

The Web of Leave and Accommodation Laws - ADA, FMLA, PWFA, and MORE!

Presented By:
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Attorneys Sara Ackermann, Nicole Stangl, and Morgan Sweeney present:

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1

EEOC Wearables Fact Sheet

- **Collecting Information from Wearables** – may be conducting “**medical examination**” or making “**disability-related inquires**”

Example

Marco’s employer tells him that he must wear a company-issued tracking watch. The watch collects Marco’s vital signs, information about his gait, and other medical information. This mandatory use of the watch does not satisfy the ADA’s requirements for employee health programs that are voluntary, and it also may be a medical examination under the ADA.



2

EEOC Wearables Fact Sheet

- **Using Information from Wearables** – if wearable-generated information is used to make employment decision with an **adverse effect** on employees because of a protected basis, this could violate EEO laws.
- Example: Using heart rate, fatigue level, and/or temperature information to infer that an employee is **pregnant** and then as a result fire the employee or put her on unpaid leave against her will.
- **Risk of disparate impact.**



3

EEOC Wearables Fact Sheet

- **Reasonable Accommodation Related to Wearables** – may need to make an exception to wearables as a reasonable accommodation under Title VII, ADA, or PWFA (or state law equivalents).



4

PWFA vs. FMLA vs. ADA

- **Pregnant Workers Fairness Act (PWFA): Condition related to pregnancy, childbirth, or related medical condition**
 - Accommodations!
 - No “magic words.”
 - **Employer burden to notify employee.**
 - **Leave is the last option.**
- **ADA: Disability**
 - Accommodation required – [this includes leave post-FMLA.](#)
 - **Employee must request the accommodation unless obvious.**
 - Sporadic, intermittent attendance may need to be tolerated unless undue hardship.
- **Family Medical Leave Act (FMLA): Serious Health Condition**
 - [Leave only—not accommodation!!](#)
 - No “magic words.”
 - **Employer burden to notify employee.**
 - Leave can be intermittent (migraines, IBS, etc.)
 - Reinstatement is protected.
 - This is not “work from home.”



5

Family Medical Leave Act: 101

- 50 employees for 20 or more weeks of this year or last year (everyone!).
- Work 12 months. (Need not be consecutive.)
- Work 1,250 hours in previous 12 months. (No paid leave.)
- **Work at location where 50 employees within 75 miles? CAUTION!**
 - What does your policy say? Are you going to offer FMLA to employees in remote locations?
 - Litigation! Home base? Work Assigned From? Employee Reports to?
 - Use caution. Offer everyone FMLA?
 - Pros: No disputes.
 - Cons: Giving job protection if it is not necessary.



6

Wisconsin Family Medical Leave: 101

- 50 employees for 6 of last 12 months (everyone!).
- Work 52 consecutive weeks.
- Work 1,000 hours in previous 52 weeks (including paid leave).
- No employee miles requirement.



7

The Leave: Federal

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid, job-protected leave in a 12-month period (*rolling or calendar must designate*) for one or more of the following reasons:

- for the birth of a child, and to bond with the newborn child;
- for the placement with the employee of a child for adoption or foster care, and to bond with that child;
- to care for an immediate family member (spouse, child, or parent – but not a parent “in-law”) with a serious health condition.



8

The Leave: Federal

- Take medical leave when the employee is unable to work because of a serious health condition; or
- For qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or call to covered active duty status as a member of the National Guard, Reserves, or Regular Armed Forces.
- The FMLA also allows eligible employees to take up to 26 workweeks of unpaid, job-protected leave in a "single 12-month period" to care for a covered servicemember with a serious injury or illness.



9

The Leave: WIFMLA

Six weeks of leave in a 12-month calendar year for:

- for the birth of a child, and to bond with the newborn child;
- for the placement with the employee of a child for adoption or foster care, and to bond with that child;

Two weeks of leave in a 12-month calendar year for EACH:

- to care for an immediate family member (spouse, child, parent, domestic partner) with a serious health condition;
- to take medical leave when the employee is unable to work because of a serious health condition.



