# **Table of Contents**

### **PART I: INTRODUCTION**

#### CHAPTER 1

# **BASIC PRINCIPLES OF EMPLOYMENT LAW**

by Jill M. Hartley

#### I. Scope of Chapter [§ 1.1]

#### II. **Employment and Nonemployment Distinguished** [§ 1.2]

- A. In General [§ 1.3]
- Common-Law Definitions [§ 1.4]
- Statutory Definitions [§ 1.5]
  - 1. In General [§ 1.6]
  - 2. Employee [§ 1.7]
  - 3. Employer [§ 1.8]
  - 4. Joint Employer [§ 1.9]
- D. Nonemployment [§ 1.10]
  - 1. In General [§ 1.11]
  - 2. Independent Contractors [§ 1.12]
  - 3. Partnerships [§ 1.13]

# Relationship Between State and Federal Employment Law [§ 1.14]

- A. Federal Preemption [§ 1.15]
  - 1. In General [§ 1.16]
  - 2. How Preemption Applies [§ 1.17]
  - 3. Matters Left to the States [§ 1.18]
- B. Jurisdiction [§ 1.19]
  - 1. In General [§ 1.20]
  - 2. Exclusive Federal Jurisdiction [§ 1.21]
  - 3. Concurrent Jurisdiction [§ 1.22]
  - 4. Exclusive State Jurisdiction [§ 1.23]
- C. Issue and Claim Preclusion [§ 1.24]

#### IV. Employment-at-Will Doctrine [§ 1.25]

A. Introduction [§ 1.26]

- B. Early Development [§ 1.27]
  - 1. English Rule [§ 1.28]
  - 2. American Rule [§ 1.29]
    - a. Wood's Treatise [§ 1.30]
    - b. Early Judicial Interpretation [§ 1.31]
      - (1) Federal Court Cases [§ 1.32]
      - (2) Wisconsin Court Cases [§ 1.33]
- C. Limitations on the Doctrine [§ 1.34]
  - 1. In General [§ 1.35]
  - 2. Statutory Limitations [§ 1.36]
  - 3. Judicial Limitations [§ 1.37]
    - a. Public Policy [§ 1.38]
      - (1) Other Jurisdictions [§ 1.39]
      - (2) Wisconsin [§ 1.40]
    - b. Contracts [§ 1.41]
    - c. Employment Torts [§ 1.42]
      - (1) In General [§ 1.43]
      - (2) Defamation [§ 1.44]
      - (3) Tortious Interference with Contract [§ 1.45]
      - (4) Other Employment Torts [§ 1.46]

#### CHAPTER 2

#### **OVERVIEW OF STATE AND FEDERAL EMPLOYMENT STATUTES**

by Jonathan T. Swain and Samantha J. Wood

- I. Scope of Chapter [§ 2.1]
- **II.** Labor Laws [§ 2.2]
  - A. Introduction [§ 2.3]
  - B. National Labor Relations Act [§ 2.4]
    - 1. Coverage [§ 2.5]
    - 2. Scope [§ 2.6]
  - C. Wisconsin Employment Peace Act [§ 2.7]
    - 1. Coverage [§ 2.8]
    - 2. Scope [§ 2.9]
- III. Fair-Employment Laws [§ 2.10]
  - A. Introduction [§ 2.11]
  - B. Equal Pay Act [§ 2.12]
    - 1. Coverage [§ 2.13]
    - 2. Scope [§ 2.14]

