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The Good, Bad, & Ugly: Employment Law Update Recent Cases & Legislation Review

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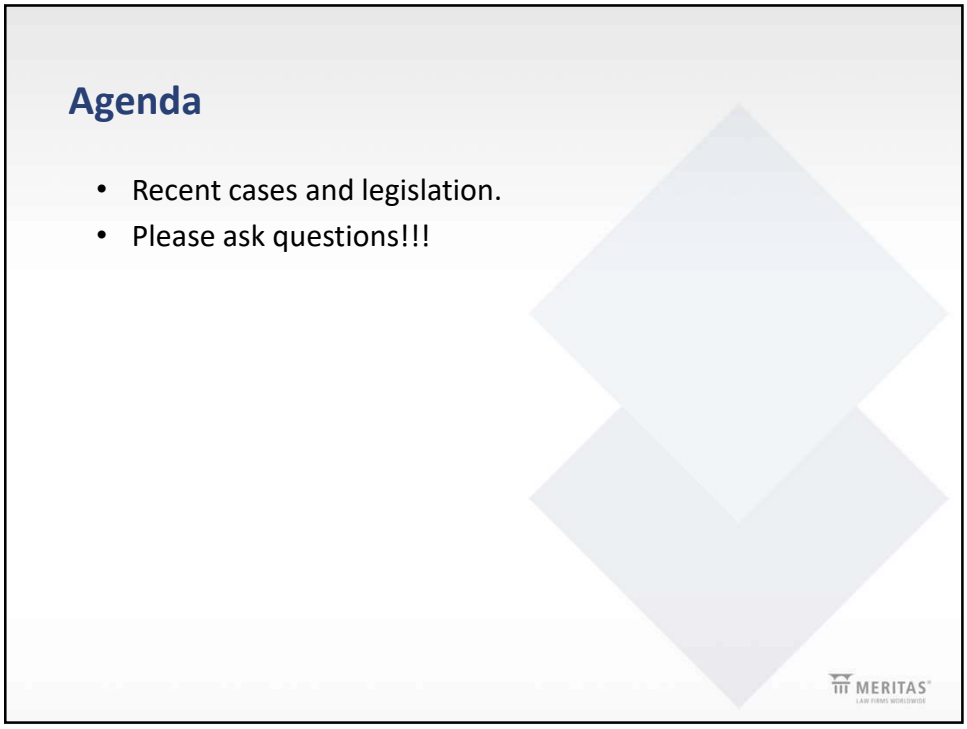

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Non-competes unlawful? (1/5/23)

Federal Trade Commission Notice of Proposed Rule:

- The FTC announced proposed rule to ban most non-compete agreements.
- Nationwide!
- Waiting…April?

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Increase minimum salary for EAP (8/30/23)

DOL Proposal:

- Increase the minimum salary threshold (the "standard salary level") for the executive, administrative, and professional (EAP) exemptions under the FLSA from $684 to $1,059 a week.
- Increase the total annual compensation requirement for the highly compensated employee (HCE) exemption under the FLSA from $107,432 to $143,988.
- Automatically update earnings thresholds every three years.
- Waiting…April?

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Non-competes violate NLRA (5/30/23)

General Counsel opinion:

- Generally, non-competes are in violation of NLRA;
- Exception:

  #1: those that clearly restrict only individuals' managerial or ownership interests in a competing business or concern true independent-contractor relationships; or

  #2: those that are sufficiently narrowly tailored that any infringement on employee rights may be justified by special circumstances. The memorandum provides no examples of narrowly-tailored language or special circumstances.

Note: Who is covered by NLRA?

What does this mean for Wisconsin employers?

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Severance provisions violate NLRA (2/21/23)

NLRB opinion (McLaren):

- Severance agreement prohibiting employees from making disparaging remarks about their employer or disclosing the terms of the agreement to others (including former co-workers), and an employer's proffer of such an agreement, violates Section 8(1)(a) of the NLRA.

What does this mean for Wisconsin employers?

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Overbroad polices violate NLRA (8/2/23)

NLRB opinion (Stericycle):

- The General Counsel must prove that a challenged rule has a reasonable tendency to chill employees from exercising their rights. If the General Counsel does so, then the rule is presumptively unlawful. However, the employer may rebut the presumption by proving that the rule *advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule.*

What does this mean for Wisconsin employers (confidentiality, taping/recording, social media, investigations, respect policies)?

Disclaimer?

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Supremes: Religious Accommodation (6/29/23)

Groff v. DeJoy

- Higher standard for employers to measure the burden a worker's religious accommodation request would impose on its business saying that "Title VII requires an employer denying a religious accommodation to show that the burden of granting it would result in substantial increased cost in relation to the conduct of its particular business."

What does this mean for Wisconsin employers?

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Wisconsin Court of Appeals (6/8/2023)

Wingra Redi-Mix, Inc., v. Labor Industry Review Commission

A formal diagnosis at the time of an employee's request for accommodation is not required to raise the protections of the Wisconsin Fair Employment Act (WFEA).

- Employee worked as a truck driver who delivered concrete to construction sites. Company's older truck models had cable-operated gas pedals, which lacked shock absorbers. Employee experienced daily pain while operating this equipment.
- Specifically, the employee complained to his employer of severe back and leg pain.
- Employee then requested that the company assign him one of its newer model trucks that was easier to operate. When managers communicated internally about the employee's reassignment request, they discussed that the employee had made the request due to the physical pain he experienced with his current equipment.
- The company ultimately denied his request because its policy prohibited employees from transferring trucks.

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Wisconsin Court of Appeals (6/8/2023)

Wingra Redi-Mix, Inc., v. Labor Industry Review Commission, cont.

- Employee emailed the company and recalled that he had previously described to management his "extreme soreness" caused by operating his truck, which caused his "body pains." Further, the employee wrote that he was not able to see a doctor because he lacked health insurance.
- Notwithstanding these emails, the company confirmed that it declined to transfer him to a different vehicle. Employee quit.
- Court of Appeals reasoned that the employer had received sufficient information to know that the employee likely met the definition of an individual with a disability.

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Wisconsin Court of Appeals (6/8/2023)

Wingra Redi-Mix, Inc., v. Labor Industry Review Commission

- Company violated the WFEA when it denied his requests for a newer model truck to accommodate his health condition. Although the employee did not obtain a medical diagnosis until after the termination of his employment, the court reasoned that such assessment was not required for the WFEA to apply and raise the reasonable accommodation requirement.
- Court clarified that an employer may seek additional medical information from an employee to substantiate a health condition and determine if it meets the WFEA's definition of a disability, but the company did not do so here.

What does this mean? Cannot ignore the information you have.

Frustrating when employee cannot get in to see the doctor, refuses to see a doctor, etc. What should employer have done here?

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Wisconsin Court of Appeals (1/10/2024)

Oconomowoc Area Sch. Dist. v. Cota

- The Labor and Industry Review Commission ruled that the termination of two employees violated the arrest record discrimination prohibition contained in the Wisconsin Fair Employment Act (WFEA).
- The Wisconsin Court of Appeals reversed.
- The employees were each issued a municipal citation for theft.
- The WFEA provides that "'Arrest record' includes, but is not limited to, 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."
- The court held that the WFEA provides no protection against terminations based upon information related to a civil, municipal charge.
- WHAT?