10

FMLA Traps

- An employee need not use “magic words.”
- Documentation – Department of Labor is very picky in this area (follow the timeline and forms).
- SHC? Anything more than standard cold/flu.
- Intermittent leave for episodes/flare ups is absolute. There is no hardship defense.
- If abuse is suspected, what can you do? (Surveillance?)
- If unsure why employee was gone, or vague response, what can you do?
- Employees cannot be penalized for using FMLA leave.
- YOU CAN BE PERSONALLY LIABLE!
- Document, Document, Document.



11

FMLA Traps – Reinstatement/Return

- Must return to equivalent position.
- Exception: Legitimate business decision
 - Misconduct?
 - RIF?
 - Will need to show: Why? And why now?
- Timing is critical factor and must be supported.
- What if employee cannot return at end of FMLA? (Hint: we are going to talk about this law next...)
- Note: No 100% policies!!! Cannot require an employee to be 100% prior to return. This is violation of ADA and WFEA.



12

Disability: Leave as an Accommodation



13

Never say **never** to a request for
an accommodation.



14

Definition

- ADA: *Physical or mental condition that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning).*
- WFEA: *An impairment that makes “achievement unusually difficult or limits the capacity to work.”*
- Note: WFEA waaaaayyyy broader than ADA.
- Under both laws, a disability can be a temporary severe impairment (3 months is enough).



15

Disability

- Disability (ADA/WI):
 - Chronic Fatigue Syndrome
 - Arthritis/Joint Problems
 - Allergies
 - Depression, Anxiety
 - ADHD, OCD, Autism
 - Chemical Sensitivity, Migraines, IBS
 - Covid? Depends.
 - Broken leg? Depends.
 - Pregnancy
 - *Need not be permanent.*



16

Pregnant Workers Fairness Act (PWFA)

- Any employer with 15 or more employees must provide reasonable accommodations for employees facing limitations related too ...
 - Pregnancy
 - Childbirth
 - Or related medical conditions ...
- Focus is on providing *temporary* accommodations.
- The employee does not need to have a disability to be eligible for an accommodation.
- Accommodation is for a “known limitation.”



17

Reasonable Accommodation (ADA)

- A reasonable accommodation *is any change in the work environment or in the way things are customarily done that enables an applicant or employee with a disability to enjoy equal employment opportunities.*
- An employee generally must request accommodation but does not have to use the term “reasonable accommodation,” or even “accommodation,” to put the employer on notice.
- Employee needs only to request an *adjustment or change at work due to a medical condition.*
- *Ex: “I cannot get to work on time because I cannot sleep at night due to my sadness over my divorce.”*
- An employer never has to provide an accommodation that would cause **undue hardship, meaning significant difficulty, or expense.**



18

Examples of Reasonable Accommodation

- **Definite term of unpaid leave.**
- **Intermittent leave.**
- **Leave for health care appointments.**
- **Leave to recover from childbirth or other medical conditions related to pregnancy or childbirth.**
- Modification of workplace policies.
- Modification of hours, schedules, shifts.
- Modification of workplace location.
- Provision of equipment, machinery, assistance.
- Employee does not get to choose! (Collaboration.)
- *Accommodations may be temporary or permanent!*



19

Leave

The EEOC states *“leave is a reasonable accommodation when it enables an employee to return to work following the period of leave.”*

- Cannot have limit on how long employee has worked (no probationary period);
- Cannot have limit on whether full-time versus part-time;
- Cannot have a *“maximum leave” policy for ANY health condition* unless it specifically states additional leave will be granted for ADA accommodations. *(So why have one?)*
- Must grant unpaid leave so long as not undue hardship!
- *How will you know at the time it will enable the employee to return? (You won't.)*



20

Undue Hardship (ADA)

- Employers MUST **consider all possible sources** of outside funding when assessing whether a particular accommodation would be too costly.
- The **overall financial resources (e.g., what is the budget for nonessential items?)**, **size, number of employees**, type, and location of facilities of the employer.
- Is **funding available from an outside** source, such as a state rehabilitation agency, to pay for all or part of the accommodation?
- Is it eligible for **certain tax credits or deductions to offset** the cost of the accommodation?
- Also, to the extent that a portion of the cost of an accommodation causes undue hardship, **the employer should ask the individual with a disability if s/he will pay the difference.**