- C. Title VII of the Civil Rights Act of 1964 [§ 2.15]
  - 1. Coverage [§ 2.16]
  - 2. Scope [§ 2.17]
  - 3. Defenses [§ 2.18]
    - a. Bona Fide Seniority and Merit Systems [§ 2.19]
    - b. Objective Tests [§ 2.20]
    - c. Bona Fide Occupational Qualification [§ 2.21]
  - 4. Enforcement [§ 2.22]
  - 5. Remedies [§ 2.23]
- D. Age Discrimination in Employment Act [§ 2.24]
  - 1. Coverage [§ 2.25]
  - 2. Scope [§ 2.26]
  - 3. Defenses [§ 2.27]
    - a. BFOQ [§ 2.28]
    - b. Factors Other Than Age [§ 2.29]
    - c. Bona Fide Seniority Systems [§ 2.30]
    - d. Bona Fide Employee Benefit Plans [§ 2.31]
  - 4. Enforcement [§ 2.32]
  - 5. Remedies [§ 2.33]
  - 6. Older Workers Benefit Protection Act [§ 2.34]
- E. Reconstruction-Era Civil Rights Act [§ 2.35]
  - 1. Introduction [§ 2.36]
  - 2. 42 U.S.C. § 1981 [§ 2.37]
  - 3. 42 U.S.C. § 1983 [§ 2.38]
  - 4. 42 U.S.C. § 1985 [§ 2.39]
- F. Executive Order No. 11,246 [§ 2.40]
  - 1. Coverage [§ 2.41]
  - 2. Scope [§ 2.42]
- G. Rehabilitation Act [§ 2.43]
  - 1. Coverage [§ 2.44]
  - 2. Scope [§ 2.45]
  - 3. Definition of Individual with a Disability [§ 2.46]
  - 4. Enforcement [§ 2.47]
- H. Affirmative Action [§ 2.48]
- I. Americans with Disabilities Act [§ 2.49]
  - 1. Coverage [§ 2.50]
  - 2. Scope [§ 2.51]
  - 3. Definition of Disability [§ 2.52]
    - a. In General [§ 2.53]
    - b. Physical or Mental Impairment [§ 2.54]
    - c. Substantial Limitations [§ 2.55]

- d. Major Life Activities [§ 2.56]
- e. Record of Impairment [§ 2.57]
- f. Regarded as Having an Impairment [§ 2.58]
- 4. Qualified Individual [§ 2.59]
- 5. Reasonable Accommodation [§ 2.60]
- 6. Enforcement [§ 2.61]
- 7. Remedies [§ 2.62]
- 8. Relationship to Other Laws [§ 2.63]
- J. Civil Rights Act of 1991 [§ 2.64]
  - 1. Coverage [§ 2.65]
  - 2. Scope [§ 2.66]
- K. Wisconsin Fair Employment Act [§ 2.67]
  - 1. Coverage [§ 2.68]
  - 2. Scope [§ 2.69]
- L. Genetic Information Nondiscrimination Act [§ 2.70]
  - 1. Coverage [§ 2.71]
  - 2. Scope [§ 2.72]

# IV. Wage and Hour Laws [§ 2.73]

- A. Fair Labor Standards Act [§ 2.74]
  - 1. Coverage [§ 2.75]
  - 2. Scope [§ 2.76]
- B. Wisconsin Wage Claim Law [§ 2.77]
  - 1. Coverage [§ 2.78]
  - 2. Scope [§ 2.79]
- C. Wisconsin Wage Garnishment Law [§ 2.80]
- D. Executive Order 13658 [§ 2.81]
  - 1. Coverage [§ 2.82]
  - 2. Scope [§ 2.83]

# V. Employee Safety Laws [§ 2.84]

- A. Occupational Safety and Health Act [§ 2.85]
  - 1. Coverage [§ 2.86]
  - 2. Scope [§ 2.87]
- B. Wisconsin Employees' Right-to-Know Law [§ 2.88]
  - 1. Coverage [§ 2.89]
  - 2. Scope [§ 2.90]
- C. Wisconsin Safe-Place Statute [§ 2.91]
  - 1. Coverage [§ 2.92]
  - 2. Scope [§ 2.93]
- D. Wisconsin Smoking Prohibited Act [§ 2.94]
  - 1. Coverage [§ 2.95]
  - 2. Scope [§ 2.96]