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Labor and Industry Review Comm. (3/16/2023)

Lane v. Bellin Memorial Hospital

- Karen Lane worked as a pediatrician.
- Arrested for obstructing an officer, battery, domestic abuse, domestic disorderly, domestic property damage. (7/2017)
- Thought husband cheating, hit him, tried to force him to open gun safe, destroyed his phone.
- Hospital immediately put her on unpaid suspension.
- ALJ found the charges were substantially related to the job (Karen loses).
- Karen appeals to LIRC.

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Labor and Industry Review Comm. (3/16/2023)

Lane v. Bellin Memorial Hospital

- LIRC says, "The record contains no evidence to indicate there are specific opportunities in the workplace that would allow complainant [Karen] to recidivate and the commission can see no reason to believe that the complainant, who worked for the Hospital for 17 years without incident, is likely to become aggressive with a patient, a patient's family member, or a co-worker that she might destroy property, or that she might obstruct an investigation in the context of her work."
- Karen Wins!
- Backpay from 2017.
- Attorneys' fees $30,000.00.
- Domestic assault charges tricky—review the circumstances closely.
- Remember Cree?

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Labor and Industry Review Comm. (9/29/2023)

Gullan v. General Mills

- Ray Gullan convicted of possession of THC intent to sell-had 25 plants.
- Second shift mechanic.
- ALJ found conviction related to the job. Ray appealed.
- LIRC agreed:

"…the commission notes that the job at issue in this case was a second-shift mechanic position in a noisy manufacturing environment surrounded by many other workers, with no supervision and substantial access to private locations accessible only by the complainant. The complainant would have had the unique opportunity to meet colleagues in private with little risk of detection. The respondent's facility has private outdoor smoking areas which are not monitored by security cameras, as well as a large secondary facility where the complainant would have worked with few other individuals present and virtually no supervision. The complainant would have checked in with other maintenance workers at the start and end of his shift but otherwise would have worked almost entirely unsupervised, while in close proximity to many other workers and private meeting spots, in the primary location. Given these specific facts, the commission is persuaded that the position would have posed an unacceptably high opportunity for the complainant to reoffend."

- General Mills wins.
- Look at circumstances of the crime AND of the job!

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Labor and Industry Review Comm. (10/30/2023)

Garza v. Koenig Concrete Corp.

- Rosalinda "Rosa" Garza made complaint after KCC questioned applicant about I-9 documentation.
- Shortly thereafter given document (friend of owner as a "neutral") to sign that acknowledged her complaint was invalid.
- Document stated Garza's complaint was about "culture" differences which are not illegal.
- Neutral informed her several times she was "at-will" and could be terminated at any time.
- Garza refused to sign and believed she had to quit if she didn't sign it.
- ALJ found Rosa engaged in protected activity and that she suffered adverse action (constructive discharge) because of protected activity.
- LIRC agreed.
- Wages, insurance from July 9, 2019;
- Attorneys' fees $82K!!!!
- Retaliation can be found even if underlying complaint was NOT about unlawful activity.

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Labor and Industry Review Comm. (10/30/2023)

Armus v. Natural Landscapes, Inc.

- Steve Armus hired as landscaper.
- Steve had formally been dermatologist.
- On first day owner asked Steve why no longer dermatologist.
- Steve explains he used to be addicted to cocaine and had been arrested for possession.
- Owner Googles Steve later that day and finds conviction with "intent to sell" in addition to possession.
- Owner fires Steve for lying to him. Steve argued that he informed owner to go online and look everything up and that he was not hiding anything.
- ALJ found the real reason NLI terminated Steve was for the cocaine conviction.
- Cocaine conviction NOT substantially related to the job of landscaper.
- Arrest had been in 2009/hire was in 2016. (Time major factor).
- LIRC agreed.
- Wages from 2016
- Attorneys' fees $30K.
- What is the real reason for the termination??? It has to be credible!! (All terms.)

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Labor and Industry Review Comm. (9/29/2023)

Schaefer v. Marcus Center for the Performing Arts, Inc.

- Cindy Schaefer worked for Marcus Center since she was 26 (1985).
- 1997, promoted to Controller.
- 2004, promoted to IT and Controller.
- Associate degree in Accounting/not a CPA.
- Cindy reported to Caroline Hayden (VP Finance).
- Caroline left in 2016.
- Caroline not a fan of Marcus's CEO Paul Matthews.
- Caroline overheard Paul frequently make age-bias comments.
- Caroline loved Cindy and found her extremely strong and capable.
- When Caroline left, Paul hired Laura to replace her.
- Laura asked Cindy to complete a "succession plan" as Laura assumed Cindy would be retiring in 10 years. Cindy never indicated she planned to retire.
- Laura informed Cindy in September of 2018 that a new employee had been hired as Director of Finance (Reonna Vang—age 38)
- Director of Finance position never posted. Reonna worked at external accounting firm.
- Cindy helped train Reonna.

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Labor and Industry Review Comm. (9/29/2023)

Schaefer v. Marcus Center for the Performing Arts, Inc., cont.

- January 10, 2019: Cindy told her job was eliminated.
- Reonna took over Cindy's duties.
- Cindy was 60 years old and had worked at Marcus 34 years.
- Laura testified reasons for termination were poor leadership, based on comments she made to others, and skill set not at level of Reonna.
- Poor leadership? No evidence in writing and Cindy credibly denied the statements.
- Skill set? No evidence provided at hearing to establish skill set lacking. Neither had CPA.
- ALJ and LIRC find age discrimination.
- Full backpay.
- Attorneys' fees $95K.
- Many former employees testified against Laura and Paul at hearing.
- Written documentation is crucial—here longevity and age had to be overcome with clear documentation.

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Seventh Circuit: Accommodation (11/20/23)

Smithson v. Austin

- Regularly delaying a teacher's arrival to work by two hours on school days is not a reasonable accommodation under the Rehabilitation Act. That the employer previously allowed late arrival on a limited basis does not mean that physical attendance at school is not an essential function.

- Rehabilitation Act vs ADA

What does this mean for Wisconsin employers?

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Seventh Circuit: Accommodation (7/28/23)

EEOC v. Charter Communications, Inc.

- Change in work schedule to accommodate a commute from home to the workplace may be a reasonable accommodation for a disability when presence at the worksite is required!!!
- Employee had cataracts and found it difficult to drive in full darkness. The employer offered a temporary 30-day period for an earlier work schedule but refused to renew the accommodation.
- The court held that when an employee's presence is required in the workplace, a change in work schedule to accommodate a different commute may be a reasonable accommodation.
- Split in Circuits.

What does this mean for Wisconsin employers?

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Seventh Circuit: Overtime (10/5/23)

Meadows v. NCR Corp.