21

Examples that might prove undue hardship

- An inability to ensure **a sufficient number of employees** to accomplish the work required;
- A **material consistent** failure to meet work goals **or to serve customers/clients** adequately;
- A need **to shift work to other employees**, thus preventing them from doing their own work or imposing **material consistent** additional burdens on them;
- Incurring **significant additional costs** when other **employees work overtime** or when **temporary workers** must be hired.



22

To approve leave, or reject leave? That is the question ...



23

Sally

Sally is a production line worker at a manufacturing company. Sally informed her supervisor that she was pregnant and requested a temporary transfer to a role that did not require heavy lifting or prolonged standing, as advised by her doctor.

Company denied her request, stating that no such positions were available. Instead, they required Sally to take unpaid leave until she could return to her original duties without any modifications.

Additionally, Company terminated Sally's employment after she notified the Company that she would not return to work if she was not provided with guaranteed breaks to express breastmilk.

What did the Company do wrong? (Hint: Forced leave is a violation of the PWFA)

What should they have done?



24

Jane

Jane has been out for twelve weeks under FMLA for chronic fatigue syndrome. HR reaches out to see if Jane can return upon exhaustion of her FMLA leave. Jane provides a note from her doctor that she will *need four more weeks of leave*. After the four weeks, Jane's same physician faxes HR another note that states she will need *three more weeks of leave*. Jane's department is slow right now, so the leave is not an undue hardship—but if Jane is truly not returning in three weeks, the busy season is right around the corner and management needs to have someone ready to go in her position.

What is company's next move?



25

Tina

Tina has requested sixteen weeks of leave as a reasonable accommodation. Tina's department is in a slow period, and there is no evidence this leave will pose an undue hardship, so you grant the sixteen weeks of leave, the first twelve of which is FMLA.

Do you have to hold Tina's job open after the FMLA portion is exhausted, so she is guaranteed reinstatement?



26

Tina

You hold the job open, but at week thirteen the company receives a huge order from a customer, and you determine that it would be an undue hardship to continue holding the job open for three more weeks. Management has already identified another employee that can be promoted into Tina's position immediately.

What do you tell Tina? Should you terminate?



27

Tina

At the end of sixteen weeks, Tina is ready to return. Her original job is still filled, and there are no vacant positions open for which she is qualified.

Is there anything you should do before terminating Tina?



28

Jason

Jason is a dispatcher for your company. He takes a full twelve weeks of FMLA leave for back pain issues arising from a birth defect and has surgery to relieve pain. A few days before the end of FMLA, you reach out to Jason to find out if he will be returning. Jason tells you he has not fully healed from surgery and provides you a note from his doctor indicating he needs twelve more weeks of leave which will include physical therapy. During Jason's leave, management had another employee covering his position, but that employee was making terrible mistakes that significantly affected customer service—one customer left for competitor. Jason's supervisor says, "there is no way we can go twelve more weeks like this ... can't we fill his position?"

Is this undue hardship?

What is the company's next move?



29

Jane

Jane is a manager in your IT Department. She takes FMLA leave for twelve weeks due to depression. She returns to employment for four weeks and is doing very well. Unfortunately, Jane texts her supervisor on week five: "I am so sorry, this past weekend I had a setback, I cannot get out of bed I am so depressed. Something must be wrong with my medication. I cannot get an appointment with my therapist for a few days. I will get HR an update as soon as I can."

What should company do?



30

Jane

Jane's therapist recommends intense therapy and twelve more weeks off work. In meeting with Jane's supervisor, he is questioning whether the company even needs Jane as the department is running fine without her and one other employee, Bob, has really "stepped up." He asks HR if they could lay her off, or at the minimum, move her into a lower position immediately and promote Bob to her position.

What is company's response?

Is this undue hardship?

What are the risks?