#### VI. Health and Welfare Laws [§ 2.97]

- A. Employee Retirement Income Security Act [§ 2.98]
  - 1. Coverage [§ 2.99]
  - 2. Scope [§ 2.100]
- B. Federal Family and Medical Leave Act [§ 2.101]
  - 1. Coverage [§ 2.102]
  - 2. Scope [§ 2.103]
- C. Wisconsin Family and Medical Leave Act [§ 2.104]
  - 1. Coverage [§ 2.105]
  - 2. Scope [§ 2.106]
- D. Patient Protection and Affordable Care Act (PPACA)[§ 2.107]
  - 1. Coverage [§ 2.108]
  - 2. Scope [§ 2.109]
  - 3. Executive Order 13706 [§ 2.110]
    - a. Coverage [§ 2.111]
    - b. Scope [§ 2.112]

#### VII. Plant-Closing Laws [§ 2.113]

- A. Worker Adjustment and Retraining Notification Act [§ 2.114]
  - 1. Coverage [§ 2.115]
  - 2. Scope [§ 2.116]
  - 3. Definitions [§ 2.117]
    - a. Employment Loss [§ 2.118]
      - (1) In General [§ 2.119]
      - (2) Employee Transfer [§ 2.120]
    - b. Affected Employee [§ 2.121]
    - c. Plant Closing [§ 2.122]
    - d. Mass Layoff [§ 2.123]
  - 4. Required Notice [§ 2.124]
    - a. In General [§ 2.125]
    - b. Sale of Business [§ 2.126]
    - c. Exceptions [§ 2.127]
      - (1) In General [§ 2.128]
      - (2) Faltering Company [§ 2.129]
      - (3) Unforeseeable Business Conditions [§ 2.130]
      - (4) Natural Disaster [§ 2.131]
  - 5. Exemptions [§ 2.132]
    - a. Closing of Temporary Facility [§ 2.133]
    - b. Strike or Lockout [§ 2.134]
  - 6. Enforcement and Remedies [§ 2.135]

- B. Wisconsin Plant-Closing Law [§ 2.136]
  - 1. Coverage [§ 2.137]
  - 2. Scope [§ 2.138]
  - 3. Definitions [§ 2.139]
    - a. Business Closing [§ 2.140]
    - b. Mass Layoff [§ 2.141]
  - 4. Required Notice [§ 2.142]
  - 5. Exemptions [§ 2.143]
  - 6. Enforcement [§ 2.144]
  - 7. Remedies [§ 2.145]

# VIII. Honesty-Testing Laws [§ 2.146]

- A. Employee Polygraph Protection Act [§ 2.147]
  - 1. Coverage [§ 2.148]
  - 2. Scope [§ 2.149]
- B. Wisconsin Employment Honesty-Testing Law [§ 2.150]
  - 1. Coverage [§ 2.151]
  - 2. Scope [§ 2.152]

# IX. Drug-Free Workplace Act [§ 2.153]

- A. Coverage [§ 2.154]
- B. Scope [§ 2.155]

#### X. Immigration Reform and Control Act [§ 2.156]

- A. Verification Requirements [§ 2.157]
  - 1. Coverage [§ 2.158]
  - 2. Scope [§ 2.159]
- B. Antidiscrimination Provisions [§ 2.160]
  - 1. Coverage [§ 2.161]
  - 2. Scope [§ 2.162]
  - 3. Enforcement [§ 2.163]

#### XI. Veterans' Reemployment Laws [§ 2.164]

- A. Uniformed Services Employment and Reemployment Rights Act [§ 2.165]
  - 1. Coverage [§ 2.166]
  - 2. Scope [§ 2.167]
  - 3. Veterans Benefits Improvement Act of 2004 [§ 2.168]
- B. Wisconsin Veterans' Reemployment Rights Law [§ 2.169]

# XII. Wisconsin Worker's Compensation Act [§ 2.170]

- A. Coverage [§ 2.171]
- B. Scope [§ 2.172]

# XIII. Wisconsin Unemployment Insurance Law [§ 2.173]

- A. Coverage [§ 2.174]
- B. Scope [§ 2.175]
- C. Enforcement [§ 2.176]

# XIV. Wisconsin Personnel Laws [§ 2.177]

- A. Access to Personnel Records [§ 2.178]
- B. Notification of Grooming Requirements [§ 2.179]
- C. Restricted Use of HIV Tests [§ 2.180]
- D. Regulation of