- Employee knew of NCR's policies prohibiting overtime and reporting requirements. But pursuant to NCR's practice, when Meadows did record unauthorized overtime, he was paid for that time. This included time spent on activities he performed before or after his shifts or during meal times, such as reviewing work emails, determining a route, responding to work calls, and ensuring that his van was stocked with adequate parts. But when he did not record that time, he was not compensated.
- FLSA does not mandate overtime pay for the performance of incidental activities that an employer has chosen to remunerate by custom or practice if the employee failed to comply with the requirements for payment imposed by that custom or practice (here, a requirement that an employee must record those activities to be compensated).
- Summary: If employee works without employer knowledge or permission, and fails to record time in accordance with policy, it is not compensable.

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Seventh Circuit: Unpaid Time (1/31/23)

Wirth v. RLJ Dental

- Wirth sued her former employer for retaliation under the FLSA and violations of Wisconsin's Wage Payment and Collection Laws.
- On appeal, the court reviewed whether the employer violated Wisconsin law when it failed to compensate Wirth for lunch breaks when she was admittedly not working.
- The employer's handbook provided, "employees will clock out for lunchtime and will clock back in when lunch is finished. Lunches are unpaid time, and you should not clock in until the next scheduled patient."
- Despite this policy, Wirth frequently clocked out for less than 30 minutes. Wirth's supervisors repeatedly instructed her that she needed to take full lunch breaks, but Wirth ignored these instructions.

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Seventh Circuit: Unpaid Time (1/31/23)

Wirth v. RLJ Dental

- Wisconsin law distinguishes rest periods from meal periods. Meal periods of 30 minutes or more during which employees are completely relieved from duty for the purposes of eating regular meals are not compensable under §272.12(2)(c)(2).
- The court found Wirth attempted to transform her non-compensable meal period into a compensable rest period by clocking back in after less than 30 minutes, despite what her employer provided and her employer's repeated instruction to take her full break.
- Employer wins!

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Seventh Circuit: Age Discrimination (12/15/23)

Vichio v. US Foods

- Nicholas Vichio sued claiming he was terminated due to his age.
- The trial court granted summary judgment for the employer; the 7th Circuit reversed.
- The court found significant evidence in the record to support a reasonable inference that the employer used Vichio's performance as pretext for discrimination.
- His record was "virtually pristine" until a new supervisor arrived, and the supervisor decided to "facilitate" Vichio's exit within 25 days at the company.
- Although the supervisor said he was giving Vichio an opportunity to improve within 30 days, he immediately started looking for a replacement. Vichio's immediate supervisors did not share any purported concerns with Vichio's performance.
- Lastly, the supervisor hired a replacement who was over 10 years younger than Vichio.
- Document!!

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Ninth Circuit: Harassment (6/7/23)

Sharp v. S&S Activewear, LLC

- Sexually graphic and violently misogynistic music audible throughout the workplace can create a hostile work environment, even if not targeted at a specific person and where both men and women are offended by it.
- The court rejected the employer's "equal opportunity harasser" defense.
- Takeaway?

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Second Circuit: Harassment (9/7/23)

Banks v. General Motors

- Single incident can qualify as "severe or pervasive" for Title VII discrimination purposes, actionable claims do not require tangible or economic harm, and incidents outside the limitations period can be considered in connection with hostile work environment claims.
- The court also concluded that delaying an employee's return to work and reassigning them to a less desirable position on their return could support a prima facie case of retaliation.
- Takeaway?

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Fifth Circuit: Harassment (7/21/23)

Mueck v. Lan Grange Acquistion, LLP

- An impairment need not be “permanent or long-term” to qualify as a disability under the ADA.
- The inquiry as to whether a limitation is a substantial limitation on a major life activity depends on "whether [the plaintiff's] impairment substantially limits [the plaintiff's] ability to 'perform a major life activity as compared to most people in the general population.’”
- What does this mean for Wisconsin employers? (WEFA Is different).

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Sixth Circuit: FMLA (1/25/23)

Milman v. Fieger & Fieger, LLC

- Employee's initial request for leave is protected under the FMLA, even if the employee is ultimately found to be ineligible for leave.

… "the Seventh Circuit recently held that an employer need not formally deny a request for leave to violate the FMLA. The court explained that the FMLA broadly prohibits an employer's activity that restrains, limits, or discourages an employee's exercise or attempt to exercise FMLA rights. That can happen even "without explicitly denying a leave request "For example, an employer that implements a burdensome approval process or discourages employees from requesting FMLA leave could interfere with and restrain access without denying many requests because few requests requiring a formal decision would ever be made." Id. The court further posited, "an employer that wanted to prevent FMLA use would have many options that would stop short of denying a claim, such as not providing basic FMLA information to an employee unaware of his rights, or orally discouraging FMLA use before the employee actually requested leave." These concerns led the Seventh Circuit to conclude that the broad coverage of § 2615(a)(1)'s language takes into account the fact that the FMLA protects employees from all employer actions that chill employees' ability to access their unpaid leave."

- Must train management—employee need not say anything to trigger FMLA paperwork.

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President Biden: AI Directive (10/30/23)

Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence.

The order directs, among other things, the Secretary of Labor to:

- in consultation with labor unions, workers, and other stakeholders develop principles and best practices to mitigate the harms and maximize the benefits of AI for works to prevent employers from undercompensating workers, evaluating job applications unfairly, or impinging on workers' ability to organize;
- produce and submit to the President a report analyzing the federal agencies' abilities to support workers displaced by the adoption of AI and other technological advancements;
- issue guidance clarifying that employers that deploy AI to monitor or augment employees' work must comply with compensation requirements under the FLSA and other laws and regulations; and
- publish guidance for federal contractors regarding non-discrimination in hiring involving AI and other technology-based hiring systems.

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EEOC: AI Guidance (5/18/23)

New Resource on AI and Title VII

- This technical assistance document addresses whether an employer's selection procedures, specifically algorithmic decision-making tools and automated systems that incorporate AI, have an adverse or disparate impact on a basis that is prohibited by Title VII.
- "Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964."

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EEOC: Harassment Guidance (10/2/23)

Notice of Proposed Enforcement Guidance on Harassment in the Workplace

- Legal analysis of standards for harassment and employer liability applicable to claims of harassment under the EEO statutes enforced by the EEOC. The guidance, once finalized, would not have the force and effect of law but could be cited in court.
- **https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace**
- Train, Train, Train.
- Managers subject to a higher standard–reporting must be mandatory!

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EEOC: PWFA Guidance (8/7/23)

Notice of Proposed PWFA Guidance

- Explains the EEOC's proposed interpretation of the Pregnant Workers' Fairness Act, by defining terms such as "temporary," "essential functions," and "communicated to the employer;"
- provides many examples of possible reasonable accommodations;
- seeks input on whether there should be more examples and if so for what scenarios; and
- solicits information and comment on particular issues, including existing data quantifying the proportion of pregnant workers who need workplace accommodations and the average cost of pregnancy-related accommodations.