31

**Is Intermittent Leave ever a
Reasonable Accommodation?**



32

Intermittent Leave under ADA/WFEA/PWFA

- FMLA requires employers to tolerate intermittent leave.
- But what about under ADA?
 - EEOC says that *in general, employers need not completely exempt an employee from time and attendance requirements, grant open-ended schedules (e.g., the ability to arrive or leave whenever the employee's disability necessitates), or accept irregular, unreliable attendance.*
- BUT – proceed with caution, as the following examples are from EEOC guidance and clearly require employers to tolerate some levels of intermittent leave, at least temporarily, when working through the interactive process ... read on.
- Likely need to tolerate under PWFA due to short-term nature.



33

Brad

Brad has asthma and is ineligible for FMLA leave. He works on an assembly line shift that begins at 7 a.m. Recently, his illness has worsened, and his doctor has been unable to control Brad's increasing breathing difficulties. As a result of these difficulties, Brad has taken *12 days of leave during the past two months, usually in one- or two-day increments.*

The severe symptoms generally occur at night, thus requiring Brad to call in sick early the next morning. The lack of notice puts a strain on the employer *because the assembly line cannot function well without all line employees present and there is no time to plan for a replacement.*



34

Brad

Company seeks medical documentation from Brad's doctor about his absences and the doctor's assessment of whether Brad will continue to have a frequent need for intermittent leave.

The doctor responds that various treatments have not controlled the asthmatic symptoms, *there is no way to predict when the more serious symptoms will suddenly flare up, and he does not expect any change in this situation for the foreseeable future.*

Given Brad's job and the consequences of being unable to plan for his absences, Company determines that he cannot keep the employee on this shift. *Assuming no position is available for reassignment, Company can fire Brad.*



35

Tiffany

Tiffany is an office worker with epilepsy who is ineligible for FMLA leave. She has two seizures at work in a three-month period. In both instances, the seizure required Tiffany to leave work for the remainder of the day, although she was able to return to work on the following day. To determine whether the seizures will continue and their impact on attendance and job performance, Company requests documentation from Tiffany's doctor.

The doctor responds that Tiffany *may experience similar seizures once every two to four months, that there is no way to predict exactly when a seizure will occur, and that the employee will need to take the rest of the day off when one does occur.*

Although Tiffany's need for leave is unpredictable, it is limited to approximately *six times a year. Company cannot establish that other employees or work will be disrupted with such leave, and therefore there is no undue hardship.*



36

Joan

Joan works as an event coordinator. She has exhausted her FMLA leave due to migraines and now requests additional intermittent leave as a reasonable accommodation. Joan can never predict when the leave will be needed or exactly how much leave she will need on each occasion, but she always needs from one to three days of leave at a time. *Company initially agrees to her request and the employee takes 14 days of leave over the next two months.*

Documentation from the employee's doctor shows that the employee will continue to need similar amounts of intermittent leave for at least the next six months.



37

Joan

Joan's job is to meet strict deadlines, and her sudden absences create significant problems. Given Joan's prognosis of requiring unpredictable intermittent leave, the Company cannot plan work around these absences. Company can show that it already had to move co-workers around to cover the employee's absences and delay certain work.

The on-going, frequent, and unpredictable nature of the absences makes additional leave an undue hardship, and thus Company is not required to provide it as a reasonable accommodation.

If Company cannot reassign Joan to a vacant position that can accommodate her need for intermittent leave, it is not required to retain her.



38

Jim

Jim has multiple sclerosis and works as a **bookkeeper** for a small dental practice that is not covered under the FMLA but is covered under the ADA.

He requests intermittent leave as a reasonable accommodation. The employee has already taken five days of sick leave for the disability when he makes the *request (a two-day and a three-day leave of absence)*.

Documentation from the employee's doctor shows that the employee will continue to need intermittent leave for at least several months.

The doctor cannot predict when or how much leave will be needed but based on the employee's treatment and the current situation, the doctor believes that each leave of absence would be from *one to three days*.



39

Jim

The Company tells Jim that it will reassess the accommodation in six months or sooner if Jim's use of leave begins to have a negative impact on its operations.

