

# *Staying a Step Ahead in the World of HR*

SEP 20 2019 | 7:30 - 10:30 A.M. | ALLIANT ENERGY CENTER, MADISON

*Bagels & Coffee with*

**BoardmanClark**



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# About Boardman Clark

Boardman & Clark LLP is a full service firm with offices in Madison, Baraboo, Poynette, Lodi, Belleville, Fennimore, and Prairie du Sac. We serve individuals, businesses, school districts, and local governments throughout the state of Wisconsin and the wider Midwest region.

We provide a wide array of legal services with an unwavering commitment to excellence and sensitivity to the needs of our clients. We develop creative legal solutions, while at the same time maintaining the highest degree of integrity and legal competence, with a healthy dose of common sense and practicality.

## PRACTICE AREAS

- Agribusiness
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## GLOBAL CAPACITY

Our firm is the only Madison-based member of Meritas, a closely integrated group of full service law firms that provides business clients with worldwide access to comprehensive legal services. Meritas offers our clients the ability to draw on the experience and legal knowledge of approximately 200 law firms worldwide.



# Today's Agenda

		Room
8:00 – 8:05 a.m.	Introduction	A
8:05 – 8:45 a.m.	<b>PLENARY SESSION</b>	
	<b>Risky Business</b> - <i>Bob Gregg</i>	A
	<b>CBD Update</b> - <i>Steve Zach</i>	
8:50 – 9:30 a.m.	<b>BREAKOUT SESSION 1</b>	
	<b>Addressing the Misuse of Technology</b> - <i>Jennifer Mirus</i>	A
	<b>Wage Garnishments</b> - <i>Jacob Frost</i>	B
9:30 – 9:40 a.m.	10 Minute Break	
9:40 – 10:20 a.m.	<b>BREAKOUT SESSION 2</b>	
	<b>Conviction Records &amp; Background Checks</b> - <i>Doug Witte and Brenna McLaughlin</i>	A
	<b>Managing Employee Substance Abuse</b> - <i>Brian Goodman</i>	B
10:20 – 10:30 a.m.	Questions	A





**Bob Gregg**

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Bob is co-chairperson of the Labor and Employment Group and has been involved in Employment Relations and Civil Rights work for more than 30 years. He litigates a wide variety of employment cases. His main emphasis is helping employers achieve enhanced productivity, creating positive work environments, and resolving employment problems before they generate lawsuits. He has designed HR policies and practices for numerous employers. Bob is nationally recognized for his work on respectful workplace education, employment and service provision, and has helped numerous public and private employers. His career has included canoe guide, carpenter, laborer, Army Sergeant, beer taster, social worker, educator, business owner, Equal Employment Opportunity officer, and employment relations attorney. Bob trains HR staff, security personnel, and civil investigators in the concepts of properly investigating employment issues.



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Brian is an associate with a general law practice and is a member of the firm’s School Law and Labor & Employment practice groups. Prior to attending law school, Brian was a music teacher in Illinois and received his Master’s Degree in Educational Administration. Brian uses his experience as an educator to assist school districts and employers on a wide range of legal issues. He currently serves on the board of directors for the Greater Madison Area Society for Human Resource Management as the Vice President of Programming.



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Jennifer is co-chairperson of the Labor and Employment Law Group and has been with the firm since 1995. Jennifer has extensive experience representing employers in all aspects of employment relations, including wage and hour issues, discrimination, Family and Medical Leave, ADA, reductions in force, harassment, hiring, discipline and terminations. Jennifer represents employers in litigation of employment-related claims and conducts workplace investigations. She also has extensive experience drafting employee handbooks, employment contracts, and non-competition agreements.

Jennifer is a sought out speaker on human resources issues and conducts human resources and management trainings for clients of all sizes.



**Doug Witte**

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Doug has over 30 years experience representing private and public sector employers in all aspects of labor and employment law. This includes advising employers on union issues, including secondary boycott matters, picketing and reserved entrances, union organizing campaigns, “salting,” handbilling, and bannering; defending employers in NLRB representation and unfair labor practice proceedings; and, representing public and private employers in collective bargaining negotiations and contract administration issues including grievance and arbitration proceedings.



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Jacob assists businesses and individuals on a wide range of legal matters, with an emphasis on commercial and personal litigation, debt collection, and family law. He has extensive experience advising and representing landlords in tenant disputes and eviction actions, supporting homeowners in disputes with contractors, and assisting individuals and businesses in debt collection and debtor bankruptcy proceedings. His family law experience focuses primarily on divorce cases and post-judgment matters, including modification of maintenance, child support, and contempt proceedings.



### **Steve Zach**

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Steve concentrates his practice in the labor and employment field and in employment-related litigation. He advises private, municipal and school district employers in areas of general employment law.

Steve litigates discrimination claims before municipal, state and federal administrative agencies and in federal and state courts. He also advises businesses, municipalities and school districts in their relations with labor unions under the National Labor Relations Act, the Wisconsin Municipal Employment Relations Act and the Wisconsin Fair Employment Act, including the counseling of employers during representation proceedings, the negotiation of labor agreements, the arbitration of labor disputes and the litigating of unfair labor practice charges.

He provides training and guidance to employers and supervisors on employment-related topics.



### **Brenna McLaughlin**

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Brenna has a general practice that primarily emphasizes labor & employment law. Brenna counsels private and public employers on a wide variety of matters affecting the employment relationship, including hiring procedures, discipline and terminations, wage and hour issues, FMLA and ADA compliance, and drafting employment contracts and non-compete agreements. Brenna also represents employers before the Madison Equal Opportunities Division, Wisconsin Equal Rights Division, Equal Employment Opportunity Commission, and state and federal courts.

Before becoming an associate, Brenna clerked for the firm for nearly two years. Prior to going to law school, Brenna worked in Madison area public schools coordinating reading and writing services for elementary students as part of an AmeriCorps program.

# ***Presentations***



# ***Risky Business:***

Ways to Avoid Getting Sued for Workplace Investigations

BOB GREGG





# ***Risky Business:***

## Ways to Avoid Getting Sued for Workplace Investigations

**BOB GREGG**

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### I. **What is an Investigation?**

Any fact-finding process

-As simple as one question and one answer

-Or complex issues involving many witnesses, experts and outside authorities

### II. **Balancing of Rights – Importance of Neutral and Fair Approach.**

The organization's right to investigate and control the work and service environment

#### A. (1) **There is an Obligation to Investigate Certain Issues.**

- Complaints by others (employees, clients, students, etc.)
- Safety issues
- Fraud
- Negligent supervision and retaliation
- Misconduct

#### (2) **The Employer's Right to Investigate.**

- Legal requirement to investigate (discrimination laws, OSHA, ethics, etc.)
- Contracts
- General right to control the work/service environment
- Policies

#### B. **Rights of Those Being Investigated.**

- Collective bargaining agreements
- Constitution and due process
- Discrimination laws
- Privacy
- Defamation
- Anti-retaliation/protected activity laws (retaliation by investigation)
- Civil suits

(See the article [Liability for Improper Investigation](#) by Boardman & Clark LLP)



### III. **Importance of Policies Which Foster Investigation.**

Lack of proper policies creates problems.

#### Key Policies

- Right to control the environment or management rights
- Harassment/anti-discrimination
- Drug and alcohol testing
- Right to inspect and search property, premises, electronics and personal property and ownership of all electronic content
- No expectation of privacy
- Right to verify attendance, medical leave and fitness for duty
- Security

### IV. **A. Intake/Stay Focused.**

- Listen (and bite your tongue)
- Do not make promises or state opinions
- Get facts (a thorough statement of the issues)
- Stay job-related (learn to “lift your pen” or redo notes to separate out improper content and stay work-related. (Don’t investigate someone’s personal lifestyle, family, politics, or privacy issues.)
- Don’t “kitchen sink” to include unrelated petty infractions, or old stale issues
- Stay focused on the major issues

### **B. Verify the Issue Before Launching an Investigation.**

- Is it a signed statement by a “complainant?”
- Is it a description by a manager? (draft the description and have manager verify its accuracy)

### V. **Preserving the Evidence.**

#### **A. Preserving the Integrity.**

- Get it before it can be compromised
- The evidence HOLD
  - Freeze the system
  - Notify IT and all involved people



## B. Problems of Non-Retention.

- **Failure to preserve is:**
  - Malpractice (you get sued)
  - Violation of Federal Rule 26 (the company loses aftermath litigation)
- Rule 26(a) requires that employers disclose, at the beginning of litigation and prior to any discovery by plaintiffs, a copy of, or a description by category and location of, any documents (paper or electronic) that may support its claims or defenses.

### Not Just the “P-File.”

- Reports
- Graphics
- Electronic files
- Charts
- Records
- Contracts
- Drafts and redrafts
- Calendars
- Network access records
- “Documents of any kind”
- Computer use (intranet and internet)
- Telephones
- Cell phones
- Text messages
- Tapes, CDs, disks
- Locaters/global positioning
- Electronic calendars
- Message systems

## C. Failure to Preserve is “Spoliation.”

### Sanctions.

- You pay to have it restored
- You pay penalties
- The court “suppresses” your evidence
- Presumption of guilt
- You lose! Court grants summary judgment due to your bad faith

(Also see Sanctions for Violating the Duty to Preserve Evidence – Selected Cases by Boardman & Clark.)

# LIABILITY FOR IMPROPER INVESTIGATION

BOB GREGG

Investigations are often initiated by complaints about employees. Sometimes the subject employee then becomes a “victim” of the investigation. Improper investigations can result in liability for the organization and the investigators themselves. The following areas of law can generate that liability.

## **CONSTITUTION**

The U.S. Constitution provides rights in public sector investigations. Public sector organizations must be more protective of rights than the private sector.

Constitutional rights challenges are generally made under 42 U.S. Code 1983 “Action for Deprivation of Rights” which is a main “operational” statute for enforcing constitutional rights. Section 1983 authorizes suit in the courts for violations of rights protected by the constitution or the laws of the U.S., various states, localities or their agencies.

### **First Amendment**

Establishment Clause: No official government endorsement of religion. Free exercise of religion or freedom from same.

Freedom of Expression: Protects “speech” (oral, print, or symbolic such as clothing, protest buttons, hair styles, etc.) that is of a public nature on issues of public interest. Often requires assessment of what is a policy violation v. protected expression (*i.e.*, is a student’s or employee’s offensive comment about race or gender, or the university president, harassment” or “disruptive,” or is it protected expression?)

Assembly

Petition the Government (including filing complaints)

### **Fourth Amendment**

Unreasonable Search and Seizure. Can apply to searches of desks, lockers, computers, purses, backpacks, etc.

### **Fifth Amendment**

Shall not be compelled to be a witness against self (regarding criminal issues)

### **Eleventh Amendment**

States Immunity



## **Fourteenth Amendment**

Due Process: Requires due process, both procedural and substantive (just cause) in investigations, before action. Protects:

Life interest: in criminal proceedings;

Property interest: in job or profession; and

Liberty interest: in reputation.

Equal Protection: Covers most EEO discrimination categories and can turn them into Constitutional cases rather than title VII issues. Often brought by “scapegoated” or “stereotyped” victims of investigations. *Lambert et. al. v. Fulton County* (11th Cir., 2002) awarded damages to white supervisors who were the subject of an improper and biased investigation which unfairly scapegoated them in a racial discrimination complaint process, apparently in order to find someone to blame rather than do a proper investigation.

## **LAWS**

### **Discrimination**

42 U.S. Code § 1981 (Civil Rights Act of 1866): Prohibits racial discrimination in “contracts,” including the generic employment contract; and mandates the racially “full and equal benefit of all laws and proceedings.” Section 1981 has a longer statute of limitations, and much greater damages (including personal damages) than most other discrimination laws. (Race can include a variety of categories, including some national origin and religious groups).

Age Discrimination in Employment Act, 29 U.S. Code § 621, *et seq.*

Americans with Disabilities Act, 42 U.S. Code § 12101, *et seq.*

Federal Rehabilitation Act, 29 U.S. Code § 701, *et seq.*

Civil Rights Act of 1964 (and Amendments), 42 U.S. Code 2000, *et seq.*

Title VII (gender, race, national origin, and religion in employment)

Title VI (race and national origin in federal programs)

Title IX (gender in federal programs)

Investigation and inquires by employers can be discriminatory or retaliatory, *i.e.*, *Stopler v. Rent-A-Center* (N.D. Cal., 2000). \$2.1 million settlement on allegations that the company inquiry violated privacy and Title VII due to questions about religion and sexual issues. [See also the prior cited *Lambert v. Fulton County* regarding racial scapegoating of the accused.]



Exercise of unequal discipline for sexual or racial harassment situations often results in a discrimination case by the person disciplined.

Inadequate provision of interpreters during investigation can lead to ADA violations and to national origin discrimination allegations under Title VII.

One should avoid asking questions about race, sexual activity or practices, sexual orientation, religion or national origin which are not directly relevant to the investigation. (The EEOC has issued guidelines on investigations and/or use of background information such as arrest/conviction records in employment decisions.)

Lack of care for confidentiality of medical information or improper medical inquiries may violate the ADA.

Family and Medical Leave Act, 29 U.S. Code § 2601, *et seq.*: Investigation of attendance or absenteeism issues often improperly intrude into FMLA protected leave. Lack of care for confidentiality of medical information can violate the FMLA.

National Labor Relations Act (or State Labor Relation Acts): Improper focus of investigations on those who have engaged in “concerted activities” leads to charges of retaliation and unfair labor practices.

Whistleblower/Anti-Retaliation Laws: There are a number of laws which contain anti-retaliation provisions. Once someone has engaged in a “protected activity,” a subsequent investigation of them may appear to be retaliatory, so should be done carefully with much attention to fairness and proper procedure.

## **Privacy**

Privacy Rights in employment are protected by a number of state and federal laws, among which are:

18 U.S. Code § 2501 et seq. Omnibus Crime Control Act/Electronic Communications Privacy Act (§ 2701 et seq.) prohibits the unauthorized interception and disclosure of wire, electronic or oral communications through the use of electronic, mechanical, or other devices. The Federal Act provides both civil and criminal penalties for violations. The Act does give employers the right to access email and voicemail in the employer’s system (not a system provided by an outside company.)

42 U.S.C. 263, Health Insurance Portability Accountability Act, Patient Health Care, and Health Insurance Privacy and Confidentiality. HIPAA protects the privacy of medical information. Requires an information management process to assure privacy and prevent improper use. The law provides for civil penalties of \$25,000 per year, per violation and criminal liability.

20 U.S. Code § 1232, Family Educational Rights and Privacy Act (FFRPA). Confidentiality of records of participants in educational programs receiving government funds (can include job training programs conducted in the work place).

18 U.S. Code § 1702, Obstruction of Correspondence, Mail Privacy. It is illegal to read another’s mail before it is delivered to the addressee. An employer can be liable for intentionally opening and reading employee’s personal incoming or outgoing mail.



42 U.S. Code § 290, Drug and Alcohol Confidentiality, provides for confidentiality of treatment records. These laws prohibit unauthorized release and dissemination of medical and treatment information, including post drug and alcohol testing counseling.

However, 29 U.S. Code § 2601 et. seq., the Federal Family Medical Leave Act, as well as the Americans With Disabilities Act, 42 U.S. Code § 12101, do give the employer a right to access and use of certain medical or treatment information when an employee reports a work-related condition, but all medical information must be kept in a separate, secured file.

15 U.S. Code § 1681, Fair Credit Reporting Act, requires “accuracy, relevancy and proper utilization of information.” This act covers not only standard “credit checks” it also covers employment references and investigations and examinations where outside parties are used as gatherers of the information.

29 U.S. Code §§ 2001-2009, Polygraph Protection Act, prohibits most private sector employers from requiring mechanical or electronic lie detector tests except under specific circumstances and from using the tests as the sole basis of making employment decisions. The Act also prohibits disclosure of the results beyond those directly involved in the investigation and decision making. This law does not prohibit written “honesty tests” (though some states do) [but also be aware that the ADA may apply if the “honesty test” is found to be “psychological testing”].

5 U.S. Code § 522(a), Federal Privacy Act, prohibits federal agencies from disclosing personnel records without the employee’s written consent. This can include improper disclosure to staff within the agency itself.

### **Tort Actions** (civil suits to address wrongs)

Employees have a variety of actions which can grow out of improper investigations. They may be under state statutes or may just be recognized in the “common law” of the state. Each state’s law is a bit different, so not all of the same torts are recognized in each state, and the required elements for a given tort may vary by state. The most common torts arising from investigations are:

#### Invasion of Privacy: (covered previously)

False Imprisonment: Restraining a person from leaving an investigatory meeting, either by force, threat or intimidation. Physical restraint can also result in assault and battery charges.

Cornered in Parking Garage. False imprisonment is a tort action, civil suit, for unwarranted “willful detention” of a person without their consent or any lawful reason. An employee was fired and told to leave. However, when she got to the company parking garage she was confronted by three armed company security guards who cornered her and prevented her from going to her car. They allegedly cursed at her when she demanded to leave and continued to block her. She managed to finally get away from the guards but could not get access to her car and walked home. The company defended the case by claiming there had been no touching or actual physical restraint. However, the court found that this was not required. There had been sufficient presence, blocking and intimidation by the guards to constitute a real restraint and detention. *Garcia v. Randolph-Brooks Credit* (W.D. Tx., 2019).



Assault and Battery: Physically touching. This can occur in restraining someone from leaving an investigatory meeting, “pat down” searches or other physical examinations.

Blackmail/Coercion: Getting a person’s “cooperation” by threats to call the police or to bring (or not bring) criminal charges can result in countercharges of blackmail or coercion. This also includes using threats to bring false or inflated charges of major wrongdoing in order to get a person to admit to a lesser infraction.

Conversion (theft): Taking another’s personal property during an investigation. (*i.e.*, the Playboy pin-up from the employees locker; the “weapon” or “documents” or “mail” which violated company policy). What is “personal property” may depend on state law, company policy, and prior patterns or practice.

Emotional Distress by Interview: Conducting interviews in an outrageous manner (yelling, bullying, false accusations, threats, intimidation). Do not copy the tactics of TV police programs. [If you do, use Colombo as your model, not Dirty Harry]. This can also be called Intentional Infliction of Emotional Distress.

Intentional Infliction of Emotion Distress: Includes the above tort, but is a broader cause of action. It is often alleged in connection with other torts or statutory violations if the other acts were intentional and had emotional consequences, *i.e.*, a detailed probe of complainant’s past may be both invasion of privacy and infliction of emotional distress. In *Sarro v. Sacramento, California*, (E.D. Cal., 1999), police did “police-type” investigating of the issue rather than civil-employment issue level investigation of person who filed sex harassment complaint. Investigators did full background search, ran fingerprints, reviewed veracity of her employment application, looked into her financial dealings, car purchases, etc. (looking for evidence of “credibility”).

Defamation by Disclosure of information to a third party (oral, written or electronic) which is false and harms one’s reputation in a serious way. Confidentiality is crucial – even after employees have been discharged.