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EEOC: ADA Guidance-Hearing (1/24/23) Vision (7/26/23)

- Explaining how the Americans with Disabilities Act (ADA) applies to job applicants and employees who are deaf or hard of hearing or have other hearing conditions.
- Information about new technologies for reasonable accommodation and describes how employment decisions made using AI and algorithms can impact individuals with visual disabilities.

Note: EEOC extremely vigilant regarding vision/hearing bias in workplace. Do not assume someone is unable to perform functions safely.

Wisconsin has treating physician rule…

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REMINDERS

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WI Unreasonable Refusal to Rehire (Retaliation)

- Work compensation injury + termination without "Cause"= one year pay.
- What is Cause?
  - **Gross misconduct?** Probably: stealing, violence, drunk on job, intentional destruction of property.
  - **Poor performance?** Maybe: only if the file supports it and you can establish others have been fired for similar issues or no precedent of such issues.
  - **Bad attitude?** Probably not: would need extraordinary case.
  - **Attendance?** Maybe: only may count attendances that have 0 connection to the injury and then must establish employee was given ample chances to improve.
  - **Employee's permanent restrictions make them unable to do anything we have open?** Best to place employee on unpaid leave until claim is settled or, if you terminate, make sure to check in with employee on regular basis to offer positions within restrictions. Lost time?
- SJA Story.

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Unreasonable Refusal to Rehire (Retaliation)

- **What if claim is denied?**
  - If work compensation claim is denied, and employee is fired without Cause, and several months later employee appeals, if claim is revived so is URR claim!
- **What if employee mentions injury for the first time during termination meeting or after being terminated?**
  - If you fire employee without Cause, employee says "but last week I fell and I am going to the doctor tomorrow" law requires you to rehire (assuming legit injury—but how will you know?).

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FMLA vs. ADA

- **Family Medical Leave Act (FMLA): Serious Health Condition**
  - Leave only.
  - No "magic words."
  - **Employer burden to notify employee.**
  - Leave can be intermittent (migraines, IBS, etc.).
  - Reinstatement is protected.
- **Americans with Disabilities Act: Disability**
  - Accommodation required—might include leave.
  - **Employee must request the accommodation unless obvious.**
  - Sporadic, intermittent attendance NOT an accommodation if it is an undue hardship (need to build a case).

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Common Questions

- Employee is exempt and requests intermittent FMLA leave. How do you pay her?
  - **You can deduct from pay during FMLA leave (usually easiest way is to just make hourly).**
- Employee is exempt, runs out of FMLA leave, and still needs intermittent leave under ADA. How do you pay her?
  - **You cannot technically "deduct" from pay but can use same approach as above. Or, if you know the workweek schedule will be the same each week, simply reduce weekly salary.**

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Common Questions

- Employee is requesting FMLA as an accommodation to work from home. Do we have to grant this?
  - **No. FMLA is for "leave." However, if the HCP says employee needs intermittent leave AND must work from home, you have an FMLA/ADA combo.**
  - **This means you have the right to additional information to support work from home request. You should use a tailored "accommodation" form in addition to FMLA certification.**
  - **Drafting tips?**

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Common Questions

- Employee says they cannot work overtime due to serious health condition. Is this ADA or FMLA?
  - **It is a request for "leave," so it is FMLA. You need to track the hours of overtime that would normally be scheduled and count them against FMLA. Once FMLA is exhausted, need to assess whether continuing to provide leave is an undue hardship. It is a good idea to track hardship during FMLA.**

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Unpredictable attendance?

What about attendance—isn't that an essential function?

Modification of schedules and attendance requirements is a reasonable accommodation (absent undue hardship) BUT:

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.

Sporadic and unexpected is NOT reasonable!

(ADA IS NOT FMLA!!)

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So…what do we have to show?

- An inability to ensure there are **a sufficient number of employees to** accomplish the work required.
- A 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 significant additional burdens on them.
- Incurring significant **additional costs** when other **employees work overtime** or when **temporary workers** must be hired.
- **TRACK ALL OF THIS DURING FMLA!!**

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Unpredictable attendance? (Ex. 1)

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.***

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Unpredictable attendance?

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 they cannot keep the employee on this shift. *Assuming no position is available for reassignment, Company can fire Brad.*

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Unpredictable attendance? (Ex. 2)

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.*

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Interactive Process Guidelines

- What does the employee want?
- What does the employee's doctor say?
- Talk with the employee about what they want and what their doctor says.
- Does employee agree? Disagree? Why?
- Are there alternatives to what employee is requesting? (A reasonable accommodation is NOT always what the employee wants.)
- Document the interactive process (discussion) in writing to the employee.
- Do not make assumptions!
- **Never say never!**

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THANK YOU!

Questions?

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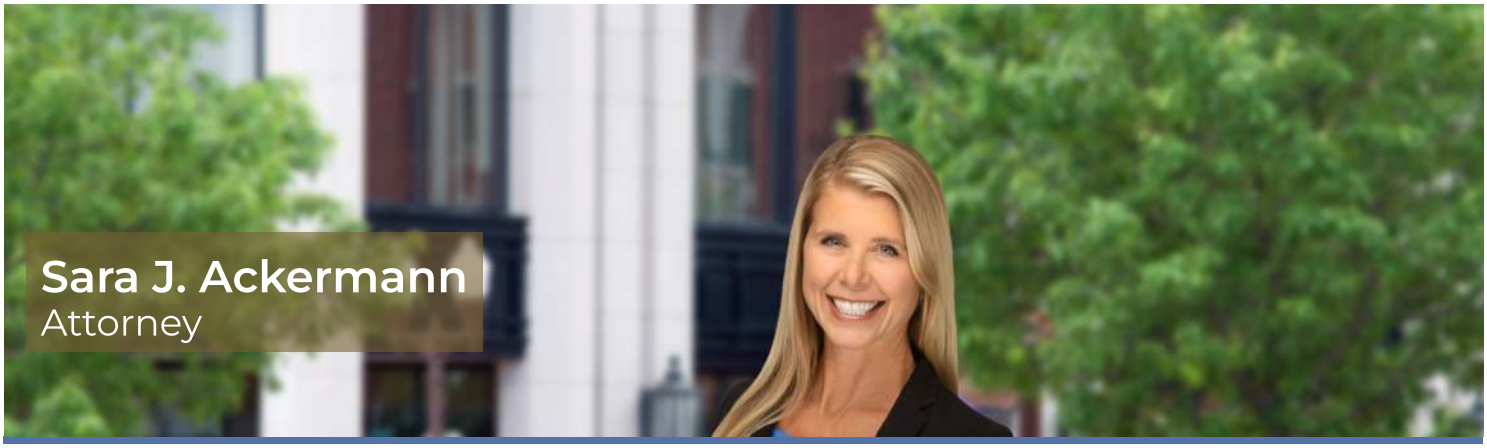

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Sara sees herself as a member of a company's HR team.

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*.

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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BUSINESS ATTORNEYS FOR BUSINESS SUCCESS®

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
- International employment
- 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 rm, over 45 attorneys provide clients with a one-stop approach to their legal needs. Ruder Ware, Business Attorneys for Business Success.

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	Ian Colby • Mergers & Acquisitions • Real Estate & Construction Eau Claire		Mykayla Dado • Agriculture • Estate Planning Eau Claire
	Linda Danielson • Agriculture • Business Organizations • Estate Planning Eau Claire		Amy Ebeling • Agriculture • Business Transactions • Estate Planning • Tax Law Wausau
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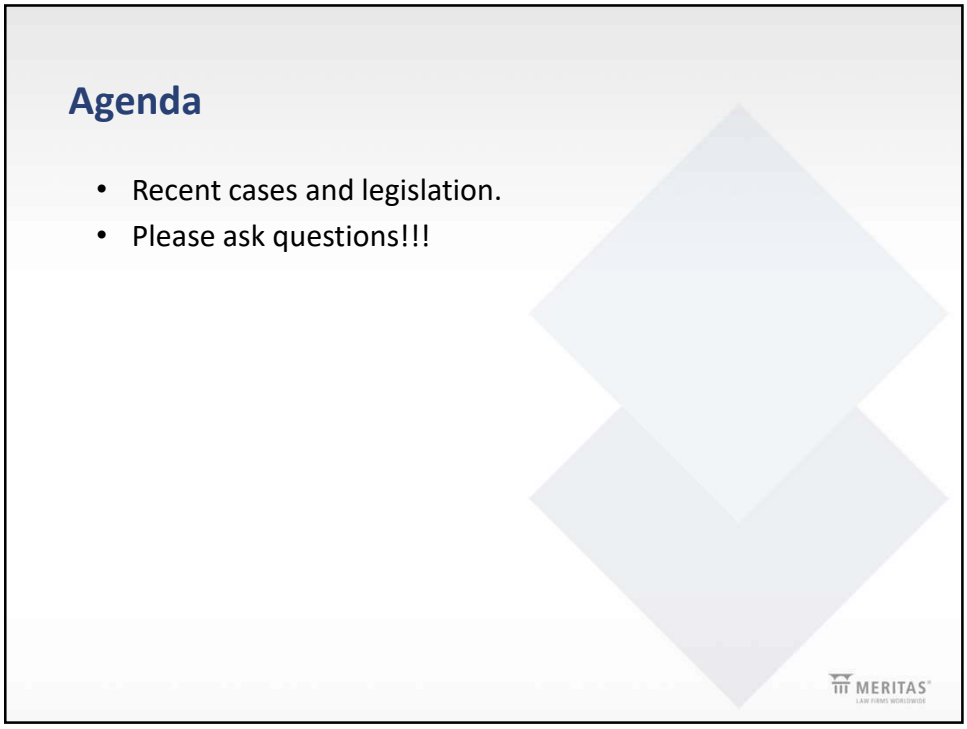
- Tax Exempt Organizations
- Taxation
- Warranty/Product Litigation
- Workplace Human Resources Compliance Training

Focus Teams

1



2

Non-competes unlawful? (1/5/23)

Federal Trade Commission Notice of Proposed Rule:

- The FTC announced proposed rule to ban most non-compete agreements.
- Nationwide!
- Waiting…April?

3

Increase minimum salary for EAP (8/30/23)

DOL Proposal:

- Increase the minimum salary threshold (the "standard salary level") for the executive, administrative, and professional (EAP) exemptions under the FLSA from $684 to $1,059 a week.
- Increase the total annual compensation requirement for the highly compensated employee (HCE) exemption under the FLSA from $107,432 to $143,988.
- Automatically update earnings thresholds every three years.
- Waiting…April?

4

Non-competes violate NLRA (5/30/23)

General Counsel opinion:

- Generally, non-competes are in violation of NLRA;
- Exception:

  #1: those that clearly restrict only individuals' managerial or ownership interests in a competing business or concern true independent-contractor relationships; or

  #2: those that are sufficiently narrowly tailored that any infringement on employee rights may be justified by special circumstances. The memorandum provides no examples of narrowly-tailored language or special circumstances.

Note: Who is covered by NLRA?

What does this mean for Wisconsin employers?

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Severance provisions violate NLRA (2/21/23)

NLRB opinion (McLaren):

- Severance agreement prohibiting employees from making disparaging remarks about their employer or disclosing the terms of the agreement to others (including former co-workers), and an employer's proffer of such an agreement, violates Section 8(1)(a) of the NLRA.

What does this mean for Wisconsin employers?

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Overbroad polices violate NLRA (8/2/23)

NLRB opinion (Stericycle):

- The General Counsel must prove that a challenged rule has a reasonable tendency to chill employees from exercising their rights. If the General Counsel does so, then the rule is presumptively unlawful. However, the employer may rebut the presumption by proving that the rule *advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule.*

What does this mean for Wisconsin employers (confidentiality, taping/recording, social media, investigations, respect policies)?

Disclaimer?

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7

Supremes: Religious Accommodation (6/29/23)

Groff v. DeJoy

- Higher standard for employers to measure the burden a worker's religious accommodation request would impose on its business saying that "Title VII requires an employer denying a religious accommodation to show that the burden of granting it would result in substantial increased cost in relation to the conduct of its particular business."

What does this mean for Wisconsin employers?

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8

Wisconsin Court of Appeals (6/8/2023)

Wingra Redi-Mix, Inc., v. Labor Industry Review Commission

A formal diagnosis at the time of an employee's request for accommodation is not required to raise the protections of the Wisconsin Fair Employment Act (WFEA).

- Employee worked as a truck driver who delivered concrete to construction sites. Company's older truck models had cable-operated gas pedals, which lacked shock absorbers. Employee experienced daily pain while operating this equipment.
- Specifically, the employee complained to his employer of severe back and leg pain.
- Employee then requested that the company assign him one of its newer model trucks that was easier to operate. When managers communicated internally about the employee's reassignment request, they discussed that the employee had made the request due to the physical pain he experienced with his current equipment.
- The company ultimately denied his request because its policy prohibited employees from transferring trucks.

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Wisconsin Court of Appeals (6/8/2023)

Wingra Redi-Mix, Inc., v. Labor Industry Review Commission, cont.

- Employee emailed the company and recalled that he had previously described to management his "extreme soreness" caused by operating his truck, which caused his "body pains." Further, the employee wrote that he was not able to see a doctor because he lacked health insurance.
- Notwithstanding these emails, the company confirmed that it declined to transfer him to a different vehicle. Employee quit.
- Court of Appeals reasoned that the employer had received sufficient information to know that the employee likely met the definition of an individual with a disability.

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10

Wisconsin Court of Appeals (6/8/2023)

Wingra Redi-Mix, Inc., v. Labor Industry Review Commission

- Company violated the WFEA when it denied his requests for a newer model truck to accommodate his health condition. Although the employee did not obtain a medical diagnosis until after the termination of his employment, the court reasoned that such assessment was not required for the WFEA to apply and raise the reasonable accommodation requirement.
- Court clarified that an employer may seek additional medical information from an employee to substantiate a health condition and determine if it meets the WFEA's definition of a disability, but the company did not do so here.

What does this mean? Cannot ignore the information you have.

Frustrating when employee cannot get in to see the doctor, refuses to see a doctor, etc. What should employer have done here?

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Wisconsin Court of Appeals (1/10/2024)

Oconomowoc Area Sch. Dist. v. Cota

- The Labor and Industry Review Commission ruled that the termination of two employees violated the arrest record discrimination prohibition contained in the Wisconsin Fair Employment Act (WFEA).
- The Wisconsin Court of Appeals reversed.
- The employees were each issued a municipal citation for theft.
- The WFEA provides that "'Arrest record' includes, but is not limited to, 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."
- The court held that the WFEA provides no protection against terminations based upon information related to a civil, municipal charge.
- WHAT?

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Labor and Industry Review Comm. (3/16/2023)

Lane v. Bellin Memorial Hospital

- Karen Lane worked as a pediatrician.
- Arrested for obstructing an officer, battery, domestic abuse, domestic disorderly, domestic property damage. (7/2017)
- Thought husband cheating, hit him, tried to force him to open gun safe, destroyed his phone.
- Hospital immediately put her on unpaid suspension.
- ALJ found the charges were substantially related to the job (Karen loses).
- Karen appeals to LIRC.

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13

Labor and Industry Review Comm. (3/16/2023)

Lane v. Bellin Memorial Hospital

- LIRC says, "The record contains no evidence to indicate there are specific opportunities in the workplace that would allow complainant [Karen] to recidivate and the commission can see no reason to believe that the complainant, who worked for the Hospital for 17 years without incident, is likely to become aggressive with a patient, a patient's family member, or a co-worker that she might destroy property, or that she might obstruct an investigation in the context of her work."
- Karen Wins!
- Backpay from 2017.
- Attorneys' fees $30,000.00.
- Domestic assault charges tricky—review the circumstances closely.
- Remember Cree?

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14

Labor and Industry Review Comm. (9/29/2023)

Gullan v. General Mills

- Ray Gullan convicted of possession of THC intent to sell-had 25 plants.
- Second shift mechanic.
- ALJ found conviction related to the job. Ray appealed.
- LIRC agreed:

"…the commission notes that the job at issue in this case was a second-shift mechanic position in a noisy manufacturing environment surrounded by many other workers, with no supervision and substantial access to private locations accessible only by the complainant. The complainant would have had the unique opportunity to meet colleagues in private with little risk of detection. The respondent's facility has private outdoor smoking areas which are not monitored by security cameras, as well as a large secondary facility where the complainant would have worked with few other individuals present and virtually no supervision. The complainant would have checked in with other maintenance workers at the start and end of his shift but otherwise would have worked almost entirely unsupervised, while in close proximity to many other workers and private meeting spots, in the primary location. Given these specific facts, the commission is persuaded that the position would have posed an unacceptably high opportunity for the complainant to reoffend."

- General Mills wins.
- Look at circumstances of the crime AND of the job!

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15

Labor and Industry Review Comm. (10/30/2023)

Garza v. Koenig Concrete Corp.

- Rosalinda "Rosa" Garza made complaint after KCC questioned applicant about I-9 documentation.
- Shortly thereafter given document (friend of owner as a "neutral") to sign that acknowledged her complaint was invalid.
- Document stated Garza's complaint was about "culture" differences which are not illegal.
- Neutral informed her several times she was "at-will" and could be terminated at any time.
- Garza refused to sign and believed she had to quit if she didn't sign it.
- ALJ found Rosa engaged in protected activity and that she suffered adverse action (constructive discharge) because of protected activity.
- LIRC agreed.
- Wages, insurance from July 9, 2019;
- Attorneys' fees $82K!!!!
- Retaliation can be found even if underlying complaint was NOT about unlawful activity.

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Labor and Industry Review Comm. (10/30/2023)

Armus v. Natural Landscapes, Inc.

- Steve Armus hired as landscaper.
- Steve had formally been dermatologist.
- On first day owner asked Steve why no longer dermatologist.
- Steve explains he used to be addicted to cocaine and had been arrested for possession.
- Owner Googles Steve later that day and finds conviction with "intent to sell" in addition to possession.
- Owner fires Steve for lying to him. Steve argued that he informed owner to go online and look everything up and that he was not hiding anything.
- ALJ found the real reason NLI terminated Steve was for the cocaine conviction.
- Cocaine conviction NOT substantially related to the job of landscaper.
- Arrest had been in 2009/hire was in 2016. (Time major factor).
- LIRC agreed.
- Wages from 2016
- Attorneys' fees $30K.
- What is the real reason for the termination??? It has to be credible!! (All terms.)

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17

Labor and Industry Review Comm. (9/29/2023)

Schaefer v. Marcus Center for the Performing Arts, Inc.

- Cindy Schaefer worked for Marcus Center since she was 26 (1985).
- 1997, promoted to Controller.
- 2004, promoted to IT and Controller.
- Associate degree in Accounting/not a CPA.
- Cindy reported to Caroline Hayden (VP Finance).
- Caroline left in 2016.
- Caroline not a fan of Marcus's CEO Paul Matthews.
- Caroline overheard Paul frequently make age-bias comments.
- Caroline loved Cindy and found her extremely strong and capable.
- When Caroline left, Paul hired Laura to replace her.
- Laura asked Cindy to complete a "succession plan" as Laura assumed Cindy would be retiring in 10 years. Cindy never indicated she planned to retire.
- Laura informed Cindy in September of 2018 that a new employee had been hired as Director of Finance (Reonna Vang—age 38)
- Director of Finance position never posted. Reonna worked at external accounting firm.
- Cindy helped train Reonna.

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Labor and Industry Review Comm. (9/29/2023)

Schaefer v. Marcus Center for the Performing Arts, Inc., cont.

- January 10, 2019: Cindy told her job was eliminated.
- Reonna took over Cindy's duties.
- Cindy was 60 years old and had worked at Marcus 34 years.
- Laura testified reasons for termination were poor leadership, based on comments she made to others, and skill set not at level of Reonna.
- Poor leadership? No evidence in writing and Cindy credibly denied the statements.
- Skill set? No evidence provided at hearing to establish skill set lacking. Neither had CPA.
- ALJ and LIRC find age discrimination.
- Full backpay.
- Attorneys' fees $95K.
- Many former employees testified against Laura and Paul at hearing.
- Written documentation is crucial—here longevity and age had to be overcome with clear documentation.

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Seventh Circuit: Accommodation (11/20/23)

Smithson v. Austin

- Regularly delaying a teacher's arrival to work by two hours on school days is not a reasonable accommodation under the Rehabilitation Act. That the employer previously allowed late arrival on a limited basis does not mean that physical attendance at school is not an essential function.

- Rehabilitation Act vs ADA

What does this mean for Wisconsin employers?

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Seventh Circuit: Accommodation (7/28/23)

EEOC v. Charter Communications, Inc.

- Change in work schedule to accommodate a commute from home to the workplace may be a reasonable accommodation for a disability when presence at the worksite is required!!!
- Employee had cataracts and found it difficult to drive in full darkness. The employer offered a temporary 30-day period for an earlier work schedule but refused to renew the accommodation.
- The court held that when an employee's presence is required in the workplace, a change in work schedule to accommodate a different commute may be a reasonable accommodation.
- Split in Circuits.

What does this mean for Wisconsin employers?

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Seventh Circuit: Overtime (10/5/23)

Meadows v. NCR Corp.

- Employee knew of NCR's policies prohibiting overtime and reporting requirements. But pursuant to NCR's practice, when Meadows did record unauthorized overtime, he was paid for that time. This included time spent on activities he performed before or after his shifts or during meal times, such as reviewing work emails, determining a route, responding to work calls, and ensuring that his van was stocked with adequate parts. But when he did not record that time, he was not compensated.
- FLSA does not mandate overtime pay for the performance of incidental activities that an employer has chosen to remunerate by custom or practice if the employee failed to comply with the requirements for payment imposed by that custom or practice (here, a requirement that an employee must record those activities to be compensated).
- Summary: If employee works without employer knowledge or permission, and fails to record time in accordance with policy, it is not compensable.

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Seventh Circuit: Unpaid Time (1/31/23)

Wirth v. RLJ Dental

- Wirth sued her former employer for retaliation under the FLSA and violations of Wisconsin's Wage Payment and Collection Laws.
- On appeal, the court reviewed whether the employer violated Wisconsin law when it failed to compensate Wirth for lunch breaks when she was admittedly not working.
- The employer's handbook provided, "employees will clock out for lunchtime and will clock back in when lunch is finished. Lunches are unpaid time, and you should not clock in until the next scheduled patient."
- Despite this policy, Wirth frequently clocked out for less than 30 minutes. Wirth's supervisors repeatedly instructed her that she needed to take full lunch breaks, but Wirth ignored these instructions.

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Seventh Circuit: Unpaid Time (1/31/23)

Wirth v. RLJ Dental

- Wisconsin law distinguishes rest periods from meal periods. Meal periods of 30 minutes or more during which employees are completely relieved from duty for the purposes of eating regular meals are not compensable under §272.12(2)(c)(2).
- The court found Wirth attempted to transform her non-compensable meal period into a compensable rest period by clocking back in after less than 30 minutes, despite what her employer provided and her employer's repeated instruction to take her full break.
- Employer wins!

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Seventh Circuit: Age Discrimination (12/15/23)

Vichio v. US Foods

- Nicholas Vichio sued claiming he was terminated due to his age.
- The trial court granted summary judgment for the employer; the 7th Circuit reversed.
- The court found significant evidence in the record to support a reasonable inference that the employer used Vichio's performance as pretext for discrimination.
- His record was "virtually pristine" until a new supervisor arrived, and the supervisor decided to "facilitate" Vichio's exit within 25 days at the company.
- Although the supervisor said he was giving Vichio an opportunity to improve within 30 days, he immediately started looking for a replacement. Vichio's immediate supervisors did not share any purported concerns with Vichio's performance.
- Lastly, the supervisor hired a replacement who was over 10 years younger than Vichio.
- Document!!

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Ninth Circuit: Harassment (6/7/23)

Sharp v. S&S Activewear, LLC.

- Sexually graphic and violently misogynistic music audible throughout the workplace can create a hostile work environment, even if not targeted at a specific person and where both men and women are offended by it.
- The court rejected the employer's "equal opportunity harasser" defense.
- Takeaway?

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Second Circuit: Harassment (9/7/23)

Banks v. General Motors

- Single incident can qualify as "severe or pervasive" for Title VII discrimination purposes, actionable claims do not require tangible or economic harm, and incidents outside the limitations period can be considered in connection with hostile work environment claims.
- The court also concluded that delaying an employee's return to work and reassigning them to a less desirable position on their return could support a prima facie case of retaliation.
- Takeaway?

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Fifth Circuit: Harassment (7/21/23)

Mueck v. Lan Grange Acquistion, LLP.

- An impairment need not be “permanent or long-term” to qualify as a disability under the ADA.
- The inquiry as to whether a limitation is a substantial limitation on a major life activity depends on "whether [the plaintiff's] impairment substantially limits [the plaintiff's] ability to 'perform a major life activity as compared to most people in the general population.’”
- What does this mean for Wisconsin employers? (WEFA Is different).

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Sixth Circuit: FMLA (1/25/23)

Milman v. Fieger & Fieger, LLC.

- Employee's initial request for leave is protected under the FMLA, even if the employee is ultimately found to be ineligible for leave.

… "the Seventh Circuit recently held that an employer need not formally deny a request for leave to violate the FMLA. The court explained that the FMLA broadly prohibits an employer's activity that restrains, limits, or discourages an employee's exercise or attempt to exercise FMLA rights. That can happen even "without explicitly denying a leave request "For example, an employer that implements a burdensome approval process or discourages employees from requesting FMLA leave could interfere with and restrain access without denying many requests because few requests requiring a formal decision would ever be made." Id. The court further posited, "an employer that wanted to prevent FMLA use would have many options that would stop short of denying a claim, such as not providing basic FMLA information to an employee unaware of his rights, or orally discouraging FMLA use before the employee actually requested leave." These concerns led the Seventh Circuit to conclude that the broad coverage of § 2615(a)(1)'s language takes into account the fact that the FMLA protects employees from all employer actions that chill employees' ability to access their unpaid leave."

- Must train management—employee need not say anything to trigger FMLA paperwork.

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President Biden: AI Directive (10/30/23)

Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence.

The order directs, among other things, the Secretary of Labor to:

- in consultation with labor unions, workers, and other stakeholders develop principles and best practices to mitigate the harms and maximize the benefits of AI for works to prevent employers from undercompensating workers, evaluating job applications unfairly, or impinging on workers' ability to organize;
- produce and submit to the President a report analyzing the federal agencies' abilities to support workers displaced by the adoption of AI and other technological advancements;
- issue guidance clarifying that employers that deploy AI to monitor or augment employees' work must comply with compensation requirements under the FLSA and other laws and regulations; and
- publish guidance for federal contractors regarding non-discrimination in hiring involving AI and other technology-based hiring systems.

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EEOC: AI Guidance (5/18/23)

New Resource on AI and Title VII

- This technical assistance document addresses whether an employer's selection procedures, specifically algorithmic decision-making tools and automated systems that incorporate AI, have an adverse or disparate impact on a basis that is prohibited by Title VII.
- "Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964."

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EEOC: Harassment Guidance (10/2/23)

Notice of Proposed Enforcement Guidance on Harassment in the Workplace

- Legal analysis of standards for harassment and employer liability applicable to claims of harassment under the EEO statutes enforced by the EEOC. The guidance, once finalized, would not have the force and effect of law but could be cited in court.
- **https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace**
- Train, Train, Train.
- Managers subject to a higher standard–reporting must be mandatory!

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EEOC: PWFA Guidance (8/7/23)

Notice of Proposed PWFA Guidance

- Explains the EEOC's proposed interpretation of the Pregnant Workers' Fairness Act, by defining terms such as "temporary," "essential functions," and "communicated to the employer;"
- provides many examples of possible reasonable accommodations;
- seeks input on whether there should be more examples and if so for what scenarios; and
- solicits information and comment on particular issues, including existing data quantifying the proportion of pregnant workers who need workplace accommodations and the average cost of pregnancy-related accommodations.

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EEOC: ADA Guidance-Hearing (1/24/23) Vision (7/26/23)

- Explaining how the Americans with Disabilities Act (ADA) applies to job applicants and employees who are deaf or hard of hearing or have other hearing conditions.
- Information about new technologies for reasonable accommodation and describes how employment decisions made using AI and algorithms can impact individuals with visual disabilities.

Note: EEOC extremely vigilant regarding vision/hearing bias in workplace. Do not assume someone is unable to perform functions safely.

Wisconsin has treating physician rule…

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REMINDERS

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WI Unreasonable Refusal to Rehire (Retaliation)

- Work compensation injury + termination without "Cause"= one year pay.
- What is Cause?
  - **Gross misconduct?** Probably: stealing, violence, drunk on job, intentional destruction of property.
  - **Poor performance?** Maybe: only if the file supports it and you can establish others have been fired for similar issues or no precedent of such issues.
  - **Bad attitude?** Probably not: would need extraordinary case.
  - **Attendance?** Maybe: only may count attendances that have 0 connection to the injury and then must establish employee was given ample chances to improve.
  - **Employee's permanent restrictions make them unable to do anything we have open?** Best to place employee on unpaid leave until claim is settled or, if you terminate, make sure to check in with employee on regular basis to offer positions within restrictions. Lost time?
- SJA Story.

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Unreasonable Refusal to Rehire (Retaliation)

- **What if claim is denied?**
  - If work compensation claim is denied, and employee is fired without Cause, and several months later employee appeals, if claim is revived so is URR claim!
- **What if employee mentions injury for the first time during termination meeting or after being terminated?**
  - If you fire employee without Cause, employee says "but last week I fell and I am going to the doctor tomorrow" law requires you to rehire (assuming legit injury—but how will you know?).

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FMLA vs. ADA

- **Family Medical Leave Act (FMLA): Serious Health Condition**
  - Leave only.
  - No "magic words."
  - **Employer burden to notify employee.**
  - Leave can be intermittent (migraines, IBS, etc.).
  - Reinstatement is protected.
- **Americans with Disabilities Act: Disability**
  - Accommodation required—might include leave.
  - **Employee must request the accommodation unless obvious.**
  - Sporadic, intermittent attendance NOT an accommodation if it is an undue hardship (need to build a case).

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Common Questions

- Employee is exempt and requests intermittent FMLA leave. How do you pay her?
  - **You can deduct from pay during FMLA leave (usually easiest way is to just make hourly).**
- Employee is exempt, runs out of FMLA leave, and still needs intermittent leave under ADA. How do you pay her?
  - **You cannot technically "deduct" from pay but can use same approach as above. Or, if you know the workweek schedule will be the same each week, simply reduce weekly salary.**

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Common Questions

- Employee is requesting FMLA as an accommodation to work from home. Do we have to grant this?
  - **No. FMLA is for "leave." However, if the HCP says employee needs intermittent leave AND must work from home, you have an FMLA/ADA combo.**
  - **This means you have the right to additional information to support work from home request. You should use a tailored "accommodation" form in addition to FMLA certification.**
  - **Drafting tips?**

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Common Questions

- Employee says they cannot work overtime due to serious health condition. Is this ADA or FMLA?
  - **It is a request for "leave," so it is FMLA. You need to track the hours of overtime that would normally be scheduled and count them against FMLA. Once FMLA is exhausted, need to assess whether continuing to provide leave is an undue hardship. It is a good idea to track hardship during FMLA.**

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Unpredictable attendance?

What about attendance—isn't that an essential function?

Modification of schedules and attendance requirements is a reasonable accommodation (absent undue hardship) BUT:

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.

Sporadic and unexpected is NOT reasonable!

(ADA IS NOT FMLA!!)

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So…what do we have to show?

- An inability to ensure there are **a sufficient number of employees to** accomplish the work required.
- A 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 significant additional burdens on them.
- Incurring significant **additional costs** when other **employees work overtime** or when **temporary workers** must be hired.
- **TRACK ALL OF THIS DURING FMLA!!**

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Unpredictable attendance? (Ex. 1)

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.***

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Unpredictable attendance?

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 they cannot keep the employee on this shift. *Assuming no position is available for reassignment, Company can fire Brad.*

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Unpredictable attendance? (Ex. 2)

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.*

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Interactive Process Guidelines

- What does the employee want?
- What does the employee's doctor say?
- Talk with the employee about what they want and what their doctor says.
- Does employee agree? Disagree? Why?
- Are there alternatives to what employee is requesting? (A reasonable accommodation is NOT always what the employee wants.)
- Document the interactive process (discussion) in writing to the employee.
- Do not make assumptions!
- **Never say never!**

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THANK YOU!

Questions?

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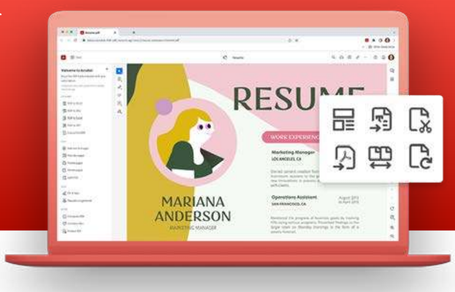

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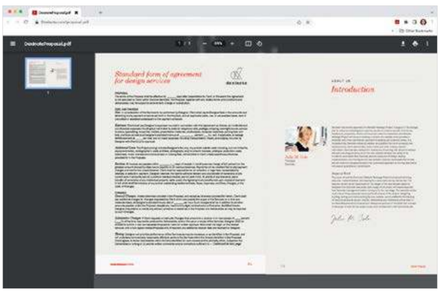

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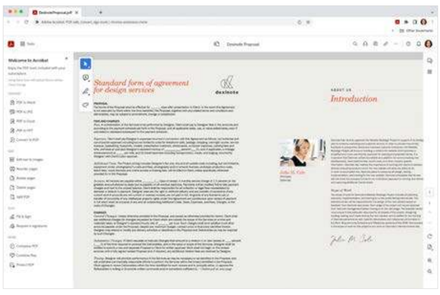

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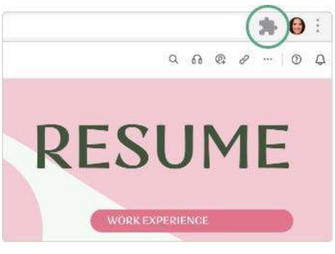

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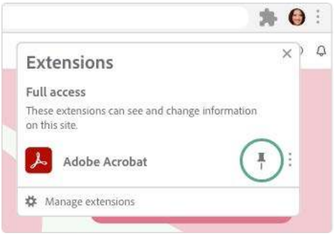

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