During the next six months, Jim takes **12 days of medical leave**. However, while Jim's unpredictable absences cause some problems, Company has managed to adjust to the situation *without burdening other employees or falling behind in the workload*.

Because there is no undue hardship at this time, the employer agrees to continue the reasonable accommodation of intermittent leave under the same conditions as before.

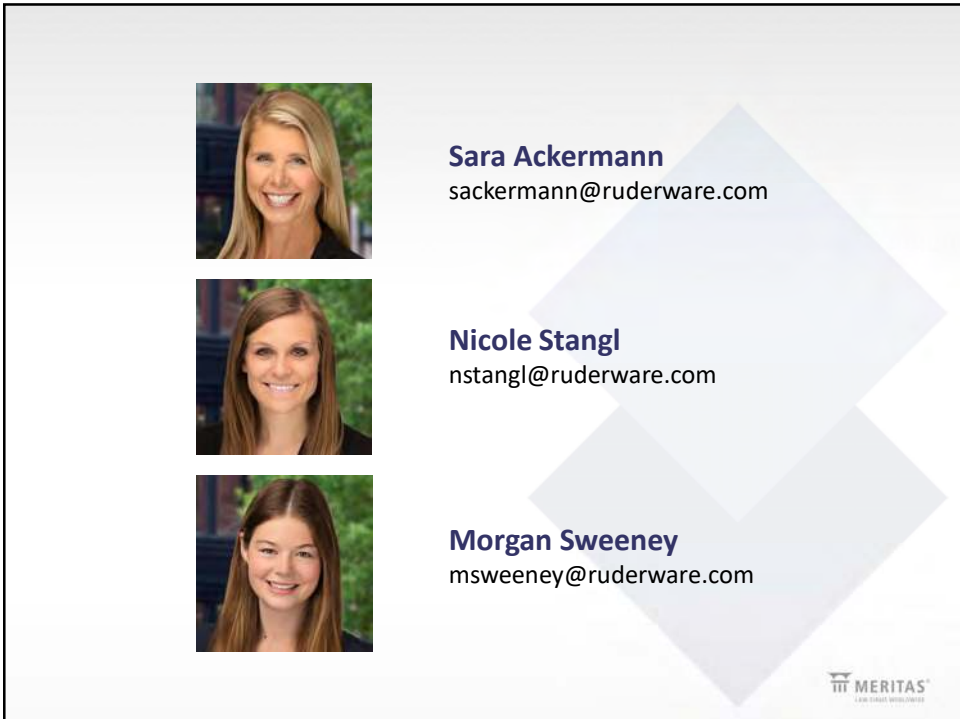
NOTE: These are good examples of DOCUMENTING the undue hardship, or lack thereof.



40



41



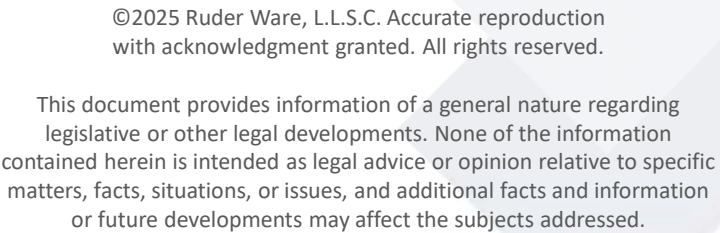
42



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43



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44



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Sara sees herself as a member of a company's HR team.

Clients utilize her varied background by treating her as a consultant and advisor on employment law topics. Sara counsels HR professionals on the development of proactive policies, procedures, and protocols drafted to retain talent and create a positive work environment. Sara has previous experience working inside a corporation so she understands the myriad of employment issues that HR professionals and business owners face every day. Her focus is on providing proactive advice by identifying issues before they arise so that her clients can minimize their risk and avoid the expensive legal fees associated with litigation.

Sara is a sought after presenter, and presents nationwide on topics affecting HR professionals. Actively involved in the local Society of Human Resource Management chapter, serving as a board member, she is connected to the HR community and is therefore skilled at providing solutions to real-life situations. She counsels clients in the private sector from a broad range of industries. Her experience includes:

- Counseling employers on every aspect of federal and state employment laws, including laws regarding drug and alcohol testing, background checks, employee privacy, wrongful discharge, antidiscrimination, anti-harassment, plant closing and mass lay-off, wage and hour, family medical leave, and reasonable accommodation.
- Representing employers in employment litigation matters and in the administrative setting including Wisconsin and Minnesota state and federal agencies.
- Guiding employers in conducting workplace investigations.
- Representing employers in Office of Federal Contract Compliance Programs (OFCCP) and Department of Labor (DOL) audits.
- Reviewing employer wage and hour practices including, exempt/non-exempt position classifications, meal/rest break practices, off the clock and record keeping issues.
- Drafting employee handbooks, separation agreements, disciplinary memoranda, affirmative action plans, employment contracts, non-compete agreements and independent contractor agreements.
- Conducting employment law training, including but not limited to, sexual harassment training for employees and "employment law basics" training for management.

Sara frequently posts to [The Blue Ink Employment blog](#).

Services

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Business Risk Analysis & Risk Management
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Compliance Training
Employee Benefits & Executive Compensation
Employment Contracts & Independent Contractor Agreements
Handbook Policy Development & Audits
Human Resources Counseling

Focus Teams

Manufacturing & Distribution

CIVIC ACTIVITIES

- **Keep Area TEENS Safe (KATS)** – Board Member (2021–present)
- **Wausau Child Care Foundation** – Member (2012–present)

- **Wausau Area Performing Arts Foundation, Inc.** – Board Member (2012–2015), Fundraising Committee (2012–2015)
 - **Wausau Child Care, Inc.** – Past President, Board Member (2005–2011)
-

PROFESSIONAL ACTIVITIES

- **Society of Human Resource Management** – Member
- **Central Wisconsin Society of Human Resource Management** – Board Member (2005-2023)

Education

- B.A., University of Minnesota – Minneapolis, MN (1995)
 - J.D. (magna cum laude), William Mitchell College of Law – St. Paul, MN (2003)
-

Admissions

- Wisconsin Supreme Court
- U.S. District Court for the Western District of Wisconsin

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Nicole Stangl's natural tendency is to establish paths for action. A savvy problem solver and inveterate puzzle geek, Nicole likes to be involved in shaping the outcome of things. It's for that reason she was naturally drawn to the hands-on nature of practicing employment law.

Nicole credits her experience as a summer associate at Ruder with focusing her practice on employment law.

At Ruder Ware, Nicole:

- Counsels employers on every aspect of federal and state employment laws, including laws regarding drug and alcohol testing, background checks, employee privacy, wrongful discharge, antidiscrimination, anti-harassment, plant closing and mass lay-off, wage and hour, family medical leave, and reasonable accommodation.
- Guides employers in conducting workplace investigations.
- Reviews employer wage and hour practices including, exempt/non-exempt position classifications, meal/rest break practices, off the clock and record keeping issues.
- Drafts employee handbooks, separation agreements, disciplinary memoranda, affirmative action plans, employment contracts, non-compete agreements and independent contractor agreements.

Nicole loves to run. A sprinter in college (where she was a 2017 NCAA Woman of the Year Nominee and in 2016 a National Qualifier taking 15th in the nation), she tends to favor long-distance runs these days. She is happiest when she's outdoors with her husband and their incredibly sweet dog.

Services

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[Employment Litigation](#)
[Workplace Human Resources Compliance Training](#)
[Employment Contracts & Independent Contractor Agreements](#)
[Handbook Policy Development & Audits](#)
[Human Resources Counseling](#)

CIVIC ACTIVITIES

GiGi's Playhouse – Board Member (2021–present), Board President (2022–present)

MOSAIC of North Central Wisconsin – Board Member (2022–2024)

Northern Valley Industries – Board Member (2022–present)

United Way of Marathon County – Emerging Leaders, Member (2020–present), Women United (2021–present)

YWCA Wausau – Board Member (2020–2022)

PROFESSIONAL ACTIVITIES

Central Wisconsin Society of Human Resource Management – Board Member (2023–present)

Education

- B.A., Ripon College – Ripon, WI (2017)
 - J.D., University of St. Thomas School of Law – Minneapolis, MN (2020)
 - UST Law Journal
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Admissions

Wisconsin Supreme Court

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Growing up, Morgan observed her parents' commitment to their family business and their employees. Their investment in people left a lasting impression on her.

After completing her undergraduate degree, Morgan sought a career that would empower employers to navigate complex rules and regulations while fostering positive relationships with their workforce. Her journey led her to Ruder Ware, where she initially served as a legal assistant. As she contemplated law school, Morgan gained valuable insights into employment law. Later, as a summer associate, she assisted on working with HR professionals and business owners regarding employee relations. Now, she's dedicated to helping businesses thrive by ensuring compliance and promoting healthy employer-employee dynamics.

Services

[Employment Contracts & Independent Contractor Agreements](#)
[Handbook Policy Development & Audits](#)
[Human Resources Counseling](#)
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At Ruder Ware, Morgan will:

- Counsel employers on every aspect of federal and state employment laws, including laws regarding drug and alcohol testing, background checks, employee privacy, wrongful discharge, antidiscrimination, anti-harassment, plant closing and mass lay-off, family medical leave, and reasonable accommodation.
- Reviews employer wage and hour practices including, exempt/non-exempt position classifications, meal/rest break practices, off the clock and record keeping issues.
- Drafts employee handbooks, separation agreements, disciplinary memoranda, affirmative action plans, employment contracts, non-compete agreements and independent contractor agreements.

Focus Teams

[Corporate Transparency Act](#)

When Morgan isn't immersed in administrative law changes, she enjoys downtime with her fiancé and their goldendoodle, Ripley. Morgan enjoys boating and relaxing up north or baking (her signature bake is a classic cheesecake with an Oreo cookie crust). Her perfect day ends with a piece of fiction in hand, near a body of water.

Education

- B.A., University of Wisconsin – Madison (2019)
- Technical Degree, Northcentral Technical College – Wausau (2020)
- J.D., University of Wisconsin Law School – Madison (2024)
 - Senior Managing Editor, *Wisconsin International Law Journal*

Human Resources Counseling

Human Resource professionals are expected to be up-to-date on employment laws and how they apply to their workforce. Plus, any task performed by HR carries some amount of legal risk.

With as often as rules change and as varied as employee needs and issues can be, HR professionals need a trusted partner. Ruder Ware's employment attorneys are often considered an extension of a company's internal HR department. Our attorneys are up-to-date on current state and federal employment laws and have walked seasoned HR professionals through incredibly tense employee issues and have emerged with practical solutions and sound advice.

Our attorneys provide counsel on:

- Background investigations and pre-employment screening
- Disability accommodation & leave management
- Drug and alcohol testing
- Employment contracts and arbitration agreements
- Employee handbooks and policies
- Employee privacy
- FMLA/ADA solutions
- [Immigration & Workforce Mobility](#)
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- Nondiscrimination
- Occupational safety and health
- Protection of trade secrets and confidential information, and drafting non-disclosure and non-competition agreements
- Severance agreements
- Training for executives, managers and employees (including harassment prevention and social media)
- Wage and hour
- Workplace harassment
- Workplace investigations into employee misconduct
- Workforce restructuring & reductions in force

While our attorneys are skilled at proactive measures, issues such as accidents, missteps, or claims against the company are still a possibility. Ruder Ware's team of litigators are prepared to provide counsel at that next level – whether through mediation or litigation.

Founded in 1920, Ruder Ware provides business, employment, estate planning, and litigation services. A full-service law firm, over 45 attorneys provide clients with a one-stop approach to their legal needs. Ruder Ware, Business Attorneys for Business Success.

Team



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Dawn M. DuLac
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Samuel J. S. Moheban
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Mary Ellen Schill
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Nicole L. Stangl
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- Tax Exempt Organizations
- Taxation
- Warranty/Product Litigation
- Workplace Human Resources Compliance Training

Focus Teams



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