*Do Not Speak Ill Of The Departed – They Can Sue For Defamation*. An Administrative Assistant told six employees that there were some surplus printers and they could take them home. So they did. The Administrative Assistant had no such authority, the printers were not surplus. The Administrative Assistant was fired. Then all six employees were fired for unauthorized taking of company equipment, in spite of their protest and the company’s knowledge that they had been told it was ok. The employees should have been more cautious, double checked with a Manager to get written authorization. As employees at-will, they had no recourse; they stayed fired. Then, however, a company HR Manager was giving an employee training program on integrity, and showed a power point emphasizing wrongful acts which had resulted in discharges. The power point had a section which included descriptions and slides of drug dealing on company property, several embezzlement incidents, “Printer Gate” and other seemingly criminal activities. Though no names were mentioned, virtually everyone present was aware of the printer issue and knew exactly what “Printer Gate” referred to and exactly who the six people were. The six former employees sued for defamation, claiming that the company had falsely represented that that their action was an intentionally criminal activity, theft. Witnesses present in the training testified that they understood the slides in that section were examples of criminal activities and they believed the six people were being





described as committing a crime. This was not at all the true story. The court first ruled that the HR Manager's false representations were *defamation per se* and did not even require a showing of actual damages. Then a jury awarded each person \$350,000 compensatory damages and \$1 million dollars in punitive damages. The court found this to be excessive and reduced it to \$350,000 per person (\$2,100,000 in all), still a very large amount to pay for a single power point slide and a few minutes discussion of "Printer Gate." *Desai v. Charter Communications* (W.D. Ky., 2019). The old saying is "do not speak ill of the dear departed." Perhaps do not speak ill of the less than "dear" either. Also, be aware that civil suits, such as defamation, false imprisonment, invasion of privacy, etc. can be filed against the Manager, HR staff, supervisors, or company executives in their personal capacities, and damages collected from their personal assets. [See the article Are You in the Crosshairs (Your Personal Liability in Employment Cases) by Boardman & Clark.]

Conspiracy to Harm Employment or Profession. Two or more people conspire willfully, maliciously to injure another in reputation, trade, business, profession or for the purpose of compelling another to do or not do something against his or her will. Must show intent and improper motive.

Intentional Interference With Employment or Profession. Similar to the above "conspiracy" but only takes one person. Must show malicious intent and improper motive.

Preventing Pursuit of Work. Any person who by threats, intimidation, force or coercion shall prevent a person from engaging in or continuing any lawful work or employment.

Negligent Investigation. This is a catch-all cause of action for a variety of poor practices.

### **QUALIFIED PRIVILEGE**

Employers have to gather, keep and discuss information about employees in order to effectively manage. Some of this information is "personal and sensitive." Some is negative, such as poor performance evaluations, discipline or discharge. The employee at question does not want it "spread around," harming his career and reputation.

The Qualified Privilege or "conditional privilege" as it is termed in the chief Wisconsin case, *Bett v. Ploetz*, 20 Wis. 2d 55 (1963), enables managers to gather and discuss this sensitive information without liability as long as one stays within the scope of the privilege.

The requirements one has to show to establish Qualified Privilege are:

1. The information is reasonably necessary for the protection of the interests of one of the parties. This criteria is automatically met by a current issue affecting someone in the scope of the organization's activities (job related). The organization has a great "interest" in finding out about and solving work-related performance problems, disability accommodations, or rule violations by its employees.
2. The scope of the inquiry is limited to what is reasonably necessary to protect the interest. This means job relatedness. Once the topic goes into family, religion, sexuality, politics, or other non-directly related areas, it has left the scope and protection of the defense, and the Qualified Privilege disappears.



3. The information is communicated on a proper occasion. This means it is a current issue within the time frames recognized by state and federal law or by internal procedures. Old, “stale” issues are not within the Qualified Privilege. Similarly, where an employer is on a fishing expedition to dig up dirt on employees for office politics or gossip, there is no Qualified Privilege.
4. The information is given to and confined to proper parties only. “Proper parties” means the small group that must process that particular issue. It can include the Personnel Manager, Affirmative Action Officer, and top Management who have a direct role in the decision making.
5. The process is conducted in a proper manner.
6. The entire process is characterized by good faith.



## SELECTED CASES: SANCTIONS FOR VIOLATING THE DUTY TO PRESERVE EVIDENCE

BOB GREGG

The discovery rules require parties to immediately preserve and reveal all relevant electronic and paper documents. Any deletions are suspect and will be met with sanctions. All organizations should have policies and practices to avoid this situation.

The following cases illustrate the issue.

***Destruction Of Interview Notes.*** “Spoliation” is the term for destruction or alteration of evidence. Spoliation results in courts assessing penalties or even precluding the party from presentation of evidence at all, due to a presumption that if some is spoiled, then all of it is suspect. In *Talavera v. Shah (USAID)* (D.C. Cir., 2011), a federal employee with excellent evaluations alleged she was passed over for promotion and filed a Title VII case. She also alleged that this was due to her complaint about sexual harassment by a contractor. The Department claimed the promotion was based on another candidate’s “superior” interview performance. However, the interviewing supervisor destroyed all interview notes. The court concluded that it was reasonable to infer the destruction was done to hide evidence of either discrimination or pretext which would undermine the Department’s defense.

***Company Will Pay \$100,000 Fine And Have Its Defenses Precluded Due To Hiding Evidence.***

In what has become a regular occurrence, a federal court imposed sanctions against a defendant for destruction of evidence. After being sued for sexual harassment and retaliation, the company destroyed computer hard drives and either hid or destroyed the notes taken during its internal investigation of the original harassment complaint. The evidence would have shown prior sexual harassment complaints by other employees against the accused manager; that the complaint made to central office was sent back to the local store for “investigation” by the alleged harasser’s direct manager and best buddy; and that the “buddy” who investigated also had been the subject of prior complaints of sexual harassment. When the destruction and withholding of evidence came to light, the court found the acts to be “unfair, unwarranted, unprincipled” and “the integrity of the judicial process has been compromised.” It also reasoned that there may be other concealed evidence which could come to light, or would have, if not destroyed. In addition to the fine, the court prevented the defendant from being able to present its affirmative defenses, and ordered that parts of the plaintiff’s evidence will be admitted as uncontestable. *EEOC v. Fry’s Elecs., Inc.* (W.D. Wash., 2012).

***Destruction Of Personnel File Sinks Case.*** A company suffered a catastrophic consequence in an ADA case. It claimed to have fired an employee with MS for poor performance. However, her personnel records were destroyed just a few days after the discharge. The court rejected the argument that the jury should “just trust” its verbal representations about the performance. Under the ADA (and Title VII), employers are supposed to keep employee records for at least one year following employment terminations, and several laws require three or more year retentions. The court believed the company destroyed the records in order to hide the truth. It sanctioned the company by ruling that the jury could infer that the employee’s performance had been satisfactory and the employer’s defense was a pretext for discrimination. *Webster v. Psychiatric Medical Care LLC* (D. Mont., 2019).



Courts reached similar decisions in two other “evidence spoliation” cases. *EEOC v. JP Morgan Chase* (S.D. OH, 2019) – destruction of 10 months of data regarding assignments of female mortgage consultants. *EEOC v. Ventura Corp.* (D. PR, 2019). Loss of critical emails and job applications due to a “software migration” and due to shredding. In both cases the sanctions were the court’s exclusion of the testimony of defense witnesses and allowing an inference by the jury that the destroyed or lost information was to hide a cover-up of evidence of discrimination. These cases should be a powerful reminder of the importance of having a good record keeping and retention system for all records (paper, electronic, telephonic, video, and more).

**Retaining Video Of Bartender Drinking On The Job Wins Case.** A bartender’s Pregnancy Discrimination Act discharge case was dismissed. Rather than pregnancy, there was clear evidence of rule violations. A security video showed her pouring drinks for herself while working, and giving free drinks to a friend. It also showed her boyfriend engaging in the same behavior when he was bartending on a different shift. Both were fired. This was solid evidence of a non-discriminatory basis for the discharge. *Ducharme v. Crescent City Déjà vu* (E.D. La., 2019). Keeping the record was the key.

The result was very different in a similar situation.

**Cocktail Waitress Could Not Be Fired For Drinking On The Job -- Employer Let Evidence Be Deleted.** A restaurant manager observed a cocktail waitress drinking from a paper cup between serving customers. He also found several tequila shots missing. She tossed the cup. He retrieved it from the trash and smelled alcohol. The waitress was fired. She denied drinking and grieved. An arbitrator overturned the discharge. The employer could not produce the security video which covers the bar area and would clearly have shown whether the waitress was drinking from the cup, and probably also shown if she took the tequila shots. The security video taped over itself every few days, and no one thought to preserve that tape. Absent this evidence, the employer lost. *Caesar’s Palace v. Culinary Workers of America #226* (2012).

**The Other Person “Interviewed Better” Defense Fails When The Supervisors Did Not Keep The Interview Notes.** An African American man filed a Title VII case after a less qualified White woman was selected for promotion to a hygiene safety manager position. The court found evidence of discrimination. The plaintiff had a Bachelor’s degree in industrial hygiene and a Master’s in public health. The woman had no degree beyond high school. He had 15 years of direct work experience in the industrial hygiene field, including developing complex safety programs. She had less experience. The employer’s defense was that the White woman “interviewed better.” However, there were no scores for the interviews. The interviewing manager kept no notes on some interviews or had notes in which pages were missing for others. The court found that the person selected had “observably and vastly inferior qualifications” than did the plaintiff. The employer’s defense was highly subjective and the absence of documentation could lead to a reasonable conclusion that the employer’s explanation was pretext for discrimination. *Hamilton v. Geithrer* (D.C. Cir., 2012).



***Electronic Discovery: When Just One Person Files, Records For All Must Be Preserved.*** A few former accountants filed a complaint alleging that they were misclassified as salaried-exempt and should have been hourly and paid overtime. The company was asked to then preserve the computer hard drives of all accountants, nationwide. It objected, claiming this was too broad, only a few individuals had filed, and it was unreasonable to freeze all hard drives or to anticipate which of the much larger number of past or present accountants might later file a claim. It argued that only the records of those who actually had filed should be preserved. The court denied the company's motion. It ruled the employer's argument to be "nonsense" and without any merit. In FLSA cases, it is the norm for other employees to join in cases. It is also the norm for the Department of Labor to find a violation on just one person's complaint and then order a remedy of overtime pay for all other employees in the same job classification, and this is entirely "foreseeable." In the electronic age, computer log on and log off are the effective time clocks and the computer hard drive also shows the types of work done. Both of these are crucial evidence in FLSA cases. Allowing destruction of hard drives would obliterate evidence which would be used in clearly foreseeable additional cases or claims. *Pippins v. KPMG, LLC* (E.D. NY, 2012). This case underscores the obligation under federal and state discovery rules to freeze the electronic system and preserve all potential evidence upon notice of litigation or of "potential" or "foreseeable" litigation and "foreseeable" plaintiffs. A records retention policy and procedure is crucial for all organizations.



# ***The Legal Status of CBD Products and Employment Law***

STEVE ZACH



# The Legal Status of CBD Products and Employment Law

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- **Controlled Substances Act** - makes it a felony to knowingly or intentionally manufacture, distribute, dispense or possess with intent to manufacture, distribute or dispense a controlled substance listed in Schedule 1 with a number of exceptions. Marijuana is currently listed as a Schedule 1 controlled substance. 21 U.S.C. § 841.
- **The Agriculture Improvement Act of 2018 (2018 Farm Bill)** - changed federal law relating to the production and marketing of hemp, which is defined as cannabis and its derivatives with less than 0.3 percent on a dry weight basis delta-9-tetrahydrocannabinol (THC). CBD that contains less than 0.3 percent THC on a dry weight basis is no longer a controlled substance under federal law provided that certain other conditions are met (FDA approval process). Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018).
- **U.S. Food & Drug Admin., FDA Regulation of Cannabis and Cannabis-derived Products: Questions and Answers**, available at <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-questions-and-answers> (last updated April 2, 2019).
- **Wisconsin – Lydia’s Law** - makes possession of CBD legal in Wisconsin if the person has certification from a physician that the CBD is to treat a medical condition, the certification was issued no more than one year before the possession, and the certification has not expired. A “certification” is defined as a letter or other official document issued by a licensed physician that contains the name, address and telephone number of the physician; the name and address of the patient who is issued the letter or document; and the date on which the letter or document is issued. Wis. Stat. § 961.32.
- **Wisconsin Industrial Hemp** – In 2017 Wisconsin enacted legislation that created a state “industrial hemp” program to be administered by the Department of Agriculture, Trade, and Consumer Protection. The legislation defined “industrial hemp” to include CBD that contains a THC concentration of 0.3 percent or less. 2017 Wis. Act 100.
- May 2018, **Wisconsin Attorney General Brad Schimel** issued a statement indicating that “products made from industrial hemp, including CBD, are lawful.” Wisconsin Dep’t of Justice, *AG Schimel and Stakeholders Resolve Questions Surrounding DATCP Industrial Hemp Research Pilot Program* (May 10, 2018), available at [https://www.doj.state.wi.us/sites/default/files/news-media/5.10.18\\_CBD.pdf](https://www.doj.state.wi.us/sites/default/files/news-media/5.10.18_CBD.pdf).



- **Omnibus Transportation Employee Testing Act of 1991** - requires drug and alcohol testing for those who hold commercial driver's licenses, including pre-employment and random testing, under regulations promulgated by the U.S. Department of Transportation. 49 U.S.C. §§ 31301–31317; 49 C.F.R. Part 382.
- The **Americans with Disabilities Act** and the **Wisconsin Fair Employment Act** permit drug screens for the current use of illegal drugs by applicants and, with reasonable suspicion, current employees. 42 U.S.C. § 12101, *et seq.* and Wis. Stat. §§ 111.31–.395.
- The **Wisconsin Fair Employment Act** prohibits employers from taking an adverse employment action based on an employee's use of legal products off of the employer's premises during nonworking hours, including prescribed products. Wis. Stat. § 111.321.
- The **ADA** and the **Wisconsin Fair Employment Act** prohibit an employer from discriminating against an applicant or an employee because of an employee's disability and require employers to reasonably accommodate an employee's disability, unless such accommodation would constitute a direct threat to others or constitute an undue hardship for the employer.





# ***Addressing the Misuse of Technology in Today's Workplaces***

JENNIFER MIRUS



# *Addressing the Misuse of Technology in Today's Workplaces*

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## **I. Introduction.**

As technology has become further intertwined in our work lives, it is vulnerable to misuse and has played an increasing role in employee misconduct. However, many employers are not prepared and do not know the legal risks when addressing misconduct that involves technology. Further confusing the issue is whether the employee has engaged in the misconduct on or off work time and whether the misconduct involves a work-owned device or a personal device. Today's presentation will focus on real life issues encountered in the use of technology in the workplace, will discuss technology trends that pose a variety of risks, will address some of the key legal issues involved in these matters, and will highlight steps employers should take to address these issues.

## **II. What are the primary employment-related laws applicable to the use of technology in the workplace?**

A. The Electronic Communications Privacy Act of 1986 and Stored Communications Act. The Electronic Communications Privacy Act ("ECPA") and the Stored Communications Act ("SCA") prohibit the interception of wire, oral, and electronic communications while those communications are being made, are in transit, and when they are stored on computers. The Acts apply collectively to email, telephone conversations, and data stored electronically.

### 1. ECPA.

- a. The ECPA prohibits the intentional actual or attempted interception, use, disclosure, or "procure[ment] [of] any other person to intercept or endeavor to intercept any wire, oral, or electronic communication." Title I also prohibits the use of illegally obtained communications as evidence.
- b. The ECPA provides exceptions for operators and service providers for uses "in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service" and for "persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance," as defined under specific laws.



- i. The exceptions permit employers to monitor employee phone calls for valid business reasons or quality-control purposes. Employee consent is not generally required if it is being done in the ordinary course of business. However, many employers do get express consent or at least a signed acknowledgement that monitoring will be done in order to have clear proof that the employee had notice of the monitoring.
  - ii. Employers must not monitor personal calls of employees beyond what is minimally necessary to determine whether the call is personal.
  - iii. Wisconsin statute § 968.31 similarly protects such communications and includes similar exceptions.
  - iv. Parts of these laws have been found not to apply to municipalities. Nevertheless, public employees may have constitutional rights to privacy and potential legal protection under other laws.
2. SCA.
- a. The Stored Communications Act (“SCA”) limits access to and disclosure of electronically stored data such as email and voicemail.
  - b. The SCA provides avenues for seeking both civil and/or criminal penalties against any person who “intentionally accesses without authorization a facility through which an electronic communications service is provided or intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system.” 18 U.S.C. § 2701(a)(1).
  - c. Employers have successfully argued in the majority of cases that the ECPA/ SCA do not prohibit their ability to monitor employee email. Employers generally use two arguments that these laws do not limit their ability to monitor employee email.
  - d. First, the law exempts communications service providers from the prohibitions on access and disclosure. This exemption may protect employers who own their own internal email systems that only allow their employees to send messages internally.

- e. Second, the law applies only to persons who access electronic communications without consent. Employers are generally exempt from the ECPA/SCA prohibitions on monitoring if they obtain consent, and courts have often ruled that employees have consented to monitoring when they receive the employer's electronic systems form stating that monitoring will occur and the employee should have no expectation of privacy in what he or she is transmitting or storing on the employer's system.
- B. The Computer Fraud and Abuse Act ("CFAA"). The CFAA was originally a criminal statute covering federal government and "federal interest" computers, but amendments in 1996 broadened the scope of the law and it generally applies to computers used in American businesses. To establish liability under the CFAA and similar state laws, a plaintiff must generally show that the defendant wrongfully accessed a protected computer; took data, programs, or supporting documentation; and used or disclosed data, programs, or supporting documentation that was wrongfully taken, and, as a result, the plaintiff suffered damages and/or is entitled to injunctive relief. 18 U.S.C. § 1030. Wisconsin's counterpart is Wis. Stat. § 943.70(2).
- C. The National Labor Relations Act ("NLRA"). Section 7 of the National Labor Relations Act provides employees with the right to engage in concerted activities for the purpose of collective bargaining or "other mutual aid or protection." In general, Section 7 of the Act provides employees the right to discuss or act as a group, or to discuss or take action on behalf of a group, to address the terms and conditions of their employment. Employee conduct is "concerted" (and thus protected by law) if it is engaged in by at least one other employee, on behalf of a group of employees, or if one employee is acting alone in the attempt to initiate group action on an issue of terms and conditions of employment. Employer policies that are deemed to stifle or curb concerted activity may be found to be unenforceable. For example, an employer cannot not have policies that forbid employees from discussing their pay or benefits.
- D. Constitutional Protections for Public Sector Employees. Public sector employees have the constitutional right to exercise free speech in the workplace and to be free from unreasonable search and seizure under the First and Fourth Amendments to the United States Constitution, respectively. While such constitutional protections do not directly apply to the private sector, public sector court decisions often guide how other cases are decided regarding expectations of privacy.
- E. Wisconsin's right to privacy statute, Wis. Stat. § 995.50.
- 1. Wisconsin recognizes an individual's right to privacy. An invasion of privacy includes, "Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass."

- a. Invasions of privacy can include:
  - i. Unreasonable intrusions upon the privacy of another. This provision prohibits “intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.” The word “place” does not necessarily refer to an individual’s physical environment, but can include an arena in which the person communicates or shares information (i.e., an off-site email account).
  - ii. The use, for advertising or trade purposes, of the name or likeness of another person; and
  - iii. Unreasonable publicity given to another person’s private life.
2. Employers must use caution in monitoring employee electronic communications and any accessing of an employee’s personal communications and/or personal devices should be done only after careful consideration of legal risk and a review of the organization’s policies. Under no circumstances should an employer ever access an employee’s personal communication or information using false pretenses.

F. Other Common Law Claims.

1. Breach of contract
2. Breach of the duty of loyalty
3. Trespass
4. Theft and conversion

G. Wisconsin Law Restricting Employer Access to Personal Social Media Accounts.

1. Since 2014, Wisconsin law restricts an employer’s ability to access personal social media accounts of candidates and employees. A number of states around the country have passed similar legislation. The law also applies to educational institutions and landlords.
2. The general aim of the law is to protect individual privacy rights in personal social media accounts, such as Facebook, Twitter, and blogs. The law prohibits employers from:
  - a. Requesting or requiring an employee or applicant, as a condition of employment, to disclose access information (e.g., passwords, user names), to a personal social media account or to otherwise grant access to or allow observation of the account.



- b. Terminating or otherwise discriminating against an employee because the employee:
    - (i) refused to provide the employer access to a personal social media account; or
    - (ii) opposed the employer's potential violation of the law, or filed a complaint or testified or assisted in an action against the employer for such a violation.
  - c. Refusing to hire an applicant because the applicant refused to provide access to a personal social media account.
3. The law does retain certain important rights for employers:
- a. Employers may require access information in order to gain access to an electronic communications device (such as a computer or cell phone) supplied by or paid for by the employer.
  - b. Employers may require access to an account or service provided by the employer, obtained by the employee due to the employee's employment or which is used for the employer's business.
  - c. Employers may discipline or discharge an employee for transferring the employer's confidential or financial information to the employee's personal social media account without the employer's authorization.
  - d. Employers may require an employee to grant access to or allow observation of the employee's personal Internet account if there is a reasonable belief that the employee has transferred confidential or financial information without authorization to the employee's personal Internet account or has engaged in another work-related violation or misconduct, if there is a reasonable belief that activity on the employee's personal Internet account relates to that misconduct or violation. Employers are not permitted to require the disclosure of access information to the account in such cases.
  - e. Employers may comply with a duty to screen applicants for employment prior to hiring and may comply with a duty to retain employee communications that is established under state or federal law, rules or regulations.

4. In addition, nothing in the law prohibits employers from restricting employee access to Internet sites on employer equipment or using the employer's network, viewing information about applicants or employees that is publicly available without personal account access information, or requiring an employee to disclose a personal email address.
5. Employers who violate the law's provisions are subject to a \$1,000 forfeiture. In addition, in the event an employer does not hire an applicant or terminates an employee in violation of the statute, the applicant or employee can pursue a claim against the employer under the Wisconsin Fair Employment Act.
6. Nothing in the law should dissuade employers from establishing electronic communications policies that govern acceptable use of electronic systems and address the employer's ownership and monitoring rights of such information and systems.

### III. Common categories of employee misconduct using technology.

- A. Harassment.
- B. Accessing and storing pornographic or other inappropriate images or information.
- C. Misappropriation of company information.
- D. Manipulation of information to cover poor performance.
- E. Use of social media to engage in harassing, disparaging or other inappropriate behavior.
- F. Failure to properly secure devices and information on devices.

### IV. Text messaging in the workplace.

- A. Text messaging has become a common mode of communicating in workplaces, even where email is the "sanctioned" or official" mode of communicating. The high use of text messaging raises several problematic issues in the workplace.
  1. **Managing by texts.** We are seeing increasing situations where managers are using text messaging as their primary mode of communicating with and managing employees. This occurs, for instance, where an employee texts his manager to state that he will be ten minutes late for work, and the manager uses the opportunity to remind the employee through text messaging about his recent history of late arrivals and that further tardiness will lead to discipline.

- a. Key challenges posed by reliance on text messaging are:
- (i) If managers are relying on text messaging, they may forego formal coaching sessions and written discipline, thinking that they have adequately addressed a performance issue with the employee through text messaging. This generally means that employees are not receiving clear messages about expectations, honest assessments of their performance and clear notice of possible consequences. Text messages, by their nature, are informal, and employees will not recognize a stern text message as a true warning or discipline.
  - (ii) Text messages are offline and are not sent, received or stored on the employer's email server. Unless those texting take snapshots of or otherwise preserve the text messages, they are often not preserved. And once a text message is deleted, there are very limited time windows in which an employer can retrieve the content of the text messages.
  - (iii) If text messages are not retained in full, employees can selectively submit text messages to spin a set of facts in a way that supports their position. Employers might not get the full story if all the messages are not retained and employers can be put in a difficult legal position if a manager/supervisor did not retain the text message conversation.
  - (iv) Because of the casual nature of texting, managers may not be as careful as they should be in communicating with employees via text. When a manager is addressing issues with an employee that can implicate other issues, such as a disability accommodation or a claim of retaliation, words matter greatly. Managers who get in the habit of communicating by text are far less likely to take the time to properly word the communications, or to review these communications with Human Resources.
  - (v) Strings of texts are difficult to read and do not always clearly indicate dates and times sent and received. When you are assessing a difficult termination or a lawsuit, this can make it very challenging to assess the evidence.
- b. Suggestions to address managing through text messaging.





- (i) Prohibit manager communication via text or, if that is not feasible, limit texting to issues that will not lead to coaching, discipline or termination or insist that managers supplement the texts with an actual coaching meeting or written discipline.
- (ii) Remind managers that they are not to address sensitive issues with employees via text message.
- (iii) Establish a policy that if a text message does slip into a substantive discussion of a work issue with the employee, the manager must archive and/or print the text messages so that they are saved.

2. **Employee communications via text messaging.**

a. Common harassment scenario.

- (i) What happens when one of your employees has allegedly harassed a co-worker, the harassed employee sues the company over the harassment, and now the plaintiff's attorney demands to see all text messages between the harassed employee and the alleged harasser?
- (ii) The employer may or may not have a legal obligation to produce text messages or other information that is stored on a personal phone or other device. However, if the devices at issue are used for business purposes or pursuant to a "Bring Your Own Device" policy, the employer may have to produce the text messages.

b. Suggestions to address employee use of text messaging.

- (i) Especially if employees are using personal cell phones for business, an employer should establish policies that:
  - (a) Prohibit work-related harassing behavior or violation of other company policies on all electronic devices.
  - (b) Allow the organization to take custody of a personal cell phone or other electronic devices for purposes of investigating alleged misconduct. Employers will likely have greater leverage to take custody of a personal device if they are reimbursing the employee for monthly fees.



- (c) Prohibit employees from deleting or otherwise altering any information on a personal device if the employee has knowledge or notice that information on their device might be involved in a workplace dispute or investigation.
- (d) Allow the organization to take all steps necessary to produce requested information pursuant to a subpoena or other legal process.
- (e) In addition, it is generally best practice to prohibit employees from conducting substantive business with customers and others via text messaging.

## V. Social media and the workplace.

- A. What are common scenarios we see with the use of social media?
  - 1. Disparagement or harassment of co-workers.
  - 2. Criticism or mocking of customers or the employer.
  - 3. Posts that are offensive or concerning about racial, religious, political or other potentially discriminatory issues.
  - 4. Posts that can be perceived as threatening or raise concerns of self harm.
- B. What concerns commonly come up in addressing or disciplining employees for social media activity?
  - 1. Is it concerted activity?
    - a. **“Concerted activity”** is defined as two or more employees working together to improve wages, hours or other terms and conditions of employment.
    - b. Employee communications using social networking tools may constitute “concerted activity” which is protected under the NLRA even if the employer is not unionized.
    - c. “Concerted activity” occurs when an employee acts with or on the authority of other employees, and not solely by or on behalf the employee himself.
    - d. It involves circumstances in which individual employees seek to initiate, induce or prepare for group action.

- e. It involves situations in which employees act to bring truly group complaints to management's attention.
2. Public sector First Amendment protections.
- a. Public employees have free speech rights under the First Amendment of the U.S. Constitution. Private employees do not have constitutional free speech rights.
  - b. The First Amendment analysis will focus on (1) whether the employee's statements are made in the context of his or her official duties or job responsibilities, whether the employee was commenting on a matter of public concern, and a balance between the interest of the employee as a citizen in commenting on matters of public concern and the interest of the State as an employer in promoting the efficiency of the public services it performs through its employees.
  - c. Employee speech that impairs discipline by superiors or harmony among co-workers, that has a detrimental impact upon close working relationships, for which personal loyalty and confidence are necessary, or that impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise, will not be protected by the First Amendment.
3. Public sector Fourth Amendment protections.
- a. Public employees have a constitutional right to be free from unreasonable searches or seizures. Private sector employees do not have rights under the constitution, though may be able to allege an invasion of privacy or other similar claim.
  - b. A search or seizure of an employee or her property of a public employee may violate the Fourth Amendment if the employee has a reasonable expectation of privacy and the search was not reasonable under all the circumstances, either at its inception or at any point during the search.
4. Questions employers should ask themselves in any disciplinary/discharge situation apply.
- a. Did the employee's conduct violate a stated rule of the employer?
  - b. Was the rule published to and known by the employees?
  - c. Did the employer make a good faith determination that the rule was violated?

- d. Has the rule been consistently enforced?
  - e. Is the punishment appropriate for the misconduct?
- C. Suggestions for social media policies.
- 1. Distinguish between use for business and personal use.
  - 2. Clearly state that inappropriate social media posts off work time or using personal devices may still violate the employer's policy.
  - 3. Check your policy against the latest NLRB guidance.

**VI. Key steps for investigating employee misconduct using technology and protecting your electronic information when an employee departs.**

- A. Talk to your IT Department or vendor now to establish the steps that will be taken if technology-related misconduct is suspected and when an employee terminates employment, especially where the employee has had access to confidential or competitive information. Discuss how long your server access log files are retained and ensure that your IT staff retains those for any employee who is suspected of misconduct or who may have departed with information of the organization. Key information may be retained for only limited periods of time, so it is critical to have steps in place to address these issues before they occur.
- B. Have sufficient auditing capabilities in place to understand your employees' internet histories, and what they have accessed and downloaded.
- C. Disable employee access to your system and all devices as soon as possible. Confirm that remote server and email access is disabled.
- D. Collect all company-owned electronic devices as soon as possible. In difficult termination circumstances, you generally should not allow the employee to return to his/her computer or have access to his/her work-provided phone at all. You may need logs of file access, USB activity, email activity, and cloud storage access to determine whether misconduct occurred or whether information was taken or compromised. Data and evidence can be downloaded, deleted, destroyed and wiped in a matter of seconds. Devices that may contain evidence of wrongdoing should not be wiped or reissued until all relevant information has been retrieved from the device and saved.

- E. Consider reviewing the employee's work email account. Employers often find significant evidence that confirms misconduct simply by going through an employee's email. Ensure that your acceptable use policy or other electronic communications policy clearly states your right to monitor, review and use any and all electronic information on your system, including employee email.

## VII. What about behavior that is possibly criminal?

- A. Consider if law enforcement should have a role.
  - 1. If the alleged misconduct by employees rises to criminal conduct under the law, consider contacting law enforcement officials before beginning an investigation.
  - 2. Contacting law enforcement, or the fact a law enforcement investigation is underway, does not automatically mean that the employer cannot or should not conduct its own investigation.
  - 3. Be cognizant of arrest and conviction record discrimination. The Wisconsin Fair Employment Act, Wis. Stat. § 111.321, prohibits employers from discriminating against an employee on the basis of the employee's arrest record or criminal conviction.
    - a. "Arrest record" is defined as: "information indicating 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 pursuant to any law enforcement or military authority."
    - b. "Conviction record" is defined as: "information indicating that an individual has been convicted of any felony, misdemeanor, or other offense, has been adjudicated delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned or paroled pursuant to any law enforcement or military authority."
  - 4. The WFEA makes an exception to its general prohibition against discrimination based on conviction record when an employer can show that the circumstances of an individual's conviction "substantially relate to the circumstances of the particular job."

- a. Employers may suspend employees when there is a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job. Employers must generally wait to determine whether the pending charge results in an actual conviction that is substantially related to the job before making a decision to terminate employment.
  - b. If an applicant or employee has a criminal conviction that is substantially related to the position at issue, then employment can be generally be denied or terminated.
5. Discipline, up to and including discharge, based on an employer's independent investigation of misconduct or possible criminal activity does not violate the WFEA's prohibition on arrest record discrimination. This is because an employment decision is not considered to be based on "arrest record" in violation of Wisconsin law if an employer bases its decision on its own independent investigation and concludes that the employee in fact engaged in the conduct in question. Merely examining a criminal complaint or receiving other information from law enforcement will generally not suffice as an independent investigation.
6. Employers may generally require employees to cooperate in workplace investigations as a condition of continued employment, even where possible criminal behavior is involved
7. In the public sector, Garrity warnings should be continued and given in all appropriate situations.
8. If an employee reports that something inappropriate has been sent to them electronically, meet with the employee to see what they received as opposed to having them send it to you. If it is an image that would constitute a crime if sitting on your device, you do not want that on your device or system.
9. Contact legal counsel to address these issues.

# ***Wage Garnishments***

A Guide for Employers to Minimize Liability

JACOB FROST



# Wage Garnishments

A Guide for Employers to Minimize Liability

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## I. **What is an earnings garnishment?**

- A. Also called a Wage Garnishment. Wisconsin court forms call it an Earnings Garnishment.
- B. “Earnings garnishment is an action to collect an unsatisfied civil judgment for money damages plus statutory interest and costs, from earnings payable by the garnishee to the debtor.” Wis. Stat. § 812.32.
- C. Layman’s terms - the legal process a creditor uses to seize a debtor’s wages to pay toward a judgment against the debtor.

## II. **What is not an earnings garnishment.**

- A. A withholding order for child support or maintenance.
- B. A wage attachment from the Wisconsin Department of Revenue or similar wage attachment from the federal government.
- C. A voluntary wage assignment.

## III. **Parties involved in an earnings garnishment.**

- A. Creditor – the person owed money.
- B. Debtor – the employee who’s wages are being seized to pay Creditor.
- C. Garnishee – the employer of Debtor.
- D. Court – the county circuit court where earnings garnishment was filed.





#### IV. **Important terms.**

- A. “Business day” – “any calendar day except Saturday and Sunday, and except the following business holidays: New Year’s Day, Martin Luther King Jr.’s Birthday, Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving and Christmas.” Wis. Stat. § 812.30(1), incorporating § 421.301(6).
- B. “Dependent” – “the debtor’s spouse if living in the debtor’s household and any other individual whom the debtor is legally required to support and to whom the debtor provides substantial support or maintenance.” Wis. Stat. § 812.30(5).
- C. “Disposable earnings” – “that part of the earnings of the debtor remaining after deducting social security taxes and federal and state income taxes listed on the person’s wage statement.” Wis. Stat. § 812.30(6).
- D. “Earnings” – “compensation paid or payable by the garnishee for personal services, whether designated as wages, salary, commission, bonus or otherwise, and includes periodic payments under a pension or retirement program.” Wis. Stat. § 812.30(7).
- E. “Household income” – “the disposable earnings of the debtor and dependents during any month in which the garnishment is in effect, plus unearned income received by the debtor and dependents in that month, less any of the debtor’s earnings assigned by court order under ch. 767.” Wis. Stat. § 812.30(8).
- F. “Need-based public assistance” – “aid to families with dependent children, relief funded by a relief block grant under ch. 49, relief provided by counties under § 59.53 (21), medical assistance, supplemental security income, food stamps, or benefits received by veterans under § 45.40 (1m) or under 38 USC §§ 1501 to 1562.” Wis. Stat. § 812.30(9).

#### V. **Service of an earnings garnishment.**

- A. Creditor is required to serve the Employer:
  - 1. A court-filed Earnings Garnishment; and
  - 2. A \$15 payment.
    - a) If you did not receive the \$15, call Creditor and inform them you will not honor the Earnings Garnishment until you receive the \$15.
  - 3. If you do not receive both, you are not required to implement the garnishment.



B. A Creditor Can Serve an Earnings Garnishment on an Employer By:

1. First class mail;
2. Certified mail, return receipt requested;
3. Personal service; or
4. Any other means if Employer signs an Admission of Service.

C. An Employer Might Receive Additional Forms, Including:

1. A Garnishee Answer;
2. Instructions from the Creditor;
3. An Exemption Notice; or
4. Poverty Guidelines.

D. Your Employee Will Receive Forms You Do Not.

VI. **Review sample earnings garnishment.**

- A. Employer will likely never see the underlying judgment.
- B. Earnings Garnishment can be against a spouse, not just the judgment debtor.
- C. You can talk to the Creditor.
- D. You can talk to your Employee.

VII. **Step one – determine if you will likely owe the debtor wages during the earnings garnishment.**

- A. Within 7 business days of receiving the Earnings Garnishment, if you will not likely owe the employee wages over the next 13 weeks, send the Creditor a written statement saying so.
  1. Garnishee Answer preferred, but not required.
  2. You can send a copy to the Debtor, but are not required to.



3. Creditor is required to provide your statement to the Court within 7 business days.
- B. If you may owe the Debtor earnings within the next 13 weeks:
1. Check whether you already have any other earnings garnishments in place against the Debtor.
    - a) If so, put the earnings garnishments into a queue in the order in which they are received.
      - (1) After one earnings garnishment expires, the next earnings garnishment becomes effective
      - (2) Within 7 business days after receipt of the Earnings Garnishment, you must inform the Creditor that the prior earnings garnishments exist and the amount owed on all pending earnings garnishments.
      - (3) If at any point before an Earnings Garnishment goes into effect or while it is in effect you determine you will no longer owe the Debtor wages, the Employer must inform the Creditor and the Court of this within 7 business days of determining will not likely owe wages.
        - (a) Send written notice to Creditor, Creditor should then inform the Court.
        - (b) Can send written notice directly to the Court.
        - (c) Can send written notice to Debtor, but not required to.
    - b) If no other earnings garnishments in place, proceed to Section VIII.

VIII. **Second step – employer obligations under an earnings garnishment.**

- A. Must garnish all non-exempt disposable earnings and pay them to the Creditor.
- B. **Duration:**
  1. Private Employers - 13 weeks.
    - a) Look to pay periods and paydays.
    - b) If week 13 ends in middle of pay period, still must issue a check the



payday for that pay period, even if payday is past 13 weeks.

- c) Unique Circumstance – a judgment for victim restitution is effective until paid in full or terminated by court order.

2. Private Employers – Stipulation to Extend Earnings Garnishment.

- a) Can be extended in additional 13 week increments for private employers if:
  - (1) Creditor and Debtor submit a written stipulation to the extension to Employer; and
  - (2) No other earnings garnishments are received by Employer.
- b) Employer MUST honor a stipulated extension if a copy of it is delivered or mailed to Employer with a \$15 payment before the last day of the last pay period affected by the current Earnings Garnishment or any prior stipulated extensions.
  - (1) A stipulated extension becomes void if a creditor issues an Earnings Garnishment for a different judgment and issues it to the Employer prior to the last day of the last pay period affected by the current Earnings Garnishment.
  - (2) Must refund \$15 garnishee fee if stipulated extension becomes void and was never in effect.

3. Public Employers - Until paid in full or terminated by court order.

**C. When Earnings Garnishment is Effective.**

- 1. Start - Garnish earnings from the paycheck for the first payday covering the pay period in effect when Employer received the Earnings Garnishment and \$15 fee.
- 2. End - Applies to 13 weeks of pay periods. Final payment may be more than 13 weeks after start.

**D. Amount of Wages Garnished.**

- 1. Must determine amount of disposable earnings that are not exempt.
  - a) Disposable earnings = wages left after deducting social security taxes and federal and state income taxes.
  - b) Exemptions explained in Section VIII.D.3. below.



2. **Special Rule for Employee Paying Child Support or Maintenance** - Child support and maintenance take priority, regardless when received by Employer.
  - a) If child support or maintenance are being withheld from Debtor's wages:
    - (1) Garnish 25% of Debtor's disposable earnings less the child support/maintenance.
    - (2) If child support and/or maintenance equal or exceed 25%, all wages are exempt.
    - (3) Must still follow other exemptions.
  
3. **Exemptions.**
  - a) 80% of wages are automatically exempt from Earnings Garnishment.
  - b) Debtor's earnings totally exempt from an Earnings Garnishment if:
    - (1) Debtor's household income is below poverty line; or
    - (2) Debtor: (usually from Debtor's answer)
      - (a) Currently receives need-based public assistance;
      - (b) Received need-based public assistance in the prior 6 months; or
      - (c) Debtor was determined eligible to receive need-based assistance but has not actually begun to receive it.
  - c) Debtor's earnings partially exempt if garnishing 20% would put Debtor's household income below the poverty line.
    - (1) Can still garnish up to the amount that keeps household earnings above the poverty line.
  - d) Review Poverty Guidelines.



e) **Unique Circumstance** - Exemptions do not apply to certain judgment debts:

- (1) Ch. 128 and Bankruptcy Ch. 13 plan judgment debts;
- (2) Judgments for the support of a person; and
- (3) Judgments for unpaid taxes.

4. Debtor's Answer.

a) Written document prepared by Debtor asserting defenses to the garnishment or claiming exemptions.

- (1) Can be provided by Debtor or Debtor's spouse.
- (2) Debtor must deliver or mail to Employer.

b) Upon receipt of a Debtor's Answer, within 3 business days Employer must mail a copy to the Creditor AND must write on that copy the date you received the Answer from the Debtor.

c) Employer must accept the statements in the Debtor's Answer as true and binding.

(1) If Debtor claims his earnings are exempt, you do not put the earnings garnishment into effect until a court orders you to.

(2) Wait for a court order to do anything.

d) If Creditor drops the earnings garnishment, consider refunding the \$15 if requested and no wages were garnished.

5. Debtor's Petition for Relief from Earnings Garnishment.

a) Debtor can ask the Court to provide relief from the garnishment if more than 80% of disposable earnings are needed "for the debtor to acquire the necessities of life for the debtor or his or her dependents."

b) Statutes do not explain whether Employer must implement the Earnings Garnishment until the Petition is resolved or wait for a Court order before doing so.

c) Best resolution – reach out to Creditor and Debtor to try to secure a written agreement what Employer should do.



- d) When in doubt, likely least risk by not implementing until Petition is resolved by the Court.
  - (1) Penalties for withholding too much from Debtor's wages are potentially greater than for not withholding and paying amounts to Creditor.
  - (2) Debtor can secure a judgment for actual damages vs. Creditor limited to amount should have, but did not pay.

6. Court Hearing on Debtor's Answer or Debtor's Petition for Relief.

- a) Employer does not need to attend.
- b) Court will resolve issues and provide an order with its directions.
  - (1) Employer must insist on seeing a court order directing Employer how to proceed before doing anything further with the Earnings Garnishment.
  - (2) Court order is binding upon Employer as of the time it is served on Employer.
    - (a) Service by mail, fax or personal delivery.
- c) If Court orders the Earnings Garnishment to proceed, the date the court order is served on Employer substitutes for the original date the garnishment was served for purposes of determining the 13 week period.

E. **Payment to Creditor.**

- 1. Must pay garnished wages to Creditor within 5 to 10 business days after payday.
- 2. Must provide Debtor written notice of all amounts paid to the Creditor at the time you issue payment.

IX. **Common employer earnings garnishment mistakes.**

- A. Not Following 13 Week Duration.
- B. Not Calculating Correct Amount.



- C. Not Following Earnings Garnishment At All.
  - D. Paying More Than the Judgment Amount.
- X. **Employer mistakes – employer liability.**
- A. **Employer can be liable to the Creditor OR to the Debtor.**
    - 1. Liability to Creditor:
      - a) Court may issue a judgment against Employer and in favor of Creditor for Employer’s failure to pay all garnished wages in a timely manner.
        - (1) Creditor can seek judgment against Employer “in the amount of the unsatisfied judgment plus interest and costs.”
        - (2) Employer can (and should when possible) assert as an affirmative defense that the total amount that could have been garnished is less than the unsatisfied judgment balance.
          - (a) If succeed in proving, then Employer’s liability is limited to the greater of \$100 or the amount that should have been paid to the Creditor.
    - 2. Liability to Debtor:
      - a) If Employer withholds more wages than should have, Debtor can pursue a judgment for the Debtor’s actual damages.
      - b) Potential Affirmative Defense – “the wrongful conduct of the garnishee was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid that error.”
        - (1) If prove this defense, liability is limited to the amount of the exempt disposable earnings paid to the creditor.
  - B. **Procedure to Pursue Judgment Against an Employer.**
    - 1. Creditor/Debtor must file a motion with the Court.
    - 2. Creditor/Debtor must personally serve the motion on Employer.
      - a) Normally means cannot serve by mail or certified mail.





- b) Process server should deliver the Motion.
- 3. Employer must appear at the hearing, raise any affirmative defenses.
  - a) Do not need to appear by an attorney.
    - (1) Wis. Stat. § 812.31(1) incorporates Wis. Stat. § 799.06(2).
      - (a) Allows entities to appear by a member, agent, authorized employee, or by an agent of the member or an authorized employee of the agent.

C. **Best Practices When Sued.**

- 1. Talk to legal counsel.
- 2. Try to resolve outside of court and get a signed, written release if resolved.
- 3. If cannot resolve, go to court.

D. **What Not to Do When Sued.**

- 1. DO NOT ignore the court proceedings. Go to court even if solely to admit your mistake and prove what should have been paid in the earnings garnishment.
- 2. DO NOT unilaterally withhold funds from Debtor's wages to reimburse Employer.
  - a) Creditor may obtain payment for part of the judgment against Employer.
  - b) No statute or law allows Employer to unilaterally reimburse itself from Debtor's wages.
    - (1) Need to sue the Debtor to try to recover or secure voluntary repayment.

XI. **WARNING – NEVER DO THE FOLLOWING.**

- A. **NEVER** put 2 earnings garnishments into effect at the same time.
- B. **NEVER** mix and match Earnings Garnishments with other withholding orders except for child support or maintenance.
- C. **NEVER** retaliate against a Debtor because of an earnings garnishment:



1. “Retaliation by garnishee for earnings garnishment forbidden. Unless permitted under any applicable collective bargaining agreement, a garnishee shall not impose any fee or take any adverse action against a debtor by reason of the garnishment of the debtor’s earnings. If a garnishee violates this section, the debtor may bring an action for reinstatement, back wages and benefits, restoration of seniority, other relief allowed by law and reasonable attorney fees incurred in bringing this action.” Wis. Stat. § 812.43.
2. Stiff penalties – right to recover reasonable attorney fees is significant.

D. **NEVER** terminate the Debtor because of the Earnings Garnishment.

1. Federal Consumer Credit Protection Act, Title III regulates earnings garnishments.
2. Prohibits Employer from firing an employee due to the employee being subject to an earnings garnishment for any one debt.
  - a) Oddly, the law does not protect an employee from discharge if the employee is subject to earnings garnishments for more than one different debts.
3. Exempts wages from garnishment by limiting the wages subject to garnishment to the lesser of:
  - a) 25% of disposable earnings; or
  - b) The amount of disposable earnings that exceed 30 times the federal minimum wage.
  - c) Allows State law to provide greater protections, which Wisconsin does.

E. **NEVER** make up your own rules.

1. Employers at times try to fix the mistakes without legal authority.
  - a) Example – Employer receives Garnishment A, puts into effect for 6 weeks. During week 6, Employer receives Garnishment B and immediately puts Garnishment B into effect. Garnishment A Creditor objects to loss of final 7 weeks of garnishment.
  - b) What do you do?
2. Need Debtor to assert most exemptions.

F. **When in doubt, look to the Court.**

XII. **Earnings garnishment of a public officer or employee – special considerations.**

A. The rules applicable to private employers apply equally to Public Employers, except:

1. Service on a Public Employer:
  - a) State – serve on Department of Administration;
  - b) 1<sup>st</sup> Class City – serve on city treasurer;
  - c) All other political subdivisions – serve on the secretary or clerk.
2. Duration.
  - a) Earnings garnishment is effective until the judgment is satisfied or the court terminates the garnishment by order.

B. Not clear how potential liability against Garnishee works with Public Employer.

1. Presumably Wis. Stat. § 893.80 requiring advance notice of claim applies.

XIII. **Examples of earnings garnishments.**

A. Private Employer receives Earnings Garnishment against Bunny Lebowski with a \$15 check. Bunny quit her job the week before, but her final paycheck will be issued the following Friday. Should Employer:

1. Garnish 20% of the final paycheck and keep the \$15;
2. Return the \$15 and inform Creditor Bunny will not be owed wages in the next 13 weeks; or
3. Enjoy a White Russian beverage and ignore the Earnings Garnishment.

B. Private Employer receives Earnings Garnishment against Bunny Lebowski with a \$15 check. Bunny is employed earning \$1,000 bi-weekly after taxes. Employer is currently withholding \$250 per paycheck for child support. Should Employer:

1. Garnish 20% of Bunny’s disposable earnings for the next 13 pay periods;
2. Return the \$15 and inform Creditor Bunny is already paying child support of 25% of her income, so she has no non-exempt income; or



3. Shred the Earnings Garnishment and act like you never saw it.
- C. Private Employer receives Earnings Garnishment against Bunny Lebowski with a \$15 check. Bunny is employed earning \$1,000 bi-weekly after taxes. Employer is currently enforcing a prior Earnings Garnishment that Employer received 6 weeks earlier. Should Employer:
1. Garnish 20% of Bunny's disposable earnings for Earnings Garnishment 1 and another 20% for Earnings Garnishment 2 until each expires after 13 weeks;
  2. Garnish 20% of Bunny's disposable earnings and provide 10% to Earnings Garnishment 1 Creditor and 10% to Earnings Garnishment 2 Creditor until Earnings Garnishment 1 expires in 7 weeks, then the full 20% to Earnings Garnishment Creditor 2 for another 6 weeks; or
  3. Put Earnings Garnishment No. 2 in a queue to implement after Earnings Garnishment 1 expires in 7 weeks.
- D. Public Employer receives Earnings Garnishment against Bunny Lebowski with a \$15 check. Bunny is employed earning \$1,000 bi-weekly after taxes. Bunny provides Employer a Debtor's Answer claiming her earnings are 100% exempt because she has a family of 7. Employer knows Bunny is not married, has no kids and lives alone. Should Employer:
1. Provide the Debtor's Answer to Creditor and garnish 20% of Bunny's disposable earnings immediately because Bunny is lying;
  2. Provide the Debtor's Answer to Creditor but do not enforce the Earnings Garnishment until instructed by a Court; or
  3. Write to the Court immediately and tell the Court Bunny is lying.
- E. Public Employer receives Earnings Garnishment against Bunny Lebowski with a \$15 check. Bunny is employed earning \$1,000 bi-weekly after taxes. Employer is currently withholding \$50 per paycheck for child support. Should Employer:
1. Garnish 20% of Bunny's disposable earnings for the next 13 pay periods;
  2. Inform Creditor Bunny is paying child support of \$50 per paycheck, but garnish 25% of her disposable earnings less the \$50 child support and pay it to Creditor until the judgment is paid off; or
  3. Fire Bunny for causing such an administrative nightmare by having child support and an Earnings Garnishment.

- F. Private Employer receives Earnings Garnishment against Bunny Lebowski with a \$15 check. Bunny is employed earning \$1,000 bi-weekly after taxes. Employer is currently under a Wage Attachment from the Wisconsin Department of Revenue and withholds \$50 per paycheck to pay to the State. Should Employer:
1. Garnish 20% of Bunny's disposable earnings for the next 13 pay periods and pay it to Creditor, putting the Earnings Garnishment ahead of the Wage Attachment;
  2. Inform Creditor Bunny is subject to a Wage Attachment by the State, but it is only \$50, so you will garnish 20% of her disposable income in addition to the State payment because in total that equals 25% of her disposable income; or
  3. Inform Creditor that because of the Wage Attachment, you cannot also garnish Bunny's wages unless Creditor secures a court order instructing you to do so.



STATE OF WISCONSIN, CIRCUIT COURT, \_\_\_\_\_ COUNTY

Creditor: \_\_\_\_\_  
Debtor: \_\_\_\_\_  
and  
Garnishee: \_\_\_\_\_

**Earnings Garnishment Notice**  
Case No. \_\_\_\_\_

To the Clerk of Court:

The creditor has commenced an earnings garnishment action against the debtor and the garnishee to collect the following unsatisfied civil judgment:

Name of Debtor(s)		County of Original Judgment
Original Case Number	Date of Original Judgment	Amount of Original Judgment
Transcript of Judgment filed in This County on:	Case Number of Transcript	Amount of Judgment Unpaid

This is a garnishment action to satisfy an order for victim restitution under §973.20(1r), Wis. Stats., and there is no filing fee.

Name of Debtor being garnished:

Name
Address

Garnishee:

Name
Address

Creditor:

Name	Phone Number
Address	

Creditor's Attorney:

Name	Phone Number
Address	State Bar Number

\_\_\_\_\_  
Creditor or Creditor's Attorney

\_\_\_\_\_  
Name Printed or Typed

\_\_\_\_\_  
Date

Creditor: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Debtor: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

and

Garnishee: \_\_\_\_\_

**Earnings Garnishment**

Case No. \_\_\_\_\_

THE STATE OF WISCONSIN, to the garnishee:

The creditor has been awarded a court judgment that has not been paid. As a result, the creditor claims that the amount owed by the debtor is as follows:

Unpaid balance on judgment	\$
Unpaid post-judgment interest	\$
Estimated costs of this earnings garnishment	\$
<b>Total amount owed by the debtor</b>	<b>\$</b>

The creditor believes that you will owe the debtor for earnings within the next 13 weeks. If the creditor has tendered the statutorily required fees with these papers, you are directed to complete the activities listed on page 2 of this form.

- This is a garnishment action to satisfy an order for victim restitution and there is no filing fee. This garnishment remains in effect until the judgment is satisfied.**

Please make check payable to and remit payment to:

The creditor must serve the following documents on the debtor at the time of service of this document:

- Exemption Notice - Earnings Garnishment (CV-423)
- Earnings Garnishment - Debtor's Answer (CV-424)
- Garnishment Exemption Worksheet (CV-426)
- Poverty Guidelines for Earnings (CV-427)

**See page 2 of form for further information.**

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### **DETERMINE WHETHER YOU WILL OWE THE DEBTOR EARNINGS**

1. Determine if you are likely to owe the debtor for earnings in pay periods beginning within the next 13 weeks.
2. If you are not likely to owe the debtor for earnings in pay periods beginning within the next 13 weeks, send a statement stating that fact to the creditor by the end of the 7th business day after receiving the earnings garnishment forms. (Business days do not include Saturdays, Sundays, or legal holidays).

### **IF THE DEBTOR SENDS YOU AN ANSWER**

3. Whenever you receive a debtor's answer form from the debtor, mail a copy of the answer form to the creditor by the end of the 3rd business day after receipt of that form. Include the date you received the answer form on the copy sent to the creditor.
4. If the debtor's answer form claims a complete exemption or defense, do not withhold or pay to the creditor any part of the debtor's earnings under this garnishment unless you receive an order of the court directing you to do so.

### **MULTIPLE EARNINGS GARNISHMENTS**

5. If the debtor's earnings are already being garnished when you receive this earnings garnishment, place this earnings garnishment into effect the pay period after the last of any prior earnings garnishments terminates. Notify the debtor of the amount of the garnishment and notify the creditor of the amount owed on the pending garnishments by the end of the 7th business day after you receive these forms. If there are no prior pending earnings garnishments against the debtor's earnings, place this earnings garnishment into effect the pay period after you receive it.

### **EARNINGS GARNISHMENTS LAST 13 WEEKS, EXCEPT FOR PUBLIC EMPLOYEES AND EXCEPT FOR GARNISHMENTS TO SATISFY AN ORDER FOR VICTIM RESTITUTION**

6. The garnishment of the earnings of employees of the state of Wisconsin and its political subdivisions, and a garnishment to satisfy an order for victim restitution under §973.20(1r), Wis. Stats., for victim restitution remain in effect until the judgment is satisfied. The garnishment of earnings of other employees will affect the debtor's earnings for all pay periods beginning within 13 weeks after you receive it, unless the debtor's earnings are already being garnished. If this earnings garnishment is delayed under paragraph 5 above, it will affect the debtor's earnings for all pay periods beginning within 13 weeks after the first day of the pay period that you put this earnings garnishment into effect. If the amount claimed by the creditor is fully paid before the end of the 13 weeks, this earnings garnishment will terminate at that point.

### **PAYING THE CREDITOR**

7. Between 5 and 10 business days after each payday of a pay period affected by this earnings garnishment, pay the creditor 20% of the debtor's disposable earnings or the amount by which disposable earnings exceed thirty times the federal minimum hourly wage, whichever is less, for that pay period. After the first payment, keep a \$3 fee for each payment delivered to the creditor. That additional fee shall be deducted from the moneys delivered to the creditor. Payment is complete upon mailing. "Disposable earnings" are those remaining after deducting Social Security, state and federal income taxes.

### **EFFECT OF COURT-ORDERED ASSIGNMENTS FOR SUPPORT**

8. If the debtor has assigned his or her earnings for support by court order, those support payments take priority over this earnings garnishment. If 25% or more of the debtors' disposable earnings is assigned for support by the court order, do not pay any part of the debtor's earnings to the creditor. Instead, send the creditor a statement of that fact by the end of the 7th business day after you receive these forms. If less than 25% of the debtor's earnings is assigned for support by court order, the amount the creditor must be paid is reduced so that the total of earnings assigned and garnished does not exceed 25% of the debtor's disposable earnings.

### **EXTENSIONS**

9. The debtor and creditor may agree in writing to extend this earnings garnishment for additional pay periods beginning within 13 weeks after this earnings garnishment would otherwise terminate. If you receive a written extension stipulation, and an additional garnishee fee for each extension, you must honor it unless a different garnishment against this debtor's earnings is served upon you before the extension takes effect. In that case, the extension is void and you must return the extension fee to the party who paid it to you.



Creditor: \_\_\_\_\_  
 Debtor: \_\_\_\_\_  
 and  
 Garnishee: \_\_\_\_\_

**Earnings Garnishment –  
 Exemption Notice**  
 Case No. \_\_\_\_\_

To the debtor:

The creditor has been awarded a judgment against you or your spouse as indicated below. That judgment has not been fully paid. The creditor has now filed a garnishment proceeding against your earnings from the garnishee. This means that the creditor is seeking to take some of your earnings to satisfy part or all of the judgment against you or your spouse.

The total amount of the creditor's claim is as follows:

County of Judgment	Case Number	Date of Judgment
Unpaid balance on judgment		\$
Unpaid post judgment interest		\$
Estimated costs of this earnings garnishment		\$
<b>Total amount owed by the debtor</b>		<b>\$</b>

By law, you are entitled to an exemption of not less than 80% of your disposable earnings. Your "disposable earnings" are those remaining after social security and federal and state income taxes are withheld.

Your earnings are completely exempt from garnishment if:

1. Your household income is below the federal poverty level. See the enclosed schedules and worksheet to determine if you qualify for this exemption.
2. You receive relief funded under public assistance, relief funded under Wis. Stats. §59.53(21), medical assistance, supplemental security income, food stamps, or veterans benefits based on need under USC 501 to 562 or §45.351(1)Wis. Stats., or have received these benefits within the past 6 months, or are eligible but have not yet received these benefits.
3. At least 25% of your disposable earnings are assigned by court order for support.

If the garnishment in either situation below would result in the income of your household being below the poverty line, the garnishment is limited to the amount of your household's income in excess of the poverty line. Those two situations are:

1. Garnishment of 20% of your disposable earnings, or;
2. Garnishment of the amount by which disposable earnings exceed thirty times the federal minimum hourly wage.

There are no exemptions to this garnishment if the debt arises out of one of the following obligations:

1. A debt amortization under §128.21 or a bankruptcy order under 11 USC 1301 to 1330.
2. For the support of any person; or,
3. Unpaid taxes.

**Continued on page 2**

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If you qualify for a complete exemption or a limitation in the amount subject to garnishment, you must give or mail a copy of the completed enclosed debtor's answer form to the garnishee/employer.

If your circumstances change while the garnishment is in effect, you may file a new answer form at any time.

If you do not qualify for a complete exemption or limitation but will not be able to acquire the necessities of life for yourself and your dependents if your earnings are reduced by this earnings garnishment, you may ask the court in which this earnings garnishment was filed to increase your exemption or grant you other relief.

### **IF YOU NEED ASSISTANCE, CONSULT AN ATTORNEY**

If you have garnished earnings that are exempt, limited or subject to a defense, the sooner you file your answer form with the garnishee/employer or seek relief from the court, the sooner such relief can be provided. This earnings garnishment affects your earnings in pay periods beginning within 13 weeks after it was served on the garnishee/employer. You may agree in writing with the creditor to extend it for additional 13-week periods until the debt is paid.

### **PENALTIES**

If you wrongly claim an exemption or defense in bad faith, or if the creditor wrongly objects to your claim in bad faith, the court may order the person who acted in bad faith to pay court costs, actual damages and reasonable attorney fees.

Creditor: \_\_\_\_\_

Debtor: \_\_\_\_\_

and

Garnishee: \_\_\_\_\_

**Earnings Garnishment – Debtor’s Answer**

Case No. \_\_\_\_\_

To the garnishee/employer:

- 1. My earnings are **completely** exempt from earnings garnishment or limited in amount subject to garnishment because
  - a. The judgment has been paid.
  - b. The judgment has been discharged in bankruptcy.
  - c. I have filed bankruptcy and enforcement of the judgment has been stayed.  
 Name of bankruptcy court: \_\_\_\_\_  
 Bankruptcy court file number: \_\_\_\_\_
  - d. The judgment is void.
  - e. I receive, am eligible for, or have within 6 months received one or more of the following:
    - Relief funded under public assistance
    - Medical assistance
    - Food stamps/FoodShare
    - Supplemental security income
    - Relief funded under §59.53(21), Wis. Stats.
    - Veterans benefits based on need under 38 USC 501-562 or §45.40(1), Wis. Stats.
  - f. At least 25% of my disposable earnings are assigned for support by court order.
  - g. My household income is below the federal poverty level.
  - h. The garnishment of 20% of my disposable income would result in the income of my household being below the poverty line.
  - i. The garnishment of my income that is over thirty times the federal minimum hourly wage would result in my household income being below the poverty line.
- 2. Too much of my earnings are being garnished because:
  - a. I am paying child support or maintenance in an amount that is less than 25% of my disposable earnings. The amount to be paid must be reduced so that the total of earnings assigned and garnished does not exceed 25% of my disposable earnings.
  - b. The garnishment of 20% of my disposable income would result in my household income being below the poverty line and the amount to be paid must be reduced to an amount equal to the amount of my household income in excess of the poverty line.
  - c. The garnishment of my income that is over thirty times the federal minimum hourly wage would result in my household income being below the poverty line and the amount to be paid must be reduced to an amount equal to the amount of my household income in excess of the poverty line.
  - d. Other: \_\_\_\_\_
- 3. I have another defense to this earnings garnishment: (Explain briefly)  
 \_\_\_\_\_  
 \_\_\_\_\_

I understand that if I claim a complete exemption, limitation or defense in bad faith, I may be held liable to the creditor for actual damages, costs and reasonable attorneys’ fees.

**THE DEBTOR IS REQUIRED TO DELIVER OR MAIL A COPY OF THIS FORM TO THE GARNISHEE/EMPLOYER AND FILL IN THE DATE OF DELIVERY OR MAILING.** Date debtor delivered or mailed to garnishee/employer: \_\_\_\_\_

**THE GARNISHEE/MPLOYER IS REQUIRED TO MAIL A COPY OF THIS FORM TO THE CREDITOR AND FILL IN THE DATE OF MAILING.** Date garnishee/employer mailed to creditor: \_\_\_\_\_

▶ \_\_\_\_\_  
 Debtor

\_\_\_\_\_  
 Name Printed or Typed

\_\_\_\_\_  
 Date

\_\_\_\_\_  
 Address

\_\_\_\_\_  
 Telephone Number

Creditor: \_\_\_\_\_

**Earnings Garnishment –  
Objection to Debtor’s Answer  
and Demand for Hearing**

Debtor: \_\_\_\_\_

and

Garnishee: \_\_\_\_\_

Case No. \_\_\_\_\_

To the Clerk of Court:

1. Attached is a copy of the debtor's answer (CV-424).
2. I object to the debtor's answer and demand a hearing to resolve the issues in controversy. By statute, this hearing must be held as soon as practicable after this objection and demand are filed. I object to the debtor's answer for the following reasons: (Explain briefly)

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

3. Please schedule this hearing and notify all parties.

4. To the best of my knowledge, the debtor's current address:

is the same as that stated in the notice I filed to commence this earnings garnishment.

is now: \_\_\_\_\_

I understand that if I object to the debtor's answer in bad faith, I may be held liable to the debtor for actual damages, costs and reasonable attorney fees.

\_\_\_\_\_

Creditor/Attorney

\_\_\_\_\_

Date

\_\_\_\_\_

Address

\_\_\_\_\_

Address

\_\_\_\_\_

Telephone Number

## Garnishment Exemption Worksheet

Note: You may use this worksheet to calculate how much of your earnings are subject to garnishment. You are not required to complete this worksheet or send it to the garnishee or the creditor.

- Instructions:
- First, calculate your total earnings by using Schedule 1 (Calculation of Income).
  - Then calculate the amount of your earnings subject to garnishment by using Schedule 2 (Calculation of Amount Subject to Garnishment).
  - Finally, to determine how much, if any, of your earnings are exempt from garnishment, use Schedule 3 (Calculation of Poverty Guideline Exemption) and the separate Poverty Guidelines for Earnings (form CV-427).

### Schedule 1. Calculation of Income

List in Column A earnings after subtracting Social Security, Federal and State Income Taxes. <i>For both Columns A and B, calculate amounts on the same basis (weekly, biweekly, semimonthly, monthly) as the debtor's earnings.</i>		List in Column B all income other than earnings.	
	Column A		Column B
1. Debtor	1a.		1b.
2. Spouse (if living in same household as debtor)	2a.		2b.
3. Other legal dependents	3a.		3b.
<b>4. TOTAL EARNINGS</b>	<b>4a.</b>		<b>4b.</b>

### Schedule 2. Calculation of Amount Subject to Garnishment

5. Debtor's disposable earnings amount from line 1a	5.	
6. 20% of amount on line 5 or the amount by which line 5 exceeds thirty times the federal minimum hourly wage, whichever is less. (Currently the federal minimum hourly wage is \$7.25. Use same basis as in Schedule 1 of weekly, biweekly, semimonthly, monthly).	6.	
7. 25% of amount on line 5	7.	
8. Court ordered assignments of child support and/or maintenance that you pay. Use same basis as in Schedule 1 (weekly, biweekly, semimonthly, monthly).	8.	
9 Subtract amount on line 8 from line 7	9.	
10. Insert the lesser amount of line 6 or line 9. This is the amount subject to garnishment. If this amount is "0" or less than zero, then you do not have to complete Schedule 3 because all earnings are exempt.	10.	

### Schedule 3. Calculation of Poverty Guideline Exemption

11. Disposable earnings from line 4a	11.	
12. Other income from line 4b	12.	
13. Add line 11 to line 12	13.	
14. Child support and/or maintenance from line 8	14.	
15. Subtract amount on line 14 from line 13 for household income		15.
16. Amount subject to garnishment from line 10	16.	
17. Poverty Guideline Amount for pay period of debtor and size of family (See current Poverty Guideline Chart)	17.	
18. Add lines 16 and 17		18.
19. Compare line 15 and line 18. If line 18 is greater than line 15, proceed to line 20. If line 15 is equal to or greater than line 18, then the amount on line 10 is the amount <b>subject</b> to garnishment.		
20. Subtract line 17 from line 15. This is the amount <b>subject</b> to garnishment if the garnishment causes the income to fall below the poverty guidelines. If this amount is "0" or less than zero, then all earnings are <b>exempt</b> from garnishment.		20.

**Poverty Guidelines for Earnings  
(For earnings from July 1, 2019 thru June 30, 2020)**

<b>Size of Family</b>	<b>Weekly</b>	<b>Bi-weekly</b>	<b>Semi-monthly</b>	<b>Monthly</b>	<b>150%</b>
1	\$240	\$480	\$520	1,041	1,561
2	\$325	\$650	\$705	1,409	2,114
3	\$410	\$820	\$889	1,778	2,666
4	\$495	\$990	\$1,073	2,146	3,219
5	\$580	\$1,160	\$1,257	2,514	3,771
6	\$665	\$1,330	\$1,441	2,883	4,324
7	\$750	\$1,500	\$1,625	3,251	4,876
8	\$835	\$1,670	\$1,810	3,619	5,429
Ea. add'l family member	Add \$85 to above amount	Add \$170 to above amount	Add \$184 to above amount	Add \$368 to above amount	Add \$553 to above amount

**DEFINITIONS:**

“Earnings” means compensation paid or payable by the garnishee for personal services, whether designated as wages, salary, commission, and bonus or otherwise, and includes periodic payments under a pension or retirement program.

“Disposable earnings” means that part of the earnings of the debtor remaining after subtracting social security taxes and federal and state income taxes listed on the person’s wage statement.

“Household income” means the disposable earnings of the debtor and dependents during any month in which the garnishment is in effect, plus unearned income received by the debtor and dependents in that month, less any of the debtor’s earnings assigned by court order under ch. 767.

**EXEMPTIONS:**

The debtor’s earnings are totally exempt from garnishment under this subchapter if the debtor’s household income is below the poverty line.

STATE OF WISCONSIN, CIRCUIT COURT, \_\_\_\_\_ COUNTY

**Earnings Garnishment Order to Garnishee/Release of Garnishee**

Case No. \_\_\_\_\_

Creditor (Name and Address)	Debtor (Name and Address)
Garnishee (Name and Address) >	Creditor's Attorney (Name and Address) >

**THE COURT FINDS AND ORDERS:**

- 1. The earnings are exempt by statute and the garnishee is released from further liability in this garnishment action.
- 2. The earnings garnishment shall continue as it was previously, and the date on which this order is served upon the garnishee shall substitute for the original date of service of the garnishment upon the garnishee for the purposes of determining any 13-week period in which the garnishee will owe the debtor for earnings and for any 13-week pay period that the garnishee will put the earnings garnishment into effect.
- 3. The earnings garnishment shall continue with an adjusted amount subject to garnishment as outlined below, and the date on which this order is served upon the garnishee shall substitute for the original date of service of the garnishment upon the garnishee for the purposes of determining any 13-week period in which the garnishee will owe the debtor for earnings and for any 13-week pay period that the garnishee will put the earnings garnishment into effect.  
\_\_\_\_\_
- 4. Other: \_\_\_\_\_

**THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL IF SIGNED BY A CIRCUIT COURT JUDGE.**

Enter the name of the county in which the garnishment was filed.

**Creditor** is the person /business who is entitled to receive money. Enter the **Creditor's** name and address.

**Debtor** is the person /business who owes the money. Enter the **Debtor's** name and address.

**Garnishee** is the person or company that has or is holding money of the debtor (money accounts, wages, ect.) and who is being asked to send it to the creditor. Enter the **Garnishee's** name, address and phone number. You are the garnishee.

Enter the case number.

For 2, check a, b, c, d, or e. If 2b, check 1 or 2. If 2b.1, fill in the blank. If 2b.2, fill in the blank and check one box. If 2e, enter an explanation. The garnishee must send a copy of this answer to the creditor and the debtor by the end of the 7<sup>th</sup> business day after receipt of the garnishment form. If a debtor files an answer at any time during the garnishment, write the date you received the answer on the debtor's answer. Attach a copy to this form and mail these forms to the creditor by the end of the 3<sup>rd</sup> business day after receipt of the debtor's answer.

Sign and print your name. Enter the date on which you signed your name. Provide phone number.

**Note:** This signature does not need to be notarized.

STATE OF WISCONSIN, CIRCUIT COURT,  
 \_\_\_\_\_ COUNTY

Creditor: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 -vs-  
 Debtor: \_\_\_\_\_  
 Address: \_\_\_\_\_


and  
 Garnishee: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Phone Number: \_\_\_\_\_

**Garnishee Answer to Creditor Earnings Garnishment (Small Claims)**

Case No. \_\_\_\_\_

**To the Creditor:**

1. I am the garnishee or a duly authorized representative of the garnishee. Your garnishment action has been received and reviewed.
2.  a. I have determined that I will not owe the debtor any earnings to be earned within 13 weeks after the date of service of the garnishment on me.
- b. The debtor's earnings are subject to one or more of the following:
  - 1) Prior earnings garnishments. Your earnings garnishment will go into effect for the pay period after the last of any prior earnings garnishments end. The amount owed on the **prior** pending garnishment(s) is \$\_\_\_\_\_.
  - 2) Child support orders that amount to \_\_\_\_\_ % of the debtor's disposable earnings. The amount available to you is:
    - \$0 or  reduced to the amount allowed by law.
- c. The debtor has delivered an answer claiming a defense to the garnishment. A copy of the answer is attached. I have written the date I received the answer on the attached copy. The garnishment cannot proceed until a court order directs otherwise.
- d. The debtor's earnings will be garnished as allowed by law.
- e. Other: \_\_\_\_\_.

 \_\_\_\_\_  
 Garnishee or Authorized Representative  
 \_\_\_\_\_  
 Print or Type Name  
 \_\_\_\_\_  
 Date  
 \_\_\_\_\_  
 Phone Number



Enter the name of the county in which the garnishment was filed.	<b>STATE OF WISCONSIN, CIRCUIT COURT,</b> _____ <b>COUNTY</b>	
<b>Creditor</b> is the person/business who is entitled to receive money. Enter the <b>Creditor's</b> name and address.	Creditor: _____ Address: _____ -vs-	<input type="checkbox"/> Amended  <b>Notice of Motion and Motion for Judgment Against Garnishee – Earnings Garnishment (Small Claims)</b>  Case No. _____
<b>Debtor</b> is the person/business who owes the money. Enter the <b>Debtor's</b> name and address.	Debtor: _____ Address: _____	
<b>Garnishee</b> is the person or company that has or is holding money of the debtor (money accounts, wages, etc.) and who is being asked to send it to the creditor. Enter the <b>Garnishee's</b> name and address.	and Garnishee: _____ Address: _____	
Enter the case number.		

**To the Garnishee:**

You are notified that at the following date and time:

<b>For Court Use Only.</b> Leave this section blank. It will be completed by the court.	Date	Time	Location
	Court Official		

or as soon as the matter may be heard.

I will be asking the court to grant a judgment against you for the amount of the unsatisfied judgment plus interest and costs, and such other relief as allowed by law.

For 2, Check a and/or b.  Service must be done by the sheriff or a private process server at least 5 days before the hearing date. File proof of service on the garnishee with the Clerk of Court at or before the hearing.
Sign and print your name. Enter the date on which you signed your name.  <b>Note:</b> This signature does not need to be notarized.

The basis for this request is:

1. An Earnings Garnishment was filed in this case and served upon you.
2. You have failed to *(Check all that apply)*
  - A. Properly respond to the Earnings Garnishment within the time period allowed by law, and/or
  - B. Pay me money to which I am entitled from the debtor's earnings.
3. I am entitled to judgment against you because of your failure.

▶ \_\_\_\_\_  
Signature

\_\_\_\_\_  
Print or Type Name

\_\_\_\_\_  
Date

# ***Arrest and Conviction Records and Criminal Background Checks in the Hiring Process***

DOUG WITTE & BRENNAN McLAUGHLIN



# ***Arrest and Conviction Records and Criminal Background Checks in the Hiring Process***

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## **I. Purpose of Background Checks**

- A. Background Checks are in some instances legally required. For example:
1. Care givers
    - a. Wisconsin's Caregiver Law requires background and criminal history checks of certain personnel who are responsible for the care, safety and security of children and adults. Wis. Stat. §§ 50.065(2) and 146.40.
    - b. The programs subject to the Caregiver Law include:
      - i. Emergency Mental Health Services Programs - DHS 34
      - ii. Mental Health Day Treatment Services for Children - DHS 40
      - iii. Outpatient Community Mental Health/Developmental Disabilities - DHS 61
      - iv. Community Substance Abuse Services (CSAS) - DHS 75
      - v. Community Support Programs (CSPs) - DHS 63
      - vi. Community Based Residential Facilities (CBRFs) - DHS 83
      - vii. Adult Family Homes (3 and 4 bed AFHs) - DHS 88
      - viii. Residential Care Apartment Complexes (RCACs) - DHS 89
      - ix. Hospitals, including Clinics that are part of the hospital-DHS 124



- x. Rural Medical Centers - DHS 127
- xi. Hospices - DHS 131
- xii. Nursing Homes - DHS 132
- xiii. Intermediate Care Facilities for Persons with Mental Retardation (ICFs/MR) - DHS 134
- xiv. Home Health Agencies (including personal care and supportive home care services provided by a licensed HHA) - DHS 133

2. Bank/Credit Unions

a. Employees

- i. 12 U.S.C. § 1829 (banks and insured depository institutions).
- ii. 12 U.S.C. § 1785 (credit unions)

b. Mortgage Loan Originators

- i. SAFE Act
- ii. Consumer Financial Protection Bureau (CFPB) Rules

3. Teachers

The Wisconsin Department of Public Instruction is required by law to conduct a background check on each applicant for a Wisconsin educator license regardless of whether it is an initial request or a renewal request. The primary purpose of a background check is to determine if the applicant has engaged in any behavior that endangers the health, welfare, safety or education of pupils. Wis. Stat. § 118.19(4).

B. Distinguish Qualified Applicants

- 1. A background check is another tool to obtain information that will assist in determining which qualified applicant is better suited for the position.
- 2. The information sought in a background check should be relevant to specific job-related considerations and priorities.

C. Screen Potential Problem Employees

- 1. Verification of Application Information



- a. Studies estimate that 30-50% of resumes and applications contain misrepresentations.
- b. A 2016 survey from CareerBuilder.com found that over 60% of employers use social networking sites to screen job candidates.
  - i. The survey of more than 2,186 hiring managers revealed that 60% of employers used social networking sites to research candidates and 49% of employers rejected applicants based on what was uncovered on social networking sites.
  - ii. Of those 49%:
    - a) 46% cited provocative or inappropriate photographs or information;
    - b) 43% cited content about drinking or using drugs;
    - c) 31% cited bad-mouthing of previous employers, co-workers or clients;
    - d) 29% cited poor communication skills; and
    - e) 33% cited discriminatory comments.

## 2. Liability Avoidance

- a. Negligent Hiring
  - i. *Miller v. Wal-Mart Stores, Inc.*, 219 Wis.2d 250 (1998).
    - a) The Wisconsin Supreme Court held that Wisconsin law recognized the tort of negligent hiring.
    - b) The elements of this tort are:
      - 1) A duty of care on the part of the defendant.

“The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act.”



- 2) A breach of that duty.

“A person fails to exercise ordinary care, when, without intending to do any harm, he or she does something or fails to do something under circumstances in which a reasonable person would foresee that by his or her action or failure to act, he or she will subject a person or property to an unreasonable risk or injury or damage.”

- 3) A causal connection between the conduct and the injury.

“This requires two questions with respect to causation. The first is whether the wrongful act of the employee was a cause-in-fact of the plaintiff’s injury. The second question is whether the negligence of the employer was a cause-in-fact of the wrongful act of the employee.”

- 4) An actual loss or damage as a result of the injury.

b. Automobile Insurance Coverage/Premiums

## II. Types of Background Checks

### A. Criminal Background

1. The Department of Justice Division of Law Enforcement Services provides criminal background checks.

<http://www.doj.state.wi.us/dles/cib/background-check-criminal-history-information>

2. Wisconsin Court System Circuit Court Access (CCAP)

<http://wcca.wicourts.gov/index.xsl>

### B. Employment History



C. Credit History

D. Driving Record

Wisconsin Department of Transportation

<http://www.dot.wisconsin.gov/drivers/records.htm>

E. Sex Offender Registry

Wisconsin Department of Corrections

The Wisconsin Sex Offender Registry is maintained by the Sex Offender Registration Program (SORP). The Sex Offender Registration and Community Notification law allows for the collection and dissemination of information related to certain sex offenders. Information included in the Registry is available to the general public.

<http://doc.wi.gov/community-resources/offender-registry>

F. Licensure

G. Patriot Act/Office of Foreign Asset and Control Watch List (OFAC)

1. The Treasury Department, State Department and Commerce Department each maintain lists of companies and people with whom all United States' citizens and companies are forbidden to do business. The watch lists are frequently updated and contain thousands of names, hundreds of which are located in the United States. Doing business with individuals on the watch lists can result in large fines and other penalties, including loss of export privileges or prison.

2. The Specially Designated Nationals (SDN) List is a publication of OFAC which lists individuals and organizations with whom United States citizens and permanent residents are prohibited from doing business.

<https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>

### III. Overview of the Fair Credit Reporting Act (“FCRA”)

A. If an employer conducts its own background check, there is no legal requirement that the employer notify individuals of the fact that it may review and take action based upon an individual's background profile.



- B. However, if an employer hires a third-party company to perform a background investigation and that company regularly conducts background checks, the employer must then comply with a federal law known as the Fair Credit Reporting Act (“FCRA”). The FCRA imposes specific notice and authorization obligations on employers that order background checks from third-party vendors (known as consumer reporting agencies).
1. FCRA regulations apply to all “consumer reports,” a broad term that includes a wide variety of reports such as driving records, criminal records, credit reports, and many other reports procured from a third-party company.
  2. Employers who hire third parties to conduct background checks or obtain credit reports from job applicants or employees must be aware of the FCRA’s requirements and make sure that if you hire a company to conduct background checks, the third party vendor is complying with the FCRA. **It is your responsibility, not your third party vendor, to make sure that the FCRA requirements are followed.**
  3. **FCRA Requirements Before the Background Check:**
    - a. Provide job applicants with a clear and conspicuous disclosure to the applicant *before* requesting the credit report, in a document consisting *solely* of that disclosure. The document must be clear, easy to understand, and a stand-alone document. The documents must include that:
      - i. A consumer report may be obtained for employment purposes;
      - ii. That the consumer has authorized in writing the procurement of the report by the employer; and,
      - iii. That before an adverse action is taken, the applicant or employee will be provided with a copy of the report, the address and phone of the credit bureau, and a copy of “A Summary of Consumers Rights” under the FCRA.
    - b. Before obtaining a credit report from a credit reporting agency, the employer must certify to the credit reporting agency that:
      - i. The consumer has been informed that a credit report may be obtained for employment purposes;
      - ii. The consumer has authorized the procurement of a credit report;



- iii. The consumer has been informed about the procedures to be taken in case an adverse action is to be taken based in whole or in part on the credit report; and,
  - iv. The information being obtained will not be used in violation of any federal or state equal opportunity law or regulation.
- c. A summary of employer’s obligations before obtaining a background check may be found on the Federal Trade Commission’s website: <https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-employers-need-know>.
- d. It is a good idea to get written permission from the applicant to conduct a background check. This can be part of the disclosure document informing the applicant you may get a background check. Make sure any signed authorization is clear and conspicuous.

4. **FCRA Requirements Before You Take an Adverse Action:**

- a. Before you reject a job applicant or take an adverse action against an employee based on information contained in a background check, you must give the employee notice.
- b. The employer must provide:
  - i. A notice that includes a copy of the consumer report you relied on to make your decision; and
  - ii. A copy of A Summary of Your Rights Under the Fair Credit Reporting Act.
    - a) This is a standard document issued by the Federal Trade Commission and Consumer Financial Protection Bureau. The agencies update this form periodically and it is your responsibility to ensure you are providing the most updated version of the form. This form can be found on the FTC’s website. The last update to this form occurred on September 21, 2018. Use of the model form is not required, but the information in the form must be provided to applicants and employees.



- b) The change in the form is a result of the recent enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act. The new law requires nationwide consumer reporting agencies to provide a “national security freeze” free of charge to consumers. The national security freeze restricts prospective lenders from obtaining access to an individual’s background report, which in turn makes it more difficult for identity thieves to misappropriate the individual’s personal information.
- c) The law also states that, whenever the FCRA requires a “consumer” to receive a Summary of Consumer Rights, a notice regarding the availability of a security freeze must be included. The new Summary of Consumer Rights form includes language related to security freezes, consistent with the new law.

5. **FCRA Requirements After Your Take Adverse Action**

- a. When the adverse action is taken, the employer must issue a notice which must include:
  - i. The name, address, and telephone number of the agency/individual that supplied the report;
  - ii. A statement that the agency/individual was not responsible for taking the adverse action and therefore, cannot explain it; and,
  - iii. A notice that the applicant or employee may dispute the accuracy or completeness of any information furnished by the agency/individual, and that the applicant or employee has the right to an additional free credit report if requested within 60 days of receipt of the Adverse Action Notice.
- b. While third party vendors typically provide copies of required FCRA notices to employers for their use, **it is the employer’s responsibility to give these to applicants and employees at the appropriate times and make sure the notices are accurate and up to date.** Failure to abide by the obligations under the FCRA can result in legal claims by those adversely affected.



6. City of Madison General Ordinance (§ 39.03(8))
  - a. Employers in the City of Madison are prohibited from refusing to hire an applicant because of credit history or refusal to disclose a Social Security number when that disclosure is not compelled by law.
  - b. Employers in the City of Madison are prohibited from requesting applicants to provide any information regarding credit history or to supply their Social Security number when such is not compelled by law.
  - c. An employer may consider an applicant's credit history if the employer can show that:
    - i. The circumstances of an individual's credit history are substantially related to the circumstances of the particular job or licensed activity; or
    - ii. Employment depends on the bondability of the individual under a standard fidelity bond and the individual may not be bondable due to the individual's credit history.

#### **IV. Legal Restrictions.**

- A. Arrest and Conviction Record
  1. Wisconsin (Wis. Stat. § 111.321)
    - a. Wisconsin law permits employers to conduct criminal background checks, but prohibits employers from discrimination on the basis of arrest or conviction record.
    - b. The fact that an applicant has been arrested, without more, may not be the basis for making an adverse employment decision.
      - i. "Arrest record" is defined as "information indicating 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 pursuant to any law enforcement or military authority." Wis. Stat. § 111.32(1).



- ii. Under the *Onalaska* rule, an employment decision is not based on “arrest record” if an employer makes that decision on the basis of its own internal investigation and concludes that the employee in fact engaged in the conduct in question, which conduct the employer finds unsatisfactory. *City of Onalaska v. LIRC*, 120 Wis. 2d 363, 367, 354 N.W.2d 223 (Ct. App. 1984).
- c. A pending criminal charge may generally serve as the basis for not hiring an applicant, but only if the nature of the charge or conviction is “substantially related” to the position in question.
  - i. “Criminal” means conduct prohibited by state law and punishable by fine or imprisonment. Wis. Stat. § 939.12.
  - ii. Conduct punishable only by forfeiture is not a crime. *State v. Roggensack*, 15 Wis. 2d 625, 630, 113 N.W. 2d 389, 392 (1962); Wis. Stat. § 939.12.
- d. A conviction may generally serve as the basis for not hiring an applicant, but only if the nature of the charge or conviction is “substantially related” to the position in question.

A “conviction record” includes, but is not limited to, “information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has been less than honorably discharged or has been placed on probation, fined, imprisoned, placed on extended supervision or paroled pursuant to any law enforcement or military authority.” Wis. Stat. § 111.32(3).

**NOTE: Educational Agencies may refuse to employ and can terminate from employment an individual who has been convicted of a felony and who has not been pardoned for that felony. See Wis. Stats. 111.335(1)(d). 2011 Wisconsin Act 83.**

- e. The “substantial relationship” test requires the employer to assess on a case-by-case basis whether the conviction is substantially related to the position.
  - i. The “substantial relationship” test seeks to strike a balance between society’s interest in rehabilitating those who have been convicted of a crime and its interest in protecting citizens. *Robertson v. Family Dollar Stores* (LIRC, 10/14/05).



- ii. The inquiry is not whether it is “likely” that the convicted person will re-offend, but whether there is an unreasonable risk” of this occurring. *Matousek v. Sears Roebuck & Co.*, (LIRC, 02/28/07) (decision on remand from *Sears Roebuck & Co. v. LIRC*, Milw. Co. Cir. Ct., 09/29/06).
  - iii. The mere possibility that a person could re-offend at a particular job does not create a substantial relationship. *Robertson v. Family Dollar Stores* (LIRC, 10/14/05).
  - iv. The substantial relationship defense does not require the employer to demonstrate that it concluded at the time of the employment decision that the circumstances of the offense were substantially related to the circumstances of the job. It is an objective legal test which is meant to be applied after the fact by a reviewing tribunal. *Zeiler v. State of Wisconsin-Dept. of Corrections* (LIRC, 09/16/04).
  - v. The amount of time which has elapsed since the conviction is not relevant. *Jackson v. Klemm Tank Lines* (LIRC, 02/19/10). In Madison, an employer cannot consider a conviction older than three years. MGO § 39.03(8)(i)3.b.
  - vi. Issues to be considered in applying the “substantial relationship” test are:
    - a) Do the circumstances of the charge or conviction suggest a propensity to commit a similar offense?
    - b) Does the job provide a particular and significant opportunity for similar criminal behavior?
    - c) The circumstances that foster criminal activity: the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the individual as revealed by the conviction.
- B. Merely Working Around Women Does Not Make Assault Conviction Substantially Related. *Palmer v. Cree, Inc.*, ERD Case. No. CR201502651 (LIRC, December 03, 2018).

1. Derrick Palmer applied for a lighting layout specialist at Cree, Inc., where he would be responsible for recommending appropriate lighting equipment and creating site plans for customers. The job required project management and working with customers largely via phone and email to help customers determine where lighting products should go. The job required occasional travel to trade shows, client locations, and in-person customer interaction. There would be no supervision while traveling.
2. The individual hired for the position would work at an assembly facility with approximately 1,100 other employees (including roughly 500 women). The lighting specialist would primarily work in an open cubicle floor area of the facility. Occasionally clients would come to the facility and the specialist would work with them in demonstration rooms.
3. Palmer applied for the position in 2015. Palmer had the technical skills required for the job and was asked by Cree's recruiter to complete an online pre-interview questionnaire. The questionnaire contained questions asking if the applicant had ever been convicted of a felony or misdemeanor and, if yes, to explain. Palmer checked both boxes and wrote "domestic related charges" as the reason for the felony and misdemeanor.
4. Palmer then had two interviews with Cree recruiters and was subsequently offered the job, conditioned to successful completion of a pre-employment drug screen and background check. Palmer accepted the job. When Cree called Palmer to set up his drug test and background check, Palmer asked if Cree was aware of his convictions that stemmed from a 2012 domestic dispute involving a live-in girlfriend. After running Palmer's background check, Cree learned Palmer had convictions for criminal damage to property (misdemeanor), battery (misdemeanor), strangulation and suffocation (felony), and 4<sup>th</sup> degree sexual assault (misdemeanor). Palmer served a prison sentence for the crimes and was on probation.
5. Cree's recruiter sent Palmer's background check information to the company's general counsel to make a formal decision as to whether or not to rescind Palmer's job offer. The general counsel used a "matrix" she developed to classify particular crimes as "failing" the background check that would automatically disqualify a candidate from employment. All of Palmer's convictions were designated "fail" on the matrix chart and Cree subsequently rescinded Palmer's job offer. Palmer then sued Cree for conviction record discrimination under the WFEA.

6. LIRC ultimately held Palmer was discriminated against due to his conviction record in violation of the WFEA. Refusal to hire based upon an applicant's conviction record is only permissible where the conviction is substantially related to the circumstances of the particular job. A finding of a substantial relationship required a conclusion that a specific job provides an unacceptably high risk of recidivism for a particular employee. The burden is on the employer to prove a substantial relationship exists.
7. Cree argued its large female population (approximately 500 workers) was potentially problematic in that Palmer would have to work with female employees, may develop a relationship with a female employee, and might exhibit inappropriate behaviors towards a female employee if the relationship ended, just as he did with his previous girlfriend. Cree also pointed out that Palmer would potentially be involved in one-on-one work with customers in private settings, completely unsupervised.
8. LIRC rejected both these arguments as both highly speculative and factually unsupported. Having the ability to meet women and form personal relationships was not unique to the job at issue and described virtually any employment situation. The mere presence of women in the workplace cannot form the basis for finding a substantial relationship, absent a credible reason to believe the applicant being in the presence of female employees would provide the applicant with a substantial opportunity to reoffend.
9. LIRC noted that factual record did not suggest Palmer would be supervising or working closely with female employees, traveling with female employees on business trips, or working with female clients in private settings. Most interactions would take place by phone, email, or other public areas. Furthermore, in situations where an assault or battery conviction stems from personal relationships and the crimes are committed at home, it cannot necessarily be assumed that the individual is likely to engage in the same conduct with co-workers or customers at the work place.
10. Labor and Industry Review Commission cases applying the "substantial relationship" test:
  - a. Violent Crimes (assault, battery, sexual assault, murder, armed robbery) – substantial relationship found:
    - i. Truck driver
    - ii. Pack and load employee
    - iii. Cab driver

- iv. Pizza assembly line worker
  - v. Juvenile correction worker
  - vi. School Bus driver
- b. Violent Crimes (assault, battery, sexual assault, murder, armed robbery) – substantial relationship not found:
- i. Custodian
  - ii. Warehouse lift driver
  - iii. Order puller – store
  - iv. Retail store employee
  - v. Food delivery
  - vi. Nursing Home assistant
  - vii. Boiler attendee public school
- c. Drugs/Intoxication – substantial relationship found:
- i. High school assistant debate coach
  - ii. Credit manager
  - iii. Youth counselor
  - iv. Teaching assistant – prison
  - v. Daycare teacher
  - vi. Residential youth counselor
  - vii. Fuel loader
  - viii. Home health aid
  - ix. Security guard – nuclear power plant
- d. Drugs/Intoxication – substantial relationship not found:
- i. Custodian



- ii. Store stocker
- iii. Retail employee
- iv. Residential caretaker
- e. Economic offenses (theft, fraud, forgery) – substantial relationship found:
  - i. Rental car employee
  - ii. Truck driver
  - iii. Systems analyst
  - iv. Background checker
  - v. Insurance and investment sales
  - vi. Police officer
  - vii. Car sales manager
- f. Child abuse/pornography – substantial relationship found:
  - i. Associate professor of teacher education
  - ii. Retail/warehouse worker
  - iii. Burglar alarm technician
  - iv. Fitness center director
  - v. Delivery driver
- g. Child abuse/pornography – substantial relationship not found:
  - i. Airport Director of Operation
  - ii. Assistant Store manager
  - iii. Machine operator



11. Employers can ask applicants whether they are subject to a pending charge or have been convicted.
  - a. The application question should be phrased in terms of a conviction for a felony, misdemeanor or other offense.
  - b. The application question must also contain a statement that the disclosure of a conviction will not necessarily disqualify the applicant from consideration for employment.

12. Federal Equal Employment Opportunities Commission (“EEOC”)

- a. The EEOC issued an extensive guidance regarding employer use of criminal background checks in 2012 and concluded that an employer’s use of an individual’s criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964.

[http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)

Recently, the 5<sup>th</sup> Circuit Court of Appeals enjoined the EEOC from enforcing its guidelines on arrest and conviction records. *State of Texas v. EEOC*, (August 6, 2019). Private litigants can still raise such claims, however.

- b. It is possible that use of a conviction record under Wisconsin’s “substantial relationship” test could be permissible, but also run afoul of Title VII as enforced by the EEOC.
- c. The EEOC Guidance suggests the following regarding employment applications:

“As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.”
- d. An employer can violate Title VII with respect to protected classes in one of two ways: disparate treatment or disparate impact.



- i. “A violation may occur when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability).”
- ii. “An employer’s neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability).”
  - a) “National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.”
  - b) Two circumstances in which the EEOC believes employers will consistently meet the “job related and consistent with business necessity” defense are as follows:
    - 13. The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (<http://www.uniformguidelines.com/uniformguidelines.html>); or,
    - 14. The employer develops a targeted screen considering at least:
      - a. The nature of the crime;
      - b. The time elapsed; and,
      - c. The nature of the job

The employer’s policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.

15. An individualized assessment may include the following considerations:
  - a. The facts or circumstances surrounding the offense or conduct;
  - b. The number of offenses for which the individual was convicted;
  - c. Older age at the time of conviction, or release from prison;
  - d. Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
  - e. The length and consistency of employment history before and after the offense or conduct;
  - f. Rehabilitation efforts, e.g., education or training;
  - g. Employment or character references and any other information regarding fitness for the particular position; and
  - h. Whether the individual is bonded under a federal, state, or local bonding program.

B. Madison Ordinance

1. 39.03 Equal Opportunities Ordinance

The practice of providing equal opportunities in employment to persons without regard to sex, race, religion or atheism, color, national origin or ancestry, citizenship status, age, handicap/disability, marital status, source of income, arrest record, conviction record, credit history, less than honorable discharge, physical appearance, sexual orientation, gender identity, genetic identity, political beliefs, familial status, student status, domestic partner status, receipt of rental assistance, the fact that the person declines to disclose their social security number, homelessness or unemployment status is a desirable goal of the City of Madison and a matter of legitimate concern to its government. As a proper function of City government the City of Madison has provided in Sec. 39.02 for affirmative action in City employment to safeguard against discrimination.

2. Arrest record includes, but is not limited to, information indicating that a person 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 pursuant to any law enforcement or military authority.
3. Conviction record includes, but is not limited to, information indicating that a person has been convicted of a felony, misdemeanor or other offense, placed on probation, fined, imprisoned or paroled pursuant to any law enforcement or military authority.
4. Discrimination because of arrest record or conviction record is not prohibited if the employer, licensing authority, labor organization, or employment agency can show that the employee or applicant
  - a. Is subject to a pending criminal charge and the circumstances of the charge substantially relate to the circumstances of the particular job;
  - b. Has been within the past three (3) years 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 or licensed activity;
  - c. Is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state, federal or local law, administrative regulation or previously established business practice of the employer.
  - d. Is not eligible for licensing or a permit under state, federal or local law or administrative regulation due to a pending criminal charge or conviction for which the employee or applicant has not been pardoned, and where such license or permit is required for the position the employee holds or for which the applicant is applying.
5. It is not employment discrimination because of conviction record to deny or to refuse to issue a license or permit under the Madison General Ordinances if the person applying for or holding the license or permit has a pending criminal charge the circumstances of which substantially relate to the circumstances of the licensed activity or permit; or has been convicted of a felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the licensed activity, and has not been pardoned for that felony, misdemeanor, or other offense.

6. It is not employment discrimination because of conviction record to refuse to employ a person in a business licensed under Wis. Stat. § 440.26, or as an employee specified in Wis. Stat. § 440.26(5)(b), if the person has been convicted of a felony and has not been pardoned for that felony.
7. It is not employment discrimination because of conviction record to refuse to employ as an installer of burglar alarms a person who has been convicted of a felony and has not been pardoned.

C. State and Federal Discrimination Statutes

1. State and federal statutes make it a discriminatory, prohibited act to refuse to hire an applicant because of the applicant's protected class status.
2. When faced with a charge of discrimination in hiring, one of an employer's best defenses is that it was not aware of the applicant's protected class status. Background checks often reveal personal information that discloses protected class status. When conducting background checks, an employer may also learn of such information. In these instances, an employer can no longer contend that it had no knowledge of protected class information.
3. Protected classifications applicable to employers include:
  - Age
  - Race
  - Creed/Religion (or atheism)
  - Color
  - Disability
  - Sex
  - National origin
  - Ancestry
  - Pregnancy
  - Genetic history
  - Sexual orientation
  - Arrest or conviction record
  - Marital status
  - Use or non-use of lawful products while off-duty, off- premises
  - Declining to attend a meeting or participating in any communication about religious or political matters
  - Less than honorable discharge (Madison)
  - Membership in the armed forces or reserves (M)
  - Physical appearance (M)
  - Citizenship (M)
  - Gender identity (M)
  - Genetic identity (M)

- Credit history (M)
- Source of income (M)
- Political beliefs (M)
- Familial status (M)
- Student status (M)
- Domestic partner status (M)
- Receipt of rental assistance (M)
- Failure to disclose social security number (M)
- Homelessness or unemployment status (M)

D. Driving Records

1. The Driver’s Privacy Protection Act of 1994, governs the privacy and disclosure of personal information gathered by state Departments of Motor Vehicles and prohibits the disclosure of personal information contained in those records without the express consent of the person to whom such information applies. This statute applies to Departments of Motor Vehicles as well as other “authorized recipient[s] of personal information,” and imposes record-keeping requirements on those “authorized recipients.”

2. Wisconsin Department of Transportation statement:

“The Federal Driver’s Privacy Protection Act passed by Congress in 1994 and ruled constitutional by the U.S. Supreme Court in January of 2000 restricts access to Division of Motor Vehicle (DMV) records. The Act is intended to protect the privacy of personal information relating to driver licenses and instruction permits, vehicle titles and registrations and identification cards issued by motor vehicle departments.

A Vehicle/Driver Record Information Request Form MV2896 must be completed before information about a Wisconsin vehicle/driver record can be obtained. WisDOT will not provide most DMV records unless the records are obtained for one of the specific reasons listed on the Vehicle/Drivers Record Information Request Form.

It is the responsibility of the requester, not the Division of Motor Vehicles, to determine eligibility. If the form is completed fraudulently, the requester may be assessed fines under the federal act.”

E. Social Media

1. Right to Privacy



- a. Wisconsin recognizes an individual's right to privacy. Wis. Stat. § 995.50. An invasion of privacy includes, "(i) intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass." Wis. Stat. § 995.50(2)(a).
  - b. Employers who access applicant information stored on social media sites should proceed with caution. Generally, if an applicant uses social media and the applicant's profile is open to the public, then the applicant will not have a claim for invasion of privacy. However, under no circumstances should an employer ever access an applicant's information on a social media site through false pretenses.
2. Employer Requiring Access to Passwords – Wis. Stat. § 995.55
- a. On April 8, 2014, Wisconsin passed a law that places restrictions on employer's ability to access personal social media accounts of candidates and employees.
  - b. A number of states around the country have passed similar legislation. The new law also applies to educational institutions and landlords.
  - c. The general aim of the law is to protect individual privacy rights in personal social media accounts such as Facebook, Twitter, and blogs. The law prohibits employers from:
    - i. Requesting or requiring an employee or applicant, as a condition of employment, to disclose access information (e.g., passwords, usernames), to a personal social media account or to otherwise grant access to or allow observation of the account.
    - ii. Terminating or otherwise discriminating against an employee because the employee:
      - a) Refused to provide the employer access to a personal social media account; or
      - b) Opposed the employer's potential violation of the law, or filed a complaint or testified or assisted in an action against employer for such violation.



- iii. Refused to hire an applicant because the applicant refused to provide access to a personal social media account.
- d. The law retains certain important rights for employers:
  - i. Employers may require access information in order to gain access to an electronic communications device (such as a computer or cell phone) supplied by or paid for by the employer.
  - ii. Employers may require access to an account or service provided by the employer, obtained by the employee due to the employee's employment or which is used for the employer's business. Employers may discipline or discharge an employee for transferring the employer's confidential or financial information to the employee's personal social media account without the employer's authorization.
  - iii. Employers may require can employee to grant access to or allow observation of the employee's personal Internet account if there is a reasonable belief that the employee has transferred confidential or financial information without authorization to the employee's personal Internet account or has engaged in another work-related violation or misconduct, if there is a reasonable belief that activity on the employee's personal Internet account relates to that misconduct or violation. Employers are not permitted to require the disclosure of access information to the account in such cases.
  - iv. Employers may comply with a duty to screen applicants for employment prior to hiring and may comply with a duty to retain employee communications that is established under state or federal law, rules or regulations.
- F. Ban the Box Legislation. (a/k/a Fair Chance Laws)
  - 1. More than a dozen states and numerous local governments have passed legislation that prohibits employers from asking up front about an applicant's criminal history.
  - 2. These states vary as to what point in the hiring process the inquiries can be made and as to what exact types of inquiries are allowed.

3. Wisconsin has considered but has not passed such legislation. However, both Illinois and Minnesota have enacted ban the box legislation.
4. Employers, especially those who have multistate operations, may face practical challenges with regard to their job applications because of the varying legal restrictions in their states of operation.
  - a. Employers must examine whether they can use a single on-line application, or whether they must make changes in their application process to comply with each jurisdiction's applicable laws and individual requirements.
  - b. Or, should they comply with the most restrictive law across all jurisdictions.
5. Madison General Ordinance § 39.08 prohibits certain contractors doing business with the City of Madison from asking questions about criminal and arrest record on application forms and in interviews.

G. References

1. Employers frequently only provide an employee's position and dates of service.
2. Employers are protected from liability for giving a negative reference.
  - a. Wisconsin has created a statutory safe haven for employers in giving negative references about a former employer. Wis. Stat. § 895.487.

“An employer who, on the request of an employee or a prospective employer of the employee, provides a reference to that prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from all civil liability that may result from providing that reference. The presumption of good faith under this subsection may be rebutted only upon a showing by clear and convincing evidence that the employer knowingly provided false information in the reference, that the employer made the reference maliciously or that the employer made the reference in violation of s. 111.322 [i.e., the reference was discriminatory].”
  - b. Defamation law likewise carries protections for those giving negative references.

i. A communication is defamatory if it “tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him.” *Converters Equip. Corp. v. Condes Corp.*, 80 Wis. 2d 257, 262, 258 N.W.2d 712 (1977).

a) Truth is an absolute defense to defamation claims. *Wozniak v. Local 1111 UE*, 57 Wis. 2d 725, 732, 205 N.W.2d 369 (1973).

b) An employer has a conditional privilege which includes the provision of letters of reference from former employers to prospective employers.

“For instance, in *Hett v. Ploetz*, 20 Wis.2d 55, 59-62, 121 N.W.2d 270 (1963), a defamatory letter of reference from an ex-employer to a prospective employer was held to be entitled to a conditional privilege. We stated that the prospective employer has an interest in receiving information concerning the character and qualifications of the former employee, and the ex-employer has an interest in giving such information in good faith to insure that he may receive an honest evaluation when he hires new employees.” *Zinda v. Louisiana Pacific Corp.*, 149 Wis.2d 913 (1989).

c. There are limitations on what an employer can ask of someone giving a reference for an applicant.

i. Questions should be job-related and should be asked consistently of all references

ii. An employer cannot ask third parties what the employer could not ask the applicant directly. For example:

a) Questions directly or indirectly related to protected status:

1) Year of graduation from high school

2) Languages spoken (unless specifically job-related)



- 3) Place of birth
- 4) What organizations or clubs did the applicant belong to;
- 5) Mr., Mrs., Miss, Ms.
- 6) Spouse's name, occupation
- 7) Children? Ages?
- 8) What church does the applicant attend?
- 9) With whom does the applicant live?
- 10) Has the applicant ever been arrested?
- 11) Does the applicant own a car? (but not: Does the applicant have reliable transportation?)

b) Questions of a medical nature:

- 1) What current or past medical problems limited the applicant's to do the job?
- 2) Did the applicant ever suffer a work-related injury or file a worker's compensation claim?
- 3) How many days was the applicant sick last year? (but not: How many days was the applicant absent?)
- 4) What medications did the applicant take?
- 5) Was the applicant ever treated for drug abuse?

# ***Managing Employee Substance Abuse and Alcoholism***

BRIAN GOODMAN



# ***Managing Employee Substance Abuse and Alcoholism***

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## **I. Introduction.**

- A. This presentation will cover the “life cycle” of an employee who is suffering with alcohol or substance abuse issues.
  - 1. Phase 1: The Hiring Process
  - 2. Phase 2: Responding to Performance Problems
  - 3. Phase 3: Resolution of Performance Problems or Termination
- B. Hypothetical Scenarios:
  - 1. You are the HR director for Cosette Musical Instruments. Your company manufactures, ships, and sells musical instruments.
  - 2. Jesse is a recovering drug user looking for a job as a stock clerk with Cosette Musical Instruments. (Of course, Cosette doesn't know this about Jesse).
  - 3. Lilly is a recovering alcoholic looking for a job as a truck driver with Cosette Musical Instruments. (Of course, Cosette doesn't know this about Lilly).

## **II. Phase 1: The Hiring Process.**

### **A. The Job Application.**

- 1. Don't ask anything in an application that you wouldn't ask in an interview. Don't ask about disabilities, including drug addiction or alcoholism.
- 2. Applicant should sign a certification affirming that application is true, complete, and correct. Lying on the application provides a non-discriminatory basis for termination, if consistently enforced.
- 3. Criminal records inquiries. Wisconsin Fair Employment Act. (WFEA).



- a. Employers can ask about criminal convictions or pending criminal charges.
- b. Records of pending criminal charges can only be considered as part of the application if the circumstances of the charges substantially relate to the particular job.
- c. Records of criminal convictions can only be considered as part of the application if the circumstances of the charges substantially relate to the particular job, or for schools, if the individual has been convicted of a felony and has not been pardoned for that felony.
- d. Employers should not assume drug addiction or alcoholism based on a criminal record with drug arrests or convictions. Alcoholism and drug addiction may be considered disabilities under the ADA and/or the WFEA. It may also be potentially “regarded as” disability discrimination to refuse to hire based on perceived disability, even if the employee is not actually disabled.

**B. Interviews.**

- 1. What questions can an employer ask?
  - a. Are you able to do the job?  
  
Specific essential job duties—hours, travel, lifting and other physical requirements.
  - b. Do you have the qualifications for the job?  
  
Education, certifications, experience.
- 2. What questions should an employer not ask?
  - a. Have you ever used illegal drugs?
  - b. Have you ever used prescription drugs?
  - c. Are you an alcoholic?



3. What if an employee volunteers information about drug or alcohol addiction?

“The Company doesn’t ask about an applicant’s disability status, because it’s not relevant to the applicant’s qualifications unless the applicant needs to request a reasonable accomodation in order to complete the application process, and the Company does not consider such information in making its employment decisions.”

**C. Conditional Job Offers.**

1. If the employee is selected after the interview, employers should make a conditional job offer pending three things:
  - a. Reference check.
  - b. Background check.
  - c. Drug test.
2. Reference Check.
  - a. Do not skip this step!
  - b. Employers might be surprised by what past employers will say about an employee.
  - c. Do not ask references any question you could not ask the candidate directly.
  - d. Employers may learn about past conduct that would disqualify the candidate for the job.
  - e. Be careful. If you learn about a disability, consider reasonable accommodations as part of the hiring process.
3. Criminal Background Check.
  - a. Comply with the WFEA as outlined above.
  - b. Are any pending criminal charges or criminal convictions substantially related to the duties of the job for which the applicant is applying?
    - i. The elements of the crime and the specific facts surrounding the crime should be considered in making this determination.





- ii. If the applicant has multiple recent DUI's, employers might not have to hire them as a bus driver.
    - iii. If an applicant has a white-collar theft conviction, employers might not have to hire them as a bookkeeper.
  - c. School districts can refuse to hire someone who has been convicted of a felony and not pardoned for that felony, even if the felony conviction is not substantially related to the job position. However, this exception does not apply to private sector companies.
  - d. In a unique situation, an employer may want to conduct its own investigation into the conduct surrounding the pending criminal charges or criminal convictions. A decision based on the employer's own investigation into an applicant (or employee's) conduct is not discrimination based on arrest or conviction record.
  - e. Be aware that the employer may need to prove that its policy regarding employment decisions surrounding criminal backgrounds are job-related and consistent with business necessity to defend against a claim that such a policy has a disparate impact against applicants from certain protected classes.
  - f. During a background check, employers may discover an applicant has a conviction for drug use. Drug use is not a disability, although drug addiction might be. Depending on the circumstances, a drug-related conviction may or may not be substantially related to the position at issue.
- 4. Drug and Alcohol Testing of Applicants.
  - a. Always wait until **after** making a conditional offer to drug test an applicant.
  - b. When conducted in good faith, a pre-offer drug test is legal, but pre-offer medical tests and inquiries are not permissible. This can cause problems from a practical perspective. The line between asking questions about why an employee tested positive for drugs (such as opiates) and asking questions about an employee's medical status is not always clear.

Drug testing is not a prohibited pre-employment medical examination. While the American with Disabilities Act (ADA) covers alcoholism and individuals recovering from drug addiction, when it appears an applicant has engaged in illegal drug use, the employer may require an applicant to provide evidence that the individual is not currently engaging in illegal drug use. However, because the WFEA may protect applicants who are addicted to illegal drugs from discrimination (provided the drug use is non-volitional and medically diagnosed), the employer should ensure that any such inquiry is limited to ensuring that the applicant can successfully complete his/her job responsibilities.

- c. The Equal Employment Opportunity Commission (EEOC) says employers can drug test before a conditional offer, but may not conduct a medical test before a conditional offer.
  - i. Problem: conducting a drug test also tests for certain legal drugs.
  - ii. If an applicant tests positive for opiates, employers cannot assume that this constitutes illegal drug use.
  - iii. Follow-up questions need to be asked of the applicant.
- d. Tip! Advertise in the job posting that the employer will be drug testing all applicants prior to hire. Current illegal drug users may choose not to apply in the first place.
- e. Some employers have reported difficulties with filling positions, particularly entry-level positions, when their drug tests require that employees test clean for marijuana use.
  - i. Maintaining a drug-free workplace under the Drug-Free Workplace Act of 1988 does not require pre-employment testing but rather requires a policy prohibiting the use of drugs by employees and imposing a sanction or requiring participation in an assistance program when an employee is convicted of an unlawful drug offense in the workplace.
  - ii. When determining what drugs to test for under a hiring policy, employers should also consider their worker's compensation policy.



- iii. The rapid proliferation of unregulated CBD products also creates challenges with respect to drug testing. An employee might test positive for THC because he/she uses one of these products (even though the product label and salesperson promised it was THC-free). Furthermore, the legality of these products is not currently clear under state and federal law.
  
- f. Hypothetical regarding pre-hire drug tests.
  - i. Jesse is no longer on drugs and passes the drug test.
  - ii. Lilly passes the drug test because the drug test does not test for alcohol use.
  - iii. Drug testing is not a perfect solution. Consider if the desire for a drug free workplace is worth the expense of testing. For example, drug testing did not catch Jesse and Lilly, and they will not be successful employees.
  
- g. Off-duty use of lawful products. Wis. Stat. § 111.35.
  - i. Employers generally can still restrict use of such products during work hours and require employees not to be under the influence of such products during work hours.
  - ii. It is not a violation of state law to bar, suspend, or terminate an individual from employment if the employee's use of lawful products impairs the individual's ability to undertake adequately the job-related responsibilities of that individual's employment. However, if the use of lawful products is related to an addiction, there may be an obligation to attempt to provide an accommodation.
  - iii. It is not a violation of state law to bar, suspend, or terminate an individual from employment if the employee's use of lawful products conflicts with any federal or state statute, rule, or regulation.
  - iv. Use of prescription medication without a lawful prescription is not use of a lawful product. *Miller v. Menard, Inc.*, ERD Case. No. CR200403853 (LIRC, Aug. 31, 2006).

- v. Other states might have other protection for off-duty use of lawful products, including marijuana (medical or recreational). However, not all states that have legalized marijuana, prevent employers from using an employee's marijuana use as the basis for adverse employment actions. For example, The Colorado Supreme Court ruled that its state lawful use law did not protect the use of marijuana because lawful use meant lawful under both state and federal law.
  
- h. Drug-Free Workplace Act
  - i. Requires employers receiving federal grants (including school districts and other public or private sector employers) to have and distribute to all employees a policy prohibiting the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the workplace.
  - ii. Requires such employers to establish a drug-free awareness program to inform employees about the dangers of drug abuse in the workplace, the employer's policy of maintaining a drug-free workplace, availability of drug counseling, and employee assistance programs, and penalties for violations.
  - iii. The policy must require employees to notify the employer of any criminal drug statute conviction no later than 5 days after the conviction. The employer in turn must report the conviction to the federal agency that awarded the grant to the employer.
  - iv. This law doesn't cover alcohol use by employees, just drug use.
  
- i. Omnibus Transportation Employee Testing Act (OTETA).
  - i. This law covers employers who employ workers who drive commercial trucks that require a CDL, which includes bus drivers.
  - ii. General Testing Rules.
    - (a) Drug tests must screen for:
      - Marijuana
      - Cocaine
      - Opiates
      - Amphetamines
      - PCP



- (b) Follow the testing procedures provided in the federal regulations (or use a 3rd party provider that does). 49 C.F.R. Part 40.
  - (c) Keep all test results confidential.
- iii. Pre-employment Testing
  - (a) Must generally test *new employees* for drugs prior to performing safety-sensitive function.
  - (b) If the employer tests any covered *applicant* prior to hiring, the employer must test all applicants prior to hire. Test after a conditional offer.
  - (c) Can test new employees for alcohol but then must test all new employees for alcohol.
    - (i) Must conduct alcohol test after conditional offer of employment.
    - (ii) Employee must have alcohol concentration under .04%
- iv. Reasonable Suspicion Testing.
  - (a) Must test when the employer has reasonable suspicion of drug or alcohol use based on specific, contemporaneous, and articulable observations made during, just before, or just after the work period.
  - (b) Employees must be tested within 2 hours of the observation.
  - (c) Supervisors must receive training.
- v. Post-accident Testing.
 

If a driver is cited for a moving violation in connection with an accident, or there is fatality, administer drug and alcohol test within 2 hours of the accident.
- vi. Random Testing



- (a) 10% of drivers must be tested annually for alcohol use.
  - (b) 50% of drivers must be tested annually for drug use.
- vii. Consequences for failing a test.
  - (a) Any employee failing a drug test is restricted from safety sensitive functions:
    - (i) Driving commercial vehicles,
    - (ii) Waiting to be dispatched,
    - (iii) Inspecting vehicles,
    - (iv) Being in a commercial vehicle except for a sleeper berth,
    - (v) Loading, unloading, or supervising the loading of a vehicle, or
    - (vi) Repairing a vehicle.
  - (b) Before returning to work following a failed test, employee must test negative for drugs and test with less than .02% alcohol concentration.
- viii. Hypothetical regarding drug testing after vehicle accidents.
  - (a) Lilly is hired as a truck driver and is involved in an accident while driving the truck. Does Lilly have to be alcohol and drug tested?

If Lilly is cited for a moving violation in connection with the accident, or there is fatality, Cosette must administer a drug test within 2 hours of the accident.
  - (b) Jesse fails a random drug test, but he wants to finish his shift by helping to unload the truck.



A stock clerk does not have to hold a CDL and thus is not covered by OTETA. However, if Cosette has a valid random drug testing policy, and Jesse failed a test under that policy, Cosette should take immediate action and not allow Jesse to perform any work, especially not safety sensitive functions like unloading a truck.

### III. Phase II: Responding to Performance Problems.

#### A. **Drug and Alcohol Testing of Employees.**

1. In general, employers should establish a policy pertaining to drug and alcohol testing of current employees prior to requiring any such test.
2. The policy should require reasonable suspicion of alcohol or drug use by the employee while performing his or her job duties prior to requiring a test. This is especially important in the public sector because drug testing is considered a search subject to the Fourth Amendment. *Knox v. Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ.*, 158 F.3d 361 (6<sup>th</sup> Cir. 1998). When circumstances suggest an employee is using drugs or alcohol, a public sector employer may require or demand that the employee take a drug test. *Id.* at 384. Reasonable suspicion of drug use is needed to compel a public sector employee to submit to a test. *Donegan v. Livingston*, 877 F. Supp.2d 212 (M.D. Pa. 2012). The determination of reasonable suspicion requires an objective evaluation based upon a fact-specific inquiry directed at a particular individual. *Armington v. Sch. Dist. of Phila.*, 767 F. Supp. 661, 666 (E.D. Pa. 1991).

Employers with a reasonable suspicion drug testing policy should ensure that managers and supervisors charged with enforcing the policy are appropriately trained to identify the symptoms of intoxication. These managers and supervisors should be qualified to evaluate employees for reasonable suspicion of intoxication and appropriately document their reasonable suspicion. When evaluating employees for reasonable suspicion of intoxication, it may be helpful if multiple employees are involved.

Refusal to take a drug test when required may warrant the employee's dismissal where reasonable suspicion exists to require a test. *Smith Cty. Sch. Dist. v. Barnes*, 90 So.3d 63 (Miss. 2012).

3. In the private sector, a drug testing policy could also require random testing of employees, except in states that prohibit random drug testing by statute.



In the public sector, an across the board random testing policy would create risks under the Fourth Amendment. The Fourth Amendment usually requires a degree of individualized suspicion before a public sector employee may be required to undergo a drug test. *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 143 F.3d 853 (5th Cir. 1998).

Some courts find that a public sector employer may require random drug testing of employees if the test is truly random and has a connection to the employer's legitimate safety concerns. *Smith Cty. Educ. Ass'n v. Smith Cty. Bd. of Educ.*, 781 F. Supp.2d 604 (M.D. Tenn. 2011) (noting random drug tests were not unconstitutional *per se*, but that the school board must demonstrate a need for such a policy, and teachers must be given notice of what drugs are subject to testing and how the policy will be implemented).

Other courts, however, have found that random drug testing violates employees' Fourth Amendment rights because they are not in safety sensitive positions that justify random drug testing. Under U.S. Supreme Court case law, a safety sensitive position requires that performance of the job carry a concrete risk of massive property damage, personal injury, or death. *American Fed. of Teachers-West Virginia, AFL-CIO v. Kanawha Cty. Bd. of Educ.*, 592 F. Supp. 2d 883 (S.D. W. Va. 2009).

4. The employer should have administrative procedures to ensure accuracy with its testing. For example, if a breathalyzer will be used for alcohol testing, the employee administering the breathalyzer should be adequately trained. The breathalyzer should meet Department of Transportation standards.
5. The employer should strongly consider contracting with a qualified vendor to administer drug and alcohol tests to employees. This will limit challenges to the employer's policy from employees who test positive. Never allow an employee to drive themselves to the vendor if you have reasonable suspicion that an employee is under the influence of drugs or alcohol.

## **B. Hypothetical Regarding Drug Use Related Performance Problems.**

Jesse is late for work 2 to 3 times per week. Jesse says that he has relapsed and is using cocaine after work which is upsetting his sleep cycle.

How do you respond?

## **C. Americans with Disabilities Act (ADA) and Illegal Drug Use.**

1. A qualified individual with a disability does not include one who is currently using illegal drugs.





2. Cosette can likely fire Jesse without liability under the ADA. His current use of drugs is not a disability protected under the ADA.

**D. WFEA and Illegal Drug Use.**

1. An employee's current use of illegal drugs may constitute a disability if the employee's use is non-volitional and supported by medical evidence. Unlike the ADA, the WFEA does not have any express statutory provisions relating to alcoholism or illegal drug use. Case law suggests medically diagnosed alcoholism is likely a disability under the WFEA if the employee's use is non-volitional. *Connecticut Gen. Life Ins. Co. v. DILHR*, 86 Wis. 2d 393, 273 N.W.2d 206 (1979). The same standard likely applies for an employee's illegal drug use. *Bailey v. St. Michael Hospital*, ERD Case No. 199801010 (LIRC June 30, 2000).

Establishing that a non-volitional condition exists under the WFEA generally requires an employee to provide medical evidence, such as a doctor's report. *Id.* However, an employee would not necessarily be required to provide this level of evidence in order to trigger an employer's duty to explore whether the employee has a disability under the WFEA.

2. Be careful and consult with legal counsel prior to taking action against Jesse under the WFEA. If Jesse is under a doctor's care and the non-volitional nature of his drug use can be documented, then Cosette has to consider if any reasonable accommodation can help Jesse perform his job responsibilities. If Jesse is using illegal drugs *at work* this can generally be treated as a conduct issue, and even where clemency and forbearance may apply, it is unlikely to justify a violation of a drug-free workplace policy, particularly if Cosette is subject to the Drug-Free Workplace Act.

**E. Family and Medical Leave Act (FMLA).**

1. What if Jesse asks for FMLA leave for treatment at the same time Cosette is discussing his tardiness?
2. Cosette can discipline or terminate Jesse based on behavior that occurred before his request for leave if the discipline and termination is consistent with policy and consistent with treatment of similarly-situated employees who did not request medical leave. However, if Jesse raised the issue of addiction causing his tardiness, Cosette would have to consider its obligation to reasonably accommodate under the WFEA, which would likely result in the granting of the FMLA leave.



3. If Cosette would not terminate an employee for tardiness (or off-duty drug use) under these circumstances, Jesse might qualify for leave.
4. Substance abuse can be a serious health condition under state or federal FMLA when formal treatment is provided by a health care provider or on referral from a health care provider.
  - a. Under state FMLA, health care provider includes: licensed physician, nurse, chiropractor, dentist, podiatrist, physical therapist, optometrist, psychologist, certified occupational therapist, occupational therapy assistant, respiratory care practitioner, acupuncturist, social worker, marriage and family therapist, professional counselor, speech-language pathologist or audiologist, and Christian Science practitioner.
  - b. Under federal FMLA, health care provider includes: doctors of medicine or osteopathy authorized to practice medicine or surgery, podiatrists, dentists, clinical psychologists, optometrists, chiropractors (for manual manipulation of spine to correct subluxation demonstrated by X-ray), nurse practitioners, nurse-midwives, and Christian Science practitioners.
5. An absence due to employee substance abuse (as opposed to treatment) is not a covered leave under FMLA
6. An absence by an employee to complete informal treatment is not likely a covered leave under state or federal FMLA.
7. The ADA and the WFEA may provide more leave to employees than is required under FMLA.

**F. Hypothetical Regarding Alcohol Use Related Performance Problems.**

Lilly receives a poor evaluation that cites attendance problems and notes that Lilly appears to lose focus while driving and loading/unloading her truck. While her supervisor is discussing the performance problem with her, Lilly explains that she is an alcoholic.

**G. Disability Discrimination Laws and Alcoholism.**

1. Alcoholism can qualify as a disability under both the ADA and WFEA.
  - a. Under the ADA, alcoholism is a disability if it substantially limits one or more of the employee's major life activities. An employer cannot consider the fact that the employee is (or could be) receiving treatment that would reduce the impact on major life activities when determining if an employee's alcoholism is a disability.

- b. Under the WFEA, a disability is a physical or mental impairment that limits the capacity to work. For alcoholism to be a disability under the WFEA the condition must be medically diagnosed and “non-volitional.” This imposes a higher burden on employees. However, an employee is not required to provide this level of medical documentation to trigger an employer’s duty to explore a possible accommodation for alcoholism. The employee telling the employer that she is an alcoholic would be adequate to trigger that obligation, and the obligation may also be triggered even if the employee has not made such a statement to the employer, but the employer is aware of facts that reasonably suggest that the employee is an alcoholic.

Once an employer has notice that an employee has a disability (under the ADA or under the WFEA), the employer must engage in the interactive process to determine a reasonable accommodation.

2. If Cosette would not fire a non-alcoholic employee for this poor evaluation, Cosette cannot fire Lilly either. Additionally, Cosette must begin the interactive process with Lilly.
3. Under the WFEA, conduct that is caused by a disability known to an employer cannot be the basis for discipline by the employer, unless no reasonable accommodation is available that would allow the employee to perform his/her job-related responsibilities. Whether conduct is caused by a disability requires expert evidence. Therefore, Cosette should explore with Lilly’s medical providers (and possibly a medical consultant hired by Cosette) whether Lilly’s alcoholism is a disability under the WFEA and whether the conduct at issue is caused by a disability. If so, Cosette should begin the interactive process and determine whether a reasonable accommodation is available.
4. Under the ADA, an employer could hold the employee who suffers from alcoholism to the same standards of employment as other employees. As a practical matter, employers need to consider the more stringent requirements of the WFEA.
5. Interactive Process.
  - a. Cosette and Lilly should work together to establish a reasonable accommodation.
  - b. If Cosette causes the interactive process to break down, it can be liable.
  - c. If Lilly causes the interactive process to break down, Cosette is generally not liable.



- d. Who caused the breakdown may be a question for a jury to decide, and when juries get involved the outcome of any litigation can be uncertain.
6. What is a reasonable accommodation?
- a. Under the ADA, a reasonable accommodation enables the employee to perform the essential functions of the job.
  - b. Under the WFEA, an accommodation is reasonable if it allows the employee to adequately perform the employee's job responsibilities.
  - c. Types of accommodations that may be reasonable:
    - i. Leave can be a possible reasonable accommodation, if it is not indefinite (even if it is in excess of FMLA obligation). Consider the interplay of FMLA leave and the request for a leave of absence as a reasonable accommodation.
    - ii. Allow the employee to leave work early for treatment.
    - iii. Allow the employee to call a sponsor or therapist on a cell phone during work time if needed.
    - iv. Temporary reassignment to a new position.
    - v. Clemency and forbearance under WFEA. Temporary suspension of certain work rules if the employee's disability prevents him or her from complying with those rules. A common rule to forbear is attendance policies.
    - vi. Under the ADA, remove non-essential job functions.
    - vii. Under the WFEA, may need to consider removing some essential job functions.
  - d. Creating a new position for the employee is generally NOT a reasonable accommodation.
7. An accommodation is not reasonable if it would cause undue hardship. Undue hardship is based on individual facts and circumstances including:
- a. Expense of the accommodation,
  - b. Size of the employer,

- c. Financial resources of the employer, and
  - d. Impact on operations.
- 8. Employee is not entitled to the reasonable accommodation of their choice; the employer does not have to select the employee's preferred accommodation so long as the employer's proposed accommodation is also effective.
- 9. Under the ADA, if no reasonable accommodation will allow an employee to adequately perform the essential functions of the job, the employer does not have a duty to provide an accommodation. This requires the employer to rule out all reasonable accommodations first.
- 10. Under the WFEA, prior to taking an adverse action against the employee, the employer needs to demonstrate that, even with a reasonable accommodation, the individual will not be able to adequately perform the job or would pose a present or future safety hazard (job-relatedness defense). This requires the employer to rule out all reasonable accommodations first. Technically, this does not require the employer to first engage in the interactive process prior to taking action; the employer just needs to be able to prove that no reasonable accommodation would be effective. However, as a practical matter, it may be difficult to prove that no accommodation would have been effective if the employer does not engage in the interactive process.
- 11. If an employee with a disability poses a direct threat, the employee is not qualified under the ADA.
  - a. Meaning: a significant risk of harm to the health and safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.
  - b. From a practical perspective, it may pose a direct threat to safety for an alcoholic employee to show up to work intoxicated. However, a reasonable accommodation can include clemency and forbearance of an alcohol policy followed by employers sending the intoxicated employee home. This would limit the potential direct threat.
  - c. Where an employee repeatedly shows up to work intoxicated, the employer has to determine whether it has sufficiently accommodated the employee such as through clemency and forbearance and unpaid leave. Then, the employer, in consultation with legal counsel, can determine whether or not to terminate the employee.
- 12. Hypothetical regarding alcohol use related performance problems continued.

While under the ADA, Cosette can take adverse action if Lilly fails to meet the employer's standards due to alcohol use, the WFEA may be more generous. First, Cosette must determine if Lilly's alcohol use rises to the level of a disability under the Act. Then, Cosette has to determine if the expert medical evidence demonstrates that Lilly's poor performance is caused by her alcoholism. Then, Cosette must consider whether clemency and forbearance or other reasonable accommodations would allow Lilly to perform her job related responsibilities.

What accommodations could Cosette offer Lilly after she reveals her struggles with alcoholism?

Consider clemency and forbearance, intermittent leave for treatment in the afternoons, and unpaid leave.

What if Lilly does not qualify for FMLA? Still consider short-term unpaid leave as a reasonable accommodation.

#### **H. Current Drug Use.**

1. Where is the line between current drug use and past drug addiction?
  - a. What was the length of time the employee was drug free?
  - b. Was there a positive drug test?
  - c. Was drug use occurring recently enough to justify the employer's reasonable belief of ongoing problem?
2. No set time period, individual assessment.
3. One court said a 3-week period of abstinence was not enough.
4. Remember, illegal drugs means unlawful drugs as well as unlawful use of prescription drugs.
5. Under the WFEA, there is not a clear rule that current drug use is not covered, if it is medically diagnosed and non-volitional. Arguably, a current illegal drug user could be considered disabled under the WFEA if it is medically diagnosed and non-volitional. In such situations, the employer would have to consider whether a reasonable accommodation could able a current illegal drug user to perform his/her job responsibilities and ensure present and future safety. These are challenging situations that need to be handled carefully on a case-by-case basis.

## **I. Past Drug Use.**

1. Employees are covered by the ADA who:
  - a. Complete a drug rehabilitation program,
  - b. Participate in a drug rehabilitation program, or
  - c. Are incorrectly regarded as illegally using drugs by the employer.
2. But, current illegal drug use is still not covered by the ADA. An employee cannot sign up for a rehab program just to gain the protections of the ADA; the employee would likely still be current drug user.
3. Employers may request evidence that an employee has completed or participated in rehab.

## **IV. Phase III: Resolution of Performance Problems or Termination.**

### **A. Last Chance Agreements.**

1. In lieu of termination or as part of the interactive process, consider entering into a last chance agreement with the employee.
2. This might allow the employee to take time off for treatment and complete a medical program.
3. Upon return to work, the employee must adequately perform their job and meet the employer's performance standards (*i.e.*, not fail another drug test).
4. Can provide that any breach of the agreement will constitute just cause for dismissal (if an employer's individual contracts, employee handbooks, or policies, require such a standard).
5. Failure to comply with a last chance agreement provides a non-discriminatory basis for termination. It can also demonstrate how an employer attempted to reasonably accommodate the employee.
6. Additional non-legal reasons last change agreements can be effective:
  - a. Last chance agreements provide clarity to the employee while also providing the opportunity to get healthy.



- b. Show that the employer is interested in helping employees.
- c. Show the employer does not tolerate alcohol and drug abuse in the workplace.
- d. These agreements are confidential but can be good for workplace culture by giving employees a second chance.

## **B. Termination.**

Can terminate if:

- 1. The employee violates a last chance agreement;
- 2. The employee fails to meet the employer's standards due to alcohol use, (and no reasonable accommodation would allow the employee to perform his/her job responsibilities); or
- 3. The employee is currently using illegal drugs of his or her own volition (*i.e.*, recreational use).

## **C. Resignation Agreements.**

- 1. Consider a possible resignation agreement in lieu of termination.
- 2. Give something to the employee in exchange for a waiver, including a waiver of disability discrimination claims.
- 3. Do not have to provide cash. Could provide:
  - a. Insurance benefits after employment for a period of time.
  - b. A factual letter of reference:
    - i. Dates of employment and general job duties.
    - ii. Never be deceitful.
    - iii. Difference between a reference letter and a recommendation letter.
- 4. Be aware of the special requirements for waivers of age discrimination claims (OWBPA) where applicable and be sure to waive state law claims as well as federal.





**D. Hypothetical Regarding Termination of Employees.**

1. Jesse continues to use illegal drugs during the course of his employment.
  - a. Cosette offers Jesse a resignation agreement in lieu of termination which waives all of his potential claims against Cosette in exchange for one week of salary. Jesse agrees to the resignation agreement.
  - b. Cosette is now protected from any claims that Jesse may bring regarding his employment up to the date he signs the agreement, provided the resignation agreement complies with all the requirements for a legally-binding waiver of claims under state and federal law.
  - c. In the alternative, Cosette may decide not to offer Jesse a resignation agreement knowing that Jesse is not qualified under the ADA and the risk of liability may not justify additional expense. However, Cosette should ensure it has first attempted reasonable accommodation under the WFEA.
2. Lilly returns from unpaid leave where she completed a rehabilitation program. Unfortunately, shortly thereafter she violates the last chance agreement she signed prior to taking leave for the rehabilitation program by coming to work under the influence of alcohol.
  - a. Lilly refuses a resignation agreement believing that Cosette has violated her rights under the ADA and WFEA. Lilly threatens to sue Cosette if Cosette terminates her.
    - i. Review the documentation in Lilly's personnel file.
    - ii. Review the enforceability of the last chance agreement.
    - iii. Review all of the steps that Cosette has taken to reasonably accommodate Lilly.
  - b. In consultation with legal counsel, decide whether Cosette can terminate Lilly without being exposed to liability under the ADA and the WFEA.





## ***Thank You!***

We appreciate your attendance today and hope you found the information presented helpful. Please take a moment to complete the seminar evaluation form and leave it on the table when you go. The evaluation can also be completed online: <https://forms.gle/P4SvivBAFxckL4yE7>

If you have additional questions or would like more information about any of the topics presented, we invite you to contact one of today's speakers.



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