals or nursing homes; • manufacturing and processing occupations; • work in public messenger services; • work at racetracks with pari-mutuel betting; • work at street carnivals and traveling shows; • work on a ladder, scaffold, or similar device more than six-feet high;

[281] WIS. STAT. § 103.65; WIS. ADMIN. CODE DWD § 270.12.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• loading and unloading goods to and from trucks, railroad cars, or conveyors; • occupations that involve operating or assisting in the operation of any light power-driven machinery, including lawn and garden equipment, and including, for minors 14 years of age and over, vacuum cleaners and floor waxers and machines and devices used in the performance of kitchen work; • work in connection with the transportation of persons or property by rail, highway, air, water, pipeline, or other means (except for office or sales work that does not involve the performance of any duties on trains, motor vehicles, aircraft, vessels, or other forms of transportation); • occupation in connection with warehousing and storage (except for office or sales work); • performing outside window washing working from window sills or requiring the use of a ladder more than six-feet high, any scaffold, or their substitutes; • work in a freezer or meat cooler or any work in the preparation of meats for sale, except that minors may work in wrapping, sealing, labeling, weighing, pricing, and stocking goods when performed in areas separate from a freezer or meat cooler or other work preparing meats for sale; or • kitchen work occupations involving cooking unless with direct adult supervision or kitchen work involved in preparing and serving food and beverages without adult supervision, including the use of dishwashers, toasters, dumbwaiters, microwaves, popcorn poppers, blenders, automatic coffee machines, and devices used to maintain the temperature of prepared foods such as warmers, steam tables, and heat lamps.[282]
Under Age 14	Minors under age 14 cannot be employed, subject to limited exceptions.[283]

Restrictions on Selling or Serving Alcohol. In Wisconsin, minors cannot be employed in establishments where liquor is present. However, minors aged 14 to 17 may be employed in occupations that do not involve serving, selling, dispensing, or giving away liquor or acting as bouncers, crowd controllers, or identification checkers.[284]

3.6(b)(ii) *State Limits on Hours of Work for Minors*

Minors aged 16 and 17 cannot be employed or permitted to work at any gainful occupation during hours they are required to attend school.[285] Minors aged 12 to 15 cannot work:

[282] WIS. ADMIN. CODE DWD §§ 270.13, 270.14.

[283] WIS. STAT. § 103.67; WIS. ADMIN. CODE DWD § 270.10.

[284] WIS. ADMIN. CODE DWD § 270.12.

[285] WIS. STAT. § 103.68.

- during school hours or contrary to local curfew ordinances;
- more than six days per week (except in street trades and farming);
- more than three hours per school day (except on the last school day of the week);
- more than eight hours per day on the last school day of the week and on nonschool days;
- more than 18 hours per calendar week during weeks in which their school is in session;
- more than 40 hours per calendar week during weeks that they are not required to attend school;
- between 7:00 P.M. and 7:00 A.M. from the day after Labor Day to May 31; or
- between 9:00 P.M. and 7:00 A.M. from June 1 to Labor Day.[286]

3.6(b)(iii) *State Child Labor Exceptions*

Wisconsin's child labor laws do not apply to the employment of a minor engaged in domestic or farm work performed outside school hours in connection with the minor's own home and directly for the minor's parent or guardian, or on another farm, with the consent of minor's parent or guardian where the farm work is primarily an exchange of labor with another farmer.[287]

Exemptions from the restrictions on occupations that minors can hold exist for minors between the ages of 14 and 17 who are performing service within the provisions of a contract for apprentice indenture, high school graduates, and student learners.[288]

Exceptions to the prohibition against employment of minors under age 14 exist for the following occupations:

- minors 12 years of age or older may be employed in school lunch programs of the school they attend;
- minors under 14 years of age may be employed in public exhibitions;
- minors 12 years of age or older may be employed in street trades, and any minor may work in fund-raising sales for nonprofit organizations, public schools, or private schools;
- minors 12 and 13 years of age may provide caddy services;
- minors 12 years of age or older may be employed in farming;
- minors 12 years of age or older may be employed in and around a home in work usual to the home of the employer, if the work is not in connection with or a part of the business, trade, or profession of the employer and the type of employment is not specifically prohibited by the child labor provisions;
- minors 12 years of age or older may be employed under the direct supervision of a parent or guardian in connection with the parent's or guardian's business, trade, or profession if the minor would otherwise not be prohibited from being employed in the same job at age 14;

[286] WIS. STAT. § 103.68; WIS. ADMIN. CODE DWD § 270.11.

[287] WIS. STAT. § 103.67; WIS. ADMIN. CODE DWD § 270.15.

[288] WIS. ADMIN. CODE DWD §§ 270.13, 270.14.

- minors 12 and 13 years of age may be employed as sideline officials to operate chains and the sideline marker for high school football games;
- minors 12 and 13 years of age may be employed under direct adult supervision as officials for athletic events sponsored by private, nonprofit organizations in which the minor would be eligible to participate or in which the participants are the same age as or younger than the minor;
- minors 11 to 13 years of age may be employed as ball monitors at high school football games and practices; and
- minors under 14 years of age may, under the juvenile criminal laws, be employed as participants in a restitution project, a supervised work program, or other community service work, or in the community service component of a youth report center program.[289]

3.6(b)(iv) *State Work Permit or Waiver Requirements*

In Wisconsin, work permits are required to employ minors under age 16. Employers must keep permits on file and allow inspection of the permit at any time by the DWD or any school attendance officer. There are certain exceptions to the work permit requirement, for example, a permit is not required for qualified apprentices, minors in deferred prosecution agreements, or minors over age 12 engaged in farming.[290] A minor of any age may be employed without a permit under the direct supervision of the minor's parent or guardian. in the business, trade or profession of the minor's parent or guardian as provided in § 103.67 (2)(g).[291]

3.6(b)(v) *State Enforcement, Remedies & Penalties*

An employer may be subject to civil penalties of not less than $25 nor more than $1,000 for each day of the first offense, and not less than $250 nor more than $5,000 for each day of the second or subsequent offense, for the following offenses:

- employing or permitting any minor to work in any employment in violation of the Wisconsin child labor laws or of any order of the DWD issued under those laws;
- hindering or delaying the DWD or school attendance officers in the performance of their duties; or
- refusing to admit or locking out the officer from any place required to be inspected.[292]

In addition to these penalties, any employer that employs any minor in violation of the maximum hours provisions, in addition to the wages paid, to pay to each minor affected an amount equal to twice the regular rate of pay as liquidated damages, for all hours worked in violation per day or per week, whichever is greater.[293]

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[289] WIS. ADMIN. CODE DWD § 270.10.

[290] WIS. STAT. §§ 103.70, 103.74; WIS. ADMIN. CODE DWD 270.05.

[291] WIS. STAT. § 103.70 (2)(d).

[292] WIS. STAT. § 103.82.

[293] WIS. STAT. § 103.82.

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[294]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[295]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[296]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[297] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[298]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that

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[294] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

[295] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

[296] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[297] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

[298] 12 C.F.R. § 1005.2(b)(3)(i)(A).

must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[299] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[300]

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[301]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[302]

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in **3.7(a)(ii)**, wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

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[299] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

[300] 12 C.F.R. § 1005.18.

[301] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

[302] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[303] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[304] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[305] tools and equipment,[306] and business transportation and travel.[307] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[308]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[309]

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[303] *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

[304] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[305] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[306] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[307] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[308] 29 C.F.R. § 778.217.

[309] 29 C.F.R. § 531.38.

- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[310]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[311]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[312]
- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[313] or
- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[314]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[315]

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[310] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[311] 29 C.F.R. § 531.40.

[312] 29 C.F.R. § 531.40.

[313] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[314] 29 C.F.R. § 825.213.

[315] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[316] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[317]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[318]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[319]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[320]

3.7(b) *State Guidelines on Wage Payment*

3.7(b)(i) *Form of Payment Under State Law*

Authorized Instruments. In Wisconsin, wages may be paid in cash, check, or other paper payable at a place of business in the county. Paychecks must be payable at some designated place of business in the county in which the work was performed, at the office of the employer, or at a bank within the state.[321]

Direct Deposit. According to the Wisconsin Department of Workforce Development, an employer may require mandatory direct deposit so long as the following requirements are met:

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316 U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

317 U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

318 29 C.F.R. § 531.36.

319 29 C.F.R. § 531.37.

320 U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

321 WIS. STAT. § 103.45.

- the employee can collect wages at a bank or facility in Wisconsin; and
- the employee receives all wages, and cannot be made to incur any charges to receive them.[322]

If an employee uses an existing bank account, these requirements are easily met. If an employee does not use a bank, and must establish an account solely for the purpose of receiving wages, the employer must cover all associated fees. A mandatory direct deposit program must provide a worker with 100% of wages without the worker incurring any cost to gain access to their pay (check fees, service charges on an account, etc.).[323]

If an employer chooses to institute a *voluntary* direct deposit system, it is immaterial whether there are fees associated with obtaining wages. If the employee chooses to use direct deposit, it is assumed the employee has agreed to pay these fees for the convenience and security of having wages placed directly into the employee's bank account.[324]

Because direct deposit as a condition of employment is not addressed by law, an employer may make employee participation in a direct deposit program a condition of employment. An employer may also require that current employees participate in a direct deposit program as a condition of continued employment.[325]

Payroll Debit Card. Wisconsin law does not address the use of payroll debit cards as a method of wage payment.

3.7(b)(ii) *Frequency of Payment Under State Law*

A Wisconsin employer must pay its employees at least monthly. The payday must occur no more than 31 days after the end of the pay period. An employee who is absent on payday must be paid within six days of demand.[326] Special rules apply to employees engaged in logging operations and farm labor, and to school district, cooperative educational service agency, and private school employees.[327]

The following individuals are not considered *employees* for purposes of the wage payment provisions: persons employed in a managerial, executive, or commissioned sales capacity or in a capacity in which the person is privy to confidential matters involving the employer-employee relationship. Additionally, the restrictions do not apply to an employee subject to a collective bargaining agreement establishing a different frequency for wage payment.[328]

3.7(b)(iii) *Final Payment Under State Law*

In most instances of discharge or voluntary resignation, an employee who does not have a written contract for a definite period of employment must be paid final wages no later than the next regular pay

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[322] Wisconsin Dep't of Workforce Dev., *Direct Deposit of Wages*, *available at* https://dwd.wisconsin.gov/er/laborstandards/deposit.htm.

[323] Wisconsin Dep't of Workforce Dev., *Direct Deposit of Wages*.

[324] Wisconsin Dep't of Workforce Dev., *Direct Deposit of Wages*.

[325] Wisconsin Dep't of Workforce Dev., *Direct Deposit of Wages*.

[326] WIS. STAT. § 109.03(1).

[327] WIS. STAT. § 109.03(1).

[328] WIS. STAT. §§ 109.01, 109.03(1).

date, but not more than a month later. However, this requirement does *not* apply to sales agents employed on a commission basis.[329]

However, whenever an employee is separated from the payroll of an employer as a result of the employer merging, liquidating, or otherwise disposing of the business, ceasing business operations in whole or in part, or relocating all or part of the business to another area within or outside the state, the employer, or the employer's successors-in-interest, must pay all unpaid wages to the employee at the usual place of payment within 24 hours of separation.[330]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

With each wage payment, Wisconsin employers must provide each employee with a wage statement showing:

- the number of hours worked;
- the rate of pay; and
- the amount of and reason for each deduction, except such miscellaneous deductions as may have been authorized by request of the employee for reasons personal to the employee. A reasonable coding system may be used by the employer.[331]

The statement may appear on the paycheck, pay envelope, or a paper accompanying the wage payment.[332] The law also provides special rules for the content and provision of wage statements to migrant workers.[333]

3.7(b)(v) *Wage Transparency*

Wisconsin law does not address whether an employer may prohibit employees from disclosing their wages or from discussing and inquiring about the wages of other employees.

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

There are no general notice requirements under Wisconsin law regarding making a change to regular paydays or an employee's rate of pay. Employers, however, should consider providing employees with advance written notice before a change occurs.

3.7(b)(vii) *Paying for Expenses Under State Law*

In Wisconsin, there is no general obligation to indemnify an employee for business expenses. Further, state law contains no express provisions addressing how uniform, tool, and/or equipment expenses incurred during employment are treated in the wage payment, minimum wage, and/or overtime contexts.

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[329] WIS. STAT. § 109.03(2).

[330] WIS. STAT. § 109.03(4).

[331] WIS. STAT. § 103.457; WIS. ADMIN. CODE DWD § 272.10.

[332] WIS. ADMIN. CODE DWD § 272.10.

[333] WIS. STAT. § 103.93.

3.7(b)(viii) *Wage Deductions Under State Law*

Wisconsin law does not include a general wage deduction statute. However, the wage payment laws address various types of wage deductions that are permissible or prohibited.

Permissible Deductions. An employer may claim an allowance for the fair value of meals, board, and lodging provided to and accepted by employees. Limits on how much can be deducted are specified in the regulation.[334] An employer may also be able to take a deduction under certain circumstances with respect to group health coverage during an employee's family leave of absence.[335] Additionally, an employer may be able to take deductions to cover wage overpayments the employer made to an employee.[336]

Prohibited Deductions. An employer cannot deduct for:

- defective or faulty workmanship; or
- lost or stolen property or damage to property.[337]

However, this does not apply if:

- the employee provides written authorization;
- the employer and an employee representative determine the defective or faulty workmanship, loss, theft, or damage is due to the employee negligence, carelessness, or willful and intentional conduct; or
- the employee is found guilty or held liable by a court due to the employee's negligence, carelessness, or willful and intentional conduct.[338]

In addition, it is an unfair labor practice for an employer to deduct labor organization dues or assessments from an employee's earnings unless the employer has been presented with an individual order, signed by the employee personally, and terminable by the employee by giving the employer at least 30 days' written notice of the termination. This provision applies to the extent permitted under federal law to collective bargaining agreements renewed, modified, or extended after March 11, 2015.[339] The Seventh Circuit, however, found that the 30-day dues checkoff provision is preempted by the Taft-Hartley Act. "[T]he Taft-Hartley Act leaves it to private actors--and not the state--to decide how long the dues-checkoff authorization should last, as long as the authorization is individual, in writing, and not irrevocable for longer than one year...The State's attempt to add additional regulatory requirements for dues-checkoffs, and thus to change the scope of permissible collective bargaining, is preempted."[340]

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[334] WIS. ADMIN. CODE DWD §§ 272.03, 272.04.

[335] WIS. STAT. § 103.10; WIS. ADMIN. CODE DWD § 225.04.

[336] *See Batteries Plus, L.L.C. v. Mohr*, 628 N.W.2d 364 (Wis. 2001); *Farady-Sultze v. Aurora Med. Ctr. of Oshkosh, Inc.*, 787 N.W.2d 433 (Wis. Ct. App. 2010).

[337] WIS. STAT. § 103.455.

[338] WIS. STAT. § 103.455.

[339] WIS. STAT. § 111.06.

[340] *International Ass'n of Machinists Dist. 10 and Local Lodge 873 v. Allen*, 2018 WL 4355864 (7th Cir. Sept. 13, 2018)(citations omitted).

3.7(b)(ix) *Wage Assignments & Wage Garnishments*

Debt Collection. In Wisconsin, employers have specific obligations when served with a garnishment summons. First, the employer must determine whether it is or may become obligated to the debtor for wages or other monies earned within the pay periods during the 13 weeks after the date the garnishment summons is served.[341] If no monies are likely owed to the employee during this period, the employer must, by the end of the seventh business day after receiving the garnishment, send a statement to the creditor indicating that it is unlikely that the employee will be receiving any money during that period.[342]

The employer must pay the creditor the appropriate portion of the employee's nonexempt disposable earnings between five and 10 business days after the payday of each pay period in which the garnishment is in effect.[343] Employers should be aware that both federal and Wisconsin law place limitations on the percentage of nonexempt disposable earnings that may be withheld in any one pay period pursuant to a garnishment summons. Employers should carefully consult the limitations before deducting from the employee's wages.

Careful compliance with Wisconsin garnishment procedures is very important. An employer's failure to pay the appropriate funds to the creditor pursuant to a valid garnishment may result in the employer's liability in the amount of the unsatisfied judgment the creditor has against the employee, as well as costs and interest.[344] In addition, Wisconsin law prohibits employers from taking adverse action against employees based on the fact that the employee's wages have been subject to garnishment.[345]

Orders of Support. An employer receiving official notice from the court regarding assignment of wages under a child support order has certain obligations under Wisconsin law. The employer must withhold the amount specified from any monies to be paid the employee beginning one week after receipt of the notice and must thereafter send the amount withheld to the Wisconsin Department of Children and Families.[346] In addition, the employer must report the employee's gross income to the department.[347] To offset withholding costs, employers may deduct a fee of up to $3 from the disposable income of an employee subject to an order of support.[348]

An employer failing to withhold or send money may be prosecuted for contempt of court.[349] No employer may use child support order as a basis for the denial of employment to a person, the discharge of an employee, or any disciplinary action against an employee. An employer that denies employment or discharges or disciplines an employee in violation of this provision may be fined not more than $500 and may be required to make full restitution to the aggrieved person, including reinstatement and back pay.[350]

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341 WIS. STAT. § 812.35(5).

342 WIS. STAT. § 812.35(5).

343 WIS. STAT. § 812.39.

344 WIS. STAT. § 812.41(1).

345 WIS. STAT. §§ 812.43, 425.110.

346 WIS. STAT. § 767.75(3h).

347 WIS. STAT. § 767.75(3h).

348 WIS. STAT. § 767.75(3h).

349 WIS. STAT. § 767.75(6).

350 WIS. STAT. § 767.75(6).

3.7(b)(x) *State Enforcement, Remedies & Penalties*

An employee in Wisconsin may file a labor standards complaint form with the Department of Workforce Development (DWD) for disputes over salaries, commissions, holiday pay, vacation pay, severance pay, dismissal pay, bonuses, child labor, or illegal deductions. The complaint must be file within two years of the alleged violation.[351]

An employee may also file suit against the employer for wage and hour violations, and is not required to exhaust administrative remedies by filing a complaint with the DWD first or permitting the DWD to complete an investigation of an existing complaint. In a wage claim action that an employee commences before the DWD has completed its investigation, a circuit court may order the employer to pay to the employee, in addition to the amount of wages due and unpaid and in addition to or in lieu of applicable criminal penalties, increased wages of not more than 50% of the amount of wages due and unpaid.[352] In a wage claim action that is commenced after the DWD has completed its investigation, a circuit court may order the employer to pay to the employee, in addition to the amount of wages due and unpaid to an employee and in addition to or in lieu of applicable criminal penalties, increased wages of not more than 100% of the amount of wages due and unpaid.[353]

Willful failure to pay wages as required may result in a criminal penalty of not more than $500 or imprisonment of not more than 90 days, or both. Each failure to pay each employee the amount of wages due constitutes a separate offense.[354]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[355] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[356] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[357]

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[351] WIS. STAT. § 109.09.

[352] WIS. STAT. § 109.11.

[353] WIS. STAT. § 109.11.

[354] WIS. STAT. § 109.11.

[355] 29 U.S.C. § 1002.

[356] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[357] 490 U.S. 107, 119 (1989).

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

Wisconsin law does not require an employer to offer employees other benefit compensation such as vacation pay, holiday pay, personal time off, bonuses, severance pay, or pensions. However, once an employer establishes a policy and promises vacation pay and other types of additional compensation, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively. It is important to draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice.

In Wisconsin, the definition of *wages* includes holiday and vacation pay and any other similar advantages agreed upon between the employer and the employee or provided by the employer to the employees as an established policy.[358] There is no statutory or regulatory provision prohibiting an employer from implementing caps on accrual or a "use-it-or-lose-it" policy. Further, an employer's vacation policy may require forfeiture of accrued vacation upon termination as long as the policy clearly so provides.[359] However, the state labor department contends that, if a policy does not contain a forfeiture provision, payout of vacation is required.[360]

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

In Wisconsin, employees who work in a factory or mercantile establishment must be provided at least 24 consecutive hours of rest in every seven consecutive days. This rule does not apply where there is a breakdown of machinery or equipment or other emergency requiring the immediate service of experienced and competent labor that is not otherwise immediately available.[361]

Moreover, the requirement does *not* apply to:

- janitors;
- security personnel;
- persons employed in the manufacture of dairy products or in the distribution of milk or cream, or in canneries and freezers;
- persons employed in bakeries, flour, and feed mills, hotels, and restaurants;

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[358] WIS. STAT. § 109.01.

[359] *See, e.g.*, *Sinclair v. Hillhaven Corp.*, 469 N.W.2d 249 (Wis. Ct. App. 1991).

[360] "Generally, IF the employer implemented a written vacation policy AND it does not include a written forfeit policy, THEN the employer must pay the employee for any earned, unused vacation pay. If you have not been paid for unused vacation and believe you are entitled to this benefit, you can file a Labor Standards Complaint." Wisconsin Department of Workforce Development, *Wage Payment and Collection, Frequently Asked Questions*, *available at* https://dwd.wisconsin.gov/er/laborstandards/wages.htm.

[361] WIS. STAT. § 103.85.

- employees whose duties include no work on Sunday other than caring for live animals or maintaining fires;
- millwrights, electricians, and pipefitters in paper and pulp mills whose duties include not more than five hours of essential work on Sunday; and
- labor called for by an emergency that could not have reasonably been anticipated.[362]

Twenty-four hours of consecutive rest in each calendar week is deemed compliant.[363] Moreover, the Wisconsin Department of Workforce Development takes the position that a day of rest need not be given every seven days. In other words, an employer may legally schedule employees to work for 12 consecutive days within a two-week period if the days of rest fall on the first and last day of the two-week period.[364] This law also does not apply to an employee who states in writing that they voluntarily choose to work without at least 24 consecutive hours of rest in seven consecutive days. However, the voluntary, written waiver rule does not apply to employees covered by a collective bargaining agreement with contrary day of rest provisions until the CBA expires or is extended, modified, or renewed, whichever occurs first.[365]

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[366] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[367] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[368] Here again, states may choose to

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[362] WIS. STAT. § 103.85.

[363] WIS. ADMIN. CODE DWD § 275.01.

[364] Wisconsin Dep't of Workforce Dev., *One Day of Rest In Seven*, *available at* https://dwd.wisconsin.gov/er/laborstandards/restday.htm.

[365] WIS. STAT. § 103.85.

[366] 29 U.S.C. § 1144.

[367] 29 U.S.C. § 1161.

[368] 29 U.S.C. § 1167(3).

extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

3.8(c)(ii) *State and Local Guidelines on Domestic Partnerships & Civil Unions*

Wisconsin solemnizes domestic partnerships, but only for same-sex couples.[369] Both same-sex and opposite-sex couples may register as domestic partners in Dane County, Kenosha County, Rock County, and the city of Madison. Domestic partnership is available to same-sex couples in Milwaukee County. However, state law does not address the issue of whether an employee's domestic partner must be considered an eligible dependent for purposes of employee benefits.

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[370]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[371]
- to take medical leave when the employee is unable to work because of a serious health condition;[372]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[373] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the

[369] WIS. STAT. §§ 770.01 *et seq.*

[370] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[371] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[372] 29 C.F.R. §§ 825.112, 825.113.

[373] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

last 12 months at a location where 50 or more employees work within 75 miles of each other.[374] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

In Wisconsin, the main statute addressing leave rights is the Wisconsin Family and Medical Leave Act (WFMLA), which provides leave rights similar to those provided by the federal Family and Medical Leave Act (FMLA). However, where state law provides for greater rights than federal law, Wisconsin employers are required to provide their employees with the more generous leave benefits. In addition, not all Wisconsin employers are covered by the federal FMLA—and, therefore, are not required to provide FMLA leave to employees. Those employers that are not covered by the FMLA may nonetheless be covered by the WFMLA.

Coverage & Eligibility. A *covered employer* under the WFMLA is defined to include a person or entity that employs 50 or more permanent employees.[375] There is no requirement that the 50-or-more employees be employed in Wisconsin. This standard is met if the employer treated at least 50 employees as permanent "according to [the employer's] usual personnel recordkeeping practices" during at least six of the past 12 calendar months.[376] The Wisconsin law's coverage is somewhat broader than the FMLA, which only covers employers that employ 50 or more employees within a 75-mile radius of the worksite.[377] Thus, some employers that have permanent employees at many different facilities, and therefore would not necessarily be covered by the FMLA, will still be covered by the WFMLA.

The term *employee* for the purpose of the WFMLA means an individual employed in Wisconsin (unless the individual is the employer's parent, spouse, or child) who has worked for an employer for:

- more than 52 consecutive weeks; and
- at least 1,000 hours during the preceding 52-week period.[378]

In determining whether a person has worked for more than 52 consecutive weeks, the question is whether the person was actually treated "according to the usual personnel recordkeeping practices of the employer" as an employee during each of those 52 weeks.[379] Therefore, if the employee was on vacation or other leave or layoff during the period in question, the employee will still qualify if the employee was allowed to return to work without reapplying for employment.[380] The 1,000 hours requirement is calculated by adding the number of hours actually worked to the number of hours for which the employee was paid under a regular policy of paid leave.[381]

Purpose & Length of Leave. The WFMLA requires a covered employer to permit eligible employees to take up to six weeks in a calendar year of unpaid leave for the birth or adoption of a child; up to two weeks of unpaid leave for the serious health condition of the employee's child, spouse, domestic partner, parent,

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[374] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[375] WIS. STAT. § 103.10(1)(c).

[376] WIS. ADMIN. CODE DWD § 225.01(2).

[377] 29 U.S.C. § 2611; 29 C.F.R. §§ 825.110, 825.111.

[378] WIS. STAT. § 103.10(2)(c).

[379] WIS. ADMIN. CODE DWD § 225.01(3).

[380] WIS. ADMIN. CODE DWD § 225.01(3).

[381] WIS. ADMIN. CODE DWD § 225.01(4).

or parent of a domestic partner; and up to two weeks of unpaid leave for the employee's own serious health condition. No more than one six-week period of leave per year may be used by an employee for the birth or adoption of any one child.[382]

If the employer is also covered by the FMLA, the employee will be eligible for up to 12 weeks of unpaid leave (plus additional leave that is potentially available for military caregiver leave under the FMLA). For purposes of calculating an employee's leave, leave time under the WFMLA may run concurrently with the FMLA; thus, an employee covered by both Wisconsin law and the FMLA will not, in most cases, be entitled to more than 12 weeks of statutory unpaid leave per calendar year if the employer calculates both WFMLA and FMLA on a calendar year. Unlike the federal FMLA, employee leave entitlements under the WFMLA must be tracked on a calendar year.[383] There is no "rolling 12-month" option under the WFMLA. The employee has the option of determining the length of the leave.

However, in certain situations, Wisconsin employees may be entitled to more than 12 weeks of unpaid family or medical leave in a calendar year. In fact, it is possible that an employee may receive up to 20 weeks of unpaid leave due to the interplay between the WFMLA and the federal FMLA. For example, where an employee exhausts federal FMLA leave upon taking 12 weeks of leave for one purpose (*e.g.*, leave to care for a seriously ill family member), this would also exhaust the employee's two weeks of leave under the WFMLA under that category. If, however, that employee later gave birth to a child during the same year, the employee may be entitled to an additional six weeks of leave for the birth of the child and another two weeks of leave to care for the employee's own health condition under the WFMLA. This extended statutory leave of absence in Wisconsin will only occur when the employee first exhausts the federal FMLA leave and then seeks leave for which the employee otherwise qualifies under the WFMLA for a different purpose.

Employer Obligations. The WFMLA requires that an employer restore an employee to their same position, if vacant, or to an equivalent position with equivalent compensation, benefits, working shift, hours of employment, and other terms and conditions of employment.[384] *Other terms and conditions of employment* include the employee's status, responsibility, and authority in their prior position.[385] The "equivalent position" requirement applies even if the employee was experiencing problems with the job before going on leave.[386]

The employer must maintain group health insurance coverage during the leave under the same conditions that applied immediately before the leave began.[387] The employer must also continue making premium

[382] WIS. ADMIN. CODE DWD § 225.02(7).

[383] WIS. ADMIN. CODE DWD § 225.01(m).

[384] WIS. STAT. § 103.10(8). An employee who decides to return to work earlier than originally scheduled must also be placed in the same or an equivalent position "within a reasonable time not exceeding the duration of the leave as scheduled." WIS. STAT. § 103.10(8)(c).

[385] *See Kelley Co. v. Marquardt*, 493 N.W.2d 68 (Wis. 1992) (finding that employee was not returned to an "equivalent position" upon her return because her duties had been reduced from supervising four employees to only one employee, and her new position required spending 25% of her time on clerical work).

[386] 493 N.W.2d 68.

[387] WIS. STAT. § 103.10(9)(b).

contributions, as long as the employee continues making any employee contributions required for participation in the plan.[388]

Employee Rights & Obligations. Employees who intend to take planned family or medical leave must give the employer advance notice in a "reasonable and practicable manner."[389] Advance notice of an employee's medical leave is considered *reasonable* if it identifies the planned dates of the leave and is given to the employer with reasonable promptness after the employee learns of the probable necessity of the leave.[390] An employer may deny family leave if the employee substantially fails to provide the requisite notice.[391] The employer may require *written* notice (except where precluded by the need for immediate health care consultation or treatment) for partial family leave, family leave to care for a sick family member, or medical leave only if: (1) the employer has a written policy that requires written notice of scheduled absences; (2) this policy governs all of the employer's Wisconsin employees; and (3) the employee was made aware of this policy.[392] Furthermore, when an employee requests medical leave, the employee does *not* have to demonstrate that the employee has a serious health condition that renders the employee unable to perform their duties and for which the leave is medically necessary.[393] Rather, the employee's request need only be reasonably calculated to advise the employer: (1) that the employee is requesting medical leave under the WFMLA; and (2) the reason for the employee's request.[394]

The WFMLA expressly provides that when leave is taken for medical reasons, an employer may require certification from the health care provider or Christian Science practitioner of the person requiring care, whether it be the employee or the employee's spouse, child, or parent.[395] Employers may request certification of only the following:

- that the employee or family member has a serious health condition;
- the date on which the serious health condition commenced and its probable duration;
- the medical facts regarding the serious health condition within the knowledge of the health care provider or Christian Science practitioner; and
- if the employee requests medical leave, an explanation of the extent to which the employee is unable to perform their employment duties.[396]

An employer may also request a second opinion, at the employer's expense, concerning any of the above information.[397] An employer may deny a leave request where the employer has properly requested

[388] WIS. STAT. § 103.10(9)(b).

[389] WIS. STAT. § 103.10(6).

[390] WIS. ADMIN. CODE DWD § 225.02(4)(a).

[391] WIS. ADMIN. CODE DWD § 225.02(8).

[392] WIS. ADMIN. CODE DWD § 225.02(3)(c), (4)(b).

[393] *See Sieger v. Wisconsin Pers. Comm'n*, 512 N.W.2d 220 (Wis. Ct. App. 1994).

[394] 512 N.W.2d at 224.

[395] WIS. STAT. § 103.10(7)(a), (b).

[396] WIS. STAT. § 103.10(7)(b).

[397] WIS. STAT. § 103.10(7)(c).

certification and the employee either fails or refuses to substantially comply with that request, unless emergency health care needs make compliance impossible.[398]

Posting. An employer with 50 or more permanent employees must post a notice, in a form approved by the Wisconsin Department of Workforce Development, setting forth the employees' rights under the WFMLA.[399] The notice must be posted in "one or more conspicuous places where notices to employees are customarily posted."[400] Each offense under this section carries a maximum fine of $100.

An employer with 25 or more employees must also post a notice describing the employer's actual policies on family and medical leaves.[401] Therefore, all employers with 50 or more permanent employees must post two notices: the notice of the employees' WFMLA rights, and the notice of the employer's leave policies. If the employer's policy is the same as that under the WFMLA, however, the employer can satisfy this requirement by simply posting a statement to that effect along with a copy of the WFMLA.[402]

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[403] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

3.9(b)(ii) *State Guidelines on Paid Sick Leave*

Wisconsin law does not address paid sick leave for private-sector employees.

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions

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398 WIS. ADMIN. CODE DWD § 225.02(9).

399 WIS. STAT. § 103.10(14)(a).

400 WIS. STAT. § 103.10(14)(a).

401 WIS. STAT. § 103.10(14)(b).

402 WIS. ADMIN. CODE DWD § 225.01(5).

403 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

under an employer's health or disability insurance or sick leave plan.[404] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the employee is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for their own serious health condition, such as severe morning sickness.[405] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[406] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in **3.11(c)**. To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

Employers in Wisconsin must provide employees with a leave of absence for pregnancy and pregnancy-related conditions on the same terms as leave is provided for other temporary disabilities.[407] Also, pregnancy-related conditions may qualify for WFMLA leave as the employee's own serious health condition. See **3.9(a)(ii)** for a discussion of the WFMLA.

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[404] 42 U.S.C. § 2000e(k); *see also 29* C.F.R. § 1604.10.

[405] 29 C.F.R. § 825.202.

[406] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

[407] WIS. STAT. § 111.36(1)(c).

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the FMLA. For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

An eligible employee may take up to six weeks off to care for a newly-adopted child as part of the employee's leave entitlement under the WFMLA. See 3.9(a)(ii) for a discussion of the WFMLA.

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

3.9(e)(ii) *State Guidelines on School Activities Leave*

Wisconsin law does not address school activities leave for private-sector employees.

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

Employers of 50 or more employees must provide up to six weeks of leave in a 12-month period for the purpose of an employee serving as a bone marrow or organ donor. Leave may be taken only for the period necessary for the employee to undergo the bone marrow or organ donation procedure and to recover from the procedure.[408] This law also prohibits discrimination against employees who take leave for organ or bone marrow donations.[409]

To be eligible for leave, an employee must have been employed by the same employer for more than 52 consecutive weeks and have worked for the employer for at least 1,000 hours during the preceding 52-week period.[410]

Notification & Certification. If an employee intends to take leave for the purpose of serving as a bone marrow or organ donor, the employee must do all of the following:

1. make a reasonable effort to schedule the bone marrow or organ donation procedure so that it does not unduly disrupt the employer's operations, subject to the approval of the health care provider of the bone marrow or organ recipient; and

[408] WIS. STAT. § 103.11(1)(c), (4).

[409] WIS. STAT. §§ 103.15, 103.11.

[410] WIS. STAT. § 103.11(3)(b).

2. give the employer advance notice of the bone marrow or organ donation in a reasonable and practicable manner.[411]

The employee must provide written verification to the employer that the employee is serving as a bone marrow or organ donor. The employer may require the employee to provide written certification from the bone marrow or organ recipient's health care provider to support the employee's request for leave. The employer may require certification of any of the following:

- that the recipient has a serious health condition that necessitates a bone marrow or organ transplant;
- that the employee is eligible and has agreed to serve as a bone marrow or organ donor for the recipient; and/or
- the amount of time expected to be necessary for the employee to recover from the bone marrow or organ donation procedure.[412]

Employer Obligations. Leave is unpaid, but the employee may substitute, for portions of the leave, any paid or unpaid leave of any other type provided by the employer. During the leave period, the employer must maintain group health insurance coverage under the conditions that applied immediately before the leave began. If the employee continues making any contribution required for participation in the employer's group health insurance plan, the employer must continue making group health insurance premium contributions as if the employee had not taken leave. The employer may require the employee to have in escrow with the employer an amount equal to the entire premium or similar expense for eight weeks of the employee's group health insurance coverage.[413]

Employee Rights & Obligations. An employee returning from bone marrow or organ donation leave is not entitled to a right, employment benefit, or employment position to which the employee would not have been entitled had he or she not taken bone marrow or organ donation leave, or to the accrual of any seniority or employment benefit during a period of bone marrow or organ donation leave.

Upon an employee's return from bone marrow or organ donation leave, the employee must be placed in an employment position as follows:

1. if the position that the employee held immediately prior to the leave began is vacant when the employee returns, the employee must be placed in that position; or
2. if the position that the employee held immediately prior to the leave began is not vacant when the employee returns, in an equivalent employment position having equivalent compensation, benefits, working shift, hours of employment, and other terms and conditions of employment.

No employer may, because an employee took bone marrow or organ donation leave, reduce or deny an employment benefit that accrued to the employee before the employee's leave began or, consistent with the reinstatement provisions, that accrued after the employee's leave began.[414]

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411 WIS. STAT. § 103.11(6).

412 WIS. STAT. § 103.11(7).

413 WIS. STAT. § 103.11(9).

414 WIS. STAT. § 103.11(8).

Posting. Each covered employer (employers of 50 or more employees) must post, in one or more conspicuous places where notices to employees are customarily posted, a notice setting forth employees' bone marrow and organ donation leave rights. Employers of 25 or more employees shall post, in one or more conspicuous places where notices to employees are customarily posted, a notice describing that employer's policy with respect to leave for bone marrow and organ donation leave.[415]

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

3.9(g)(ii) *State Voting Time Guidelines*

Employers in Wisconsin must provide employees with at least three consecutive hours of voting leave. The employer may designate the time of day for the absence. Other than a permissible deduction for lost time from wages, employers are prohibited from imposing penalties, including discharge, on an employee who is absent from work for the purpose of voting.[416]

Election Officials. An employer must provide leave to an employee who has been appointed to serve as an election official. Such an employee is entitled to a 24-hour leave of absence on election day while the employee is serving in their official capacity. The employee must provide at least 7 days' notice; however, there is no requirement that the leave be paid. The employer may request verification of an employee's appointment as an election official from the municipal clerk.[417]

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

Other than leave for election officials discussed in **3.9(g)(ii)**, Wisconsin has not enacted any statutes requiring employers to offer leave for private-sector employees to participate in political activities.

3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[418] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can

[415] WIS. STAT. § 103.11(14).

[416] WIS. STAT. § 6.76.

[417] WIS. STAT. § 7.33.

[418] 28 U.S.C. § 1875.

set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of additional federal statutes.[419] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Leave to Serve on a Jury. An employer in Wisconsin must grant an employee a leave of absence without loss of time in service for the period of jury service. For the purpose of determining seniority or pay advancement, the status of the employee must be considered uninterrupted by the jury service. The employer may also not discharge or discipline an employee for absences due to jury duty.[420]

Leave to Comply with a Subpoena. Employers in Wisconsin may not discharge an employee because the employee is subpoenaed to testify in a judicial proceeding. Employees must provide the employer with notice of the need for time off to testify within one business day after the receipt of a subpoena. If the employee is subpoenaed to testify in an action or proceeding as a result of a crime against the employer or a crime that occurred during the course of the employee's employment, the employer may not deduct any wages for the time the employee is away from work to comply with the subpoena.[421]

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Wisconsin law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning

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[419] *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

[420] WIS. STAT. § 756.255.

[421] WIS. STAT. § 103.87.

from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[422]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[423] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.424 Notably, leave is only available for covered relatives of military members called to active federal service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.
2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

Military Service Leave. Employees in Wisconsin must be granted a leave of absence for up to five years for service in the reserves or National Guard. The employee need not be a Wisconsin resident, and may be a member of the National Guard of any state or U.S. territory. Employees are entitled to reemployment if: (1) they provide the employer with advance notice of the leave; (2) the leave does not exceed five years; and (3) they provide the following notice of intent to return to work:

- **Leave for Less Than 31 Days.** The employee must provide notice of intent to return to work not later than the beginning of the first full regularly-scheduled work period on the first full

[422] USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

[423] 29 C.F.R. § 825.126(a).

[424] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

calendar day following completion of service and expiration of eight hours following travel home; or as soon as possible if reporting within that period is impossible or unreasonable through no fault of the employee.

- **Leave for More Than 30 But Less Than 181 Days.** The employee must provide notice of intent to return to work by submitting an application for reemployment not later than 14 days after completion of service or the next first full calendar day if submitting an application within that time is impossible or unreasonable through no fault of the applicant.
- **Leave Greater Than 180 Days.** The employee must provide notice of intent to return to work by submitting an application for reemployment not later than 90 days after completion of service.[425]

Civil Air Patrol. Employers with 11 or more employees are required to provide unpaid leave if certain conditions are met, including:

- written notification from the employee verifying membership in the Civil Air Patrol, if requested by the employer;
- authorization to leave work to respond to an emergency; and
- if requested by the employer, a written statement from the employee's commander in the Civil Air Patrol certifying participation in Civil Air Patrol activities during the leave of absence.[426]

An employee who is called to duty for a Civil Air Patrol mission is entitled to an unpaid leave from employment while engaged in a mission, for up to 15 days in a calendar year, but no more than five consecutive days at a time. The status of an employee who takes a Civil Air Patrol leave of absence must be treated as uninterrupted service.[427]

Other Military-Related Protections: Spousal Unemployment. An employee who voluntarily terminates employment will be eligible for benefits if:

1. The employee's spouse is a member of the U.S. armed forces on active duty.
2. The employee's spouse was required by the U.S. armed forces to relocate to a place to which it is impractical for the employee to commute.
3. The employee terminated work to accompany the spouse to that place.[428]

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

[425] WIS. STAT. § 321.65.

[426] WIS. STAT. § 321.66.

[427] WIS. STAT. § 321.66.

[428] WIS. STAT. § 108.04(7)(t).

3.9(l)(ii) *State Guidelines on Other Leaves*

Emergency Volunteer Responder Leave. Employers in Wisconsin must provide unpaid leave to an employee who is a volunteer fire fighter, emergency medical technician, first responder, or ambulance driver for a volunteer fire department or fire company, due to the employee responding to an emergency that begins before the employee is required to report to work.[429] To be eligible for this leave, the employee must:

- notify the employer of their volunteer affiliation within 30 days after becoming a member of the volunteer group;
- make every effort to notify the employer that the employee may be late for or absent from work due to responding to the emergency; and
- provide a written statement from the chief of the volunteer fire department or fire company or from the person in charge of the ambulance service provider certifying that the employee was responding to an emergency at the time of the absence.[430]

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[431] Employers are also required to comply with all applicable occupational safety and health standards.[432] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see LITTLER ON WORKPLACE SAFETY.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[433] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

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[429] WIS. STAT. § 103.88.

[430] WIS. STAT. § 103.88(3).

[431] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[432] 29 U.S.C. § 654(a)(2).

[433] 29 U.S.C. § 667(c)(2).

3.10(a)(ii) *State-OSH Act Guidelines*

Wisconsin does not have an approved state plan under the Fed-OSH Act that covers public or private-sector employees. Accordingly, employers must abide by the Fed-OSH Act. In addition, the Wisconsin Safe Place statute is applicable to all employers. Under the statute, an employer has a duty to:

1. provide its employees with a place of employment that is safe for both the employees and "frequenters;"
2. furnish and use safety devices and safeguards;
3. adopt and use methods and processes reasonably adequate to make the place of employment and the employment itself safe;
4. construct, repair, and maintain the place of employment or public building to ensure its safety; and
5. "do every other thing reasonably necessary to protect the life, health, safety, and welfare of [its] employees and frequenters."[434]

In addition, the safe place statute prohibits every employee from:

1. tampering with or removing any safety device or other safeguard provided by the employer;
2. interfering with other persons' use of such devices or any other methods or processes adopted by the employer to ensure safety; or
3. failing to do "every other thing reasonably necessary to protect the life, health, safety or welfare of [the employer's] employees or frequenters."[435]

Because of the Fed-OSH Act's preemptive effect, no state agency enforces the safe place statute against private employers. However, the Workers' Compensation Division of the Wisconsin Department of Workforce Development may order a 15% increase in an employee's compensation award (not to exceed $15,000) if the employee's injury stemmed from the employer's violation of the safe place statute.[436] The DWD may also order a 15% decrease of the employee's award (not to exceed $15,000) if the employee was injured because of: (1) a failure to use employer-provided safety equipment; (2) a failure to follow a safety policy or rule; or (3) intoxication or use of a controlled substance.[437]

The safe place statute's primary means of enforcement, however, is through private lawsuits by nonemployee third parties against employers and property owners who violate the statute. If the particular situation is governed by a safety regulation from the DWD, violation of that regulation is an automatic violation of the safe place statute.[438] The employer cannot argue that the "frequenter" assumed the risk of injury by entering an unsafe environment. However, the employer can argue that the

[434] WIS. STAT. § 101.11(1).

[435] WIS. STAT. § 101.11(2)(B).

[436] WIS. STAT. § 102.57.

[437] WIS. STAT. § 102.58.

[438] *Cossette v. Lepp*, 157 N.W.2d 629 (Wis. 1968).

other party's own negligence contributed to the injury (thus decreasing the employer's liability proportionately).[439]

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

In Wisconsin, a driver may not operate a motor vehicle while composing or sending a text message or email. An exception exists where a driver uses a voice-operated or hands-free device if the driver does not use their hands to operate the device, except to activate or deactivate a feature or function of the device.[440]

This prohibition applies to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, the restriction.

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

Firearms in the Workplace. Wisconsin employers may prohibit an employee from carrying a concealed weapon in the course of the employee's employment.[441] Further, an employer that does not prohibit its employees from carrying a concealed weapon is immune from any liability arising from its decision.[442]

Firearms in Company Parking Lots. Employers may not prohibit an employee from storing a weapon or ammunition in the employee's own motor vehicle, regardless of whether the motor vehicle is used in the course of employment or whether the motor vehicle is driven or parked on property used by the employer.[443]

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

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439 *Kaiser v. Cook*, 227 N.W.2d 50 (Wis. 1975).

440 WIS. STAT. § 346.89.

441 WIS. STAT. § 175.60(15m)(a).

442 WIS. STAT. § 175.60(21).

443 WIS. STAT. § 175.60(15m)(b).

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

Wisconsin law prohibits indoor smoking in all places of employment.[444] A *place of employment* is "any enclosed place that employees normally frequent during the course of employment," including an office, work area, elevator, employee lounge, restroom, conference room, meeting room, classroom, hallway, stairway, lobby, common area, vehicle, or employee cafeteria.[445]

The person in charge of a facility is responsible for making reasonable efforts to prohibit persons from illegally smoking.[446] Reasonable efforts include posting warning signs or providing other appropriate notification; asking a person who is smoking to refrain from doing so; asking a person to leave if the person refuses to stop smoking; and immediately notifying an appropriate law enforcement agency if a smoker refuses to leave after being asked to do so.[447]

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

Employers of manufacturing, mechanical, or mercantile establishments must provide suitable seats for employees. Employers must permit employees to use these seats when employees are not necessarily engaged in active duties of employment. An employer that violates the seating law may be fined between $10 and $30 per offense.[448]

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

Wisconsin law does not address employer workplace violence protection orders.

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[444] *Smoking* means burning or holding, or inhaling or exhaling smoke from a lighted cigarette, cigar, pipe, or any other lighted smoking equipment. WIS. STAT. § 101.123(1)(h).

[445] WIS. STAT. § 101.123(2).

[446] WIS. STAT. § 101.123(2m).

[447] WIS. STAT. § 101.123(2m)(c)-(d).

[448] WIS. STAT. § 103.16.

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[449] (2) the Americans with Disabilities Act (ADA);[450] (3) the Age Discrimination in Employment Act (ADEA);[451] (4) the Equal Pay Act;[452] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[453] (6) the Civil Rights Acts of 1866 and 1871;[454] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[455]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[456] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[457]

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[449] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[450] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[451] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[452] 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. § 203.

[453] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[454] 42 U.S.C. §§ 1981, 1983.

[455] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

[456] The EEOC's website is available at http://www.eeoc.gov/.

[457] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

3.11(a)(ii) *State FEP Protections*

Wisconsin's main FEP law is the Wisconsin Fair Employment Act (WFEA).[458] The WFEA is a comprehensive statute that addresses discrimination in the areas of public accommodation, public services, housing, education, credit, and business relationships, in addition to employment. The WFEA prohibits discrimination on the basis of the following:

- age (40);
- race;
- creed;
- color;
- disability;
- marital status;
- sex (including pregnancy, childbirth, maternity leave, or related medical condition, and sexual orientation);
- national origin;
- ancestry;
- arrest record;
- conviction record;
- military service;
- use or nonuse of lawful products (off the employer's premises during nonworking hours); or
- declining to meet or communicate about religious or political matters.[459]

Covered Employers. Under the WFEA, an *employer* means the state and its agencies, and any other person, "engaging in any activity, enterprise or business employing at least one individual."[460] This definition does not include a social club or fraternal society where the particular job at issue is advertised only within the membership.[461]

Covered Individuals. With respect to unfair discriminatory practices in employment, the WFEA generally governs the relationship between employers and employees. An *employee* is defined by the standard applicable to Title VII.[462] That standard is "an individual employed by an employer," except for an elected government official, an individual chosen by an elected government official to serve on their personal staff, an individual appointed by an elected government official on the policy-making level, or an immediate adviser of an elected government official with respect to the exercise of the constitutional or

[458] WIS. STAT. §§ 111.31 *et seq*.

[459] WIS. STAT. §§ 111.32, 111.321, and 111.36.

[460] WIS. STAT. § 111.32(6)(a).

[461] WIS. STAT. § 111.32(6)(b).

[462] *Moore v. Labor & Indus. Review Comm'n*, 499 N.W.2d 288, 291 (Wis. Ct. App. 1993).

legal powers of the office.[463] Under the WFEA, an *employee* does not include any individual employed by their parents, spouse, or child.[464]

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

Any person aggrieved by a violation of the WFEA may file a complaint with the Equal Rights Division (ERD) of the Wisconsin Department of Workforce Development (DWD).[465] If the individual chooses to file a complaint the individual must complete and sign a form provided by the ERD.[466] The ERD will then serve a copy of the complaint upon the respondent and request that a written response be submitted within a specified time period.[467] If the respondent fails to answer the complaint in writing, the ERD may make an initial determination on the complaint based solely on the ERD's investigation and the information supplied by the complainant.[468]

After the complaint is filed, the ERD will make a preliminary determination regarding whether:

- the complainant is protected by the WFEA;
- the respondent is subject to the WFEA;
- the complaint states a claim for relief under the WFEA; and
- the complaint was filed within the applicable time period, if that issue is raised in writing by the respondent.[469]

If any of the above elements are not found, the ERD will dismiss the complaint; the complainant then has 20 days to file a written appeal.[470]

After the ERD makes its preliminary determination, it will investigate the complaint to determine if there is probable cause to believe that discrimination occurred as alleged in the complaint.[471] If the ERD makes an initial determination of probable cause, the case is certified for a hearing on the merits before an Administrative Law Judge (ALJ).[472] If, on the other hand, the ERD dismisses the complaint for lack of probable cause, the complainant has 30 days to appeal.[473] If the complainant appeals, the complainant

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[463] 42 U.S.C. § 2000e(f). This exemption does not, however, include employees subject to the civil service laws of a state government, governmental agency, or political subdivision. 42 U.S.C. § 2000e(f).

[464] WIS. STAT. § 111.32(5).

[465] WIS. STAT. § 111.39(1). The Wisconsin Supreme Court has ruled, however, that police and firefighters must pursue their claims of discipline or discharge that allegedly violate the WFEA's discrimination provisions before the police and fire commission rather than before the DWD. *See City of Madison v. State Dep't of Workforce Dev.*, 664 N.W.2d 584 (Wis. 2003).

[466] *See* WIS. ADMIN. CODE DWD § 218.03(3).

[467] WIS. ADMIN. CODE DWD § 218.04(2).

[468] WIS. ADMIN. CODE DWD § 218.04(2).

[469] WIS. ADMIN. CODE DWD § 218.05(1).

[470] WIS. ADMIN. CODE DWD § 218.05(2)-(3).

[471] WIS. ADMIN. CODE DWD §§ 218.06, 218.07.

[472] WIS. ADMIN. CODE DWD § 218.07.

[473] WIS. ADMIN. CODE DWD § 218.08.

receives a hearing before an ALJ on the issue of probable cause. If the ALJ finds probable cause after that hearing, the case is certified for a hearing on the merits before a different ALJ.

After the ALJ issues a final decision on the merits of the complaint, either party has 21 days to appeal the decision to the Labor and Industry Review Commission (LIRC).[474] The LIRC's decision may then be reviewed by the appropriate circuit court, provided that the appeal is filed within 30 days of the decision.[475]

Although the ERD has exclusive jurisdiction over the WFEA, the ERD's jurisdiction is also limited to these claims. In other words, an employee may seek remedies under the WFEA before the ERD, and subsequently seek additional remedies in federal court under the federal antidiscrimination statutes.[476]

3.11(a)(iv) *Additional Discrimination Protections*

HIV Test. Wisconsin law prohibits discrimination on the basis of employees who obtain an HIV test.[477]

Genetic Information. The WFEA also prohibits the use of testing for genetic information and honesty testing devices in employment situations.[478]

Lawful Products. Wisconsin prohibits discrimination for the use or nonuse of lawful products off the employer's premises during nonworking hours under the WFEA.

3.11(a)(v) *Local FEP Protections*

In addition to the federal and state laws, employers with operations in Madison and Milwaukee are subject to local fair employment practices ordinances.

- **Madison.** Protected classifications include: unemployment; homelessness; credit history; sexual harassment; sex; race; religion or atheism; color; national origin or ancestry; citizenship status; age (18 years or older); handicap or disability; marital status; source of income; arrest record; conviction record; less than honorable discharge from the military; physical appearance; sexual orientation; gender identity; genetic identity; political beliefs; familial status; student status; domestic partner status; receipt of rental assistance; and the fact that the person declines to disclose their Social Security number when such disclosure is not compelled by state or federal law.[479] An individual alleging a violation may file a complaint with the City of Madison Equal Opportunities Commission within the Department of Civil Rights within 300 days of the alleged discrimination.[480]
- **Milwaukee.** Private employers that employ one or more persons must extend nondiscrimination protections on the basis of: sex and sexual harassment; race; religion; color; national origin or ancestry; age (40 years or older); disability; lawful source of income; marital status (including domestic partnership); sexual orientation; gender identity or

[474] WIS. STAT. § 111.39(5); WIS. ADMIN. CODE DWD § 218.21.

[475] WIS. STAT. §§ 111.395, 227.52.

[476] *See Staats v. County of Sawyer*, 220 F.3d 511 (7th Cir. 2000).

[477] WIS. STAT. § 103.15.

[478] WIS. STAT. §§ 111.37, 111.372.

[479] MADISON, WIS., CODE OF ORDINANCES § 39.03 (includes exception for *bona fide* occupational qualification).

[480] MADISON, WIS., CODE OF ORDINANCES § 39.03.

expression; past or present membership in the military service; familial status; protective hairstyle; victimhood of domestic abuse or sexual assault; HIV status; genetic identity; homelessness; and affiliation or perceived affiliation with any category.[481] An aggrieved person may, not later than 300 days after an alleged discriminatory practice has occurred, file a written complaint with the City of Milwaukee Equal Rights Commission alleging a discriminatory practice or violation.[482]

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[483] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[484]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

The WFEA makes it an unlawful employment practice to discriminate against any individual in compensation paid for equal or substantially similar work on the basis of sex where sex is not a *bona fide* occupational qualification.[485] Sex is a *bona fide* occupational qualification if all of the members of one sex are physically incapable of performing the essential duties required by a job, or if the essence of the employer's business operation would be undermined if employees were not hired exclusively from one sex.

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[481] MILWAUKEE, WIS., CODE OF ORDINANCES §§ 109-3 (exemptions include a social club or fraternal society, with respect to a particular job for which the club or society seeks to employ or employs a member, if the particular job is advertised only within the membership), 109-5, 109-9, 109-45, and 109-47 (exceptions, including religious and fraternal associations and organizations, and *bona fide* occupational qualifications).

[482] MILWAUKEE, WIS., CODE OF ORDINANCES § 109-51.

[483] 29 U.S.C. § 206(d)(1).

[484] 42 U.S.C. § 2000e-5.

[485] WIS. STAT. § 111.36.

The Act does not afford a private right of action. An employee alleging a violation may file an administrative complaint with the Wisconsin Equal Rights Division within 300 days of the alleged violation.[486]

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[487]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or

[486] WIS. STAT. § 111.36.

[487] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

- temporary suspension of an employee's essential job function(s).[488]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[489] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[490] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[491]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[492]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

  - allowing an employee to carry or keep water near and drink, as needed;

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488 29 C.F.R. § 1636.3.

489 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

490 29 C.F.R. § 1636.3.

491 29 C.F.R. § 1636.4.

492 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[493]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

Other than the pregnancy leave requirements discussed in **3.9(c)(ii)**, Wisconsin law does not address pregnancy accommodations for private-sector employees.

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[494] Multiple decisions of the U.S. Supreme Court[495] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[496] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see **LITTLER ON HARASSMENT IN THE WORKPLACE** and **LITTLER ON EMPLOYEE TRAINING**.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

There are no antiharassment training and education requirements mandated for private employers in Wisconsin.

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[493] 29 C.F.R. § 1636.3.

[494] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[495] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

[496] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

Wisconsin protects whistleblowers under the Wisconsin Fair Employment Act (WFEA). See 3.11(a)(ii) for information on the WFEA.

The WFEA codifies an exception to an employer's ability to terminate an at-will employee for any reason or no reason at all. Under the WFEA, an employer may not discharge an employee because the employee testifies or assists in any action or proceeding, or files a complaint (or attempts to enforce any right) under specific Wisconsin laws. This is typically referred to as a *whistleblower* action. The employee is protected in engaging in such activity with regard to the following statutory provisions:

- statutes regarding maximum hours or overtime requirements;
- the Wisconsin Family and Medical Leave Act;
- Wisconsin laws guaranteeing access by an employee to personnel records;
- enforcement provisions regarding the regulation of street trades;
- laws regarding wage claims on behalf of minors;
- provisions of Wisconsin law prohibiting deductions for faulty workmanship, loss, or theft;
- statutory provisions guaranteeing state contract wage rates;
- enforcement mechanisms of the laws guaranteeing wage and hour requirements in highway contracts;
- minimum wage requirements;
- wage claims and collections provisions;
- the Wisconsin plant-closing law;
- statutory provisions governing notice prior to the cessation of providing health care benefits;
- reporting violations in health care facilities;
- the Wisconsin Employee's Right to Know Law;
- Wisconsin law governing the fraudulent receipt of public assistance;
- prevailing wage and hour scales; and

- Wisconsin law prohibiting the employment of minors in certain professions.[497]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[498] and the Railway Labor Act (RLA)[499] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

Wisconsin is a right-to-work state. Wisconsin's right-to-work law prohibits an employer from requiring, as a condition of obtaining or continuing employment, an individual to refrain or resign from membership in a labor organization, to become or remain a member of a labor organization, to pay dues or other charges to a labor organization, or to pay any other person an amount that is in place of dues or charges required of members of a labor organization.[500] To the extent permitted by federal law, such provisions are deemed void.[501]

The law does not impact the right of employers and labor organizations to negotiate dues check-off and other similar provisions. However, an employer cannot deduct dues or assessments from an employee's

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[497] WIS. STAT. § 111.322.

[498] 29 U.S.C. §§ 151 to 169.

[499] 45 U.S.C. §§ 151 *et seq*.

[500] WIS. STAT. § 111.04(3). Note, the Seventh Circuit found that the thirty-day dues checkoff provision in Wisconsin's right to work law is preempted by the Taft-Hartley Act: "[T]he Taft-Hartley Act leaves it to private actors--and not the state--to decide how long the dues-checkoff authorization should last, as long as the authorization is individual, in writing, and not irrevocable for longer than one year...The State's attempt to add additional regulatory requirements for dues-checkoffs, and thus to change the scope of permissible collective bargaining, is preempted." *International Ass'n of Machinists Dist. 10 and Local Lodge 873 v. Allen*, 904 F.3d 490 (7th Cir. 2018) (citations omitted).

[501] WIS. STAT. § 111.04(4)(b).

earnings unless the employee has voluntarily signed and provided to the employer an authorization that such deductions be made.[502] Violation of the law is a Class A misdemeanor.[503]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[504] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[505] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

The Wisconsin Business Closing and Mass Layoff Law (WBCL) is Wisconsin's state-law counterpart to the federal WARN Act. Wisconsin law requires covered employers to provide 60 days' written notice to affected employees in the event of a business closing or mass layoff.[506] A *covered employer* includes businesses that employ 50 or more persons in the state.[507] The definition of "persons" does not include certain new or low-hour employees.[508] Further, an "employer" does not include federal and state governments (and their political subdivisions) or charitable and tax-exempt organizations. Independent contractors and wholly and partially-owned subsidiaries that are independent from their parent entity are considered separate employers.[509]

Triggering Events. The WBCL's notice requirements are triggered in the event of either a "business closing" or a "mass layoff." A *business closing* constitutes a permanent or temporary shutdown of an employment site[510] or one or more facilities or operating units at an employment site or within a single

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[502] WIS. STAT. § 111.06(1)(i).

[503] WIS. STAT. § 947.20.

[504] 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

[505] 20 C.F.R. §§ 639.4, 639.6.

[506] WIS. STAT. § 109.07; WIS. ADMIN. CODE DWD § 279.04(1).

[507] WIS. STAT. § 109.07(1)(d); WIS. ADMIN. CODE DWD § 279.01(1)(d).

[508] A *new or low-hour employee* means an employee who has been employed by an employer for fewer than six of the 12 months preceding the date on which the notice is required, or who averages fewer than 20 hours of work per week. WIS. STAT. § 109.07(1)(h).

[509] WIS. STAT. § 109.07(1)(d); WIS. ADMIN. CODE DWD § 279.01(1)(d).

[510] *Employment site* is defined as "a single location or group of locations within the same municipality or reasonable geographic proximity that share the same or related staff or operational purpose." Employment sites

municipality that affects 25 or more employees, not including new or low-hour employees.[511] A *mass layoff i*s a reduction in an employer's workforce that is not the result of a business closing, but that affects the following numbers of employees at an employment site or within a single municipality, not including new or low-hour employees:

- at least 25% of the employer's workforce or 25 employees, whichever is greater; or
- at least 500 employees.[512]

Events that do *not* trigger notice requirements include:

- A business closing or mass layoff caused by a strike or lockout.
- The sale of all or part of the business, if the purchaser agrees in writing, as part of the agreement, to hire substantially all of the affected employees with not more than a six-month break in service.[513]
- The relocation of all or part of the business within a reasonable commuting distance, if the employer offers to transfer substantially all of the affected employees with not more than a six-month break in employment.
- Completion of a particular project or work of a specific duration, if the affected employees were hired with the understanding that employment was limited to the duration of the work or project.
- Business circumstances that were not foreseeable when notice would have been timely given.
- A natural or man-made disaster beyond the control of the employer.
- A temporary cessation in business operations, if the employer recalls the affected employees within 60 days.
- If, at the time notice would have been given, the employer was actively seeking capital or business to enable it to avoid or postpone the closing or mass layoff, and the employer reasonably and in good faith believed that giving notice would have prevented it from obtaining the capital or business.

Notice Requirements. Where the notice requirements apply, the employer must provide the notice at least 60 days prior to the date the closing or layoff occurs.[514] The notice must be provided to affected employees, any collective bargaining representatives of affected employees, the highest official of any municipality in which the affected employment site is located, and the Wisconsin Department of Workforce Development (DWD).[515] Additional notice of a delayed business closing or mass layoff must be

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that have separate workforces, separate management, or produce different products are considered separate employment sites. WIS. ADMIN. CODE DWD § 279.01(1)(e).

511 WIS. STAT. § 109.07(1)(b).

512 WIS. STAT. § 109.07(1)(f).

513 If this exception does not apply and notice is required, the seller must provide notice of any business closing or mass layoff that occurs up to the time of sale, and the buyer is responsible for providing notice thereafter. In addition, the buyer and seller may issue notices jointly or enter into a private agreement addressing the allocation of responsibility. WIS. ADMIN. CODE DWD § 279.02(2).

514 WIS. ADMIN. CODE DWD § 279.04(1).

515 WIS. STAT. § 109.07(1m); WIS. ADMIN. CODE DWD §§ 279.02(1), 279.03.

issued within a reasonable time after the employer learns that there will be a postponement or delay beyond the date announced in the original notice.[516]

Strict rules govern the content of the notice. Where notice is given to affected employees, it must include:

- The name and address of the employment site, and the name and telephone number of the company official to contact for more information.
- Contact information for the local workforce development board serving the area where the affected employment site is located. If the Board has created a list of resources for career planning and other job support materials, such list of resources or contacts must be included in the notification.
- Description of whether the action is expected to be permanent or temporary and, if temporary, expected duration. Also, a statement that the entire site is to be closed, if applicable.
- Expected date when business the closing or mass layoff will commence, and expected date of the employee's layoff or separation.
- The name and address of the employee's collective bargaining representative, if applicable.[517]

In addition, where notice is provided to the employees' collective bargaining representative, the notice must contain:

- The name and address of the employment site; whether planned action is expected to be temporary or permanent; and a statement that the entire site is to be closed, if applicable.
- Schedule of separation or layoff.
- List, including job titles, of affected positions and names of employees currently holding the jobs or expected to be affected.
- The name and address of the company official to contact for more information.[518]

Finally, where notice is provided to the DWD and the highest official of the municipality where the affected employment site is located, the notice must include:

- The name and address of the employment site where the closing or layoff will occur.
- The name and address of the company official to contact for more information.
- Expected date of first separation or layoff.
- Number of employees affected by closing or layoff.
- Description of whether planned action is expected to be permanent or temporary and, if temporary, the estimated duration of the action (if known). Also, a statement that the entire site will be closed, if applicable.[519]

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[516] WIS. ADMIN. CODE DWD § 279.05.

[517] WIS. ADMIN. CODE DWD § 279.06.

[518] WIS. ADMIN. CODE DWD § 279.06.

[519] WIS. ADMIN. CODE DWD § 279.06.

The WBCL does not contain any reemployment assistance or severance requirements.

State Enforcement, Remedies & Penalties. Damages for an employer's failure to comply with the WBCL may include both missed pay to employees and the value of any missed benefits, subject to certain reductions.[520] In addition, an employer may be subject to a surcharge of not more than $500 per day where the employer fails to give notice to the highest official of a municipality, starting on the day the employer was required to give notice and ending on the earlier of the day that the employer gave notice or the day the business closed or the mass layoff occurred.[521]

4.1(c) *State Mass Layoff Notification Requirements*

Wisconsin does not require that an employer notify the state unemployment insurance department or another department in the event of a mass layoff.

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 10 lists the documents that must be provided when employment ends under federal law.

Table 10. Federal Documents to Provide at End of Employment

Category	Notes
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[522] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[523]

[520] WIS. STAT. § 109.07(3); WIS. ADMIN. CODE DWD § 279.09(2).

[521] WIS. STAT. § 109.07(4m).

[522] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[523] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 11 lists the documents that must be provided when employment ends under state law.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	Generally speaking, an employer must provide a separating insured employee with written notification of the right to continue group coverage or convert to individual coverage. Such notice must indicate the payment amounts required, including the manner, place, and time in which the payments must be made. Notice must be given not more than five days after the employer receives notice of coverage termination (such as the qualifying event of separation). Notice may be sent to the insured's home address as shown on the employer's records.[524]
Unemployment Notice	**Generally.** Wisconsin does not require that employees be provided notice about unemployment benefits when employment ends. Nonetheless, the employer generally must post in places readily accessible to individuals, and provide a copy of, printed statements concerning benefit rights and how to file claims for benefits.[525] Accordingly, it is recommended that an employer provide a copy of the unemployment notice when employment ends. **Multistate Workers.** Wisconsin similarly does not require that employees be notified as to the jurisdiction under whose unemployment compensation law services have been covered. It is recommended, however, that an employer provide notice of the jurisdiction where services will be covered for unemployment purposes. Additionally, employers should follow that state's general notice requirement, if applicable.

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

[524] WIS. STAT. § 632.897. The statute explains the types of covered insureds who are eligible for continuation coverage. *See* WIS. STAT. § 632.897(2)(b) (indicating that employees discharged for misconduct may not be eligible).

[525] WIS. ADMIN. CODE DWD § 120.01. This notice is available in English at https://dwd.wisconsin.gov/dwd/publications/ui/ucb-7-p.pdf and in Spanish at https://dwd.wisconsin.gov/dwd/publications/ui/ucb-7-s-p.pdf. It is also available in Hmong and in other languages at https://dwd.wisconsin.gov/dwd/publications/ui/notice.htm.

4.3(b) *State Guidelines on References*

Wisconsin law does not specifically address providing former employees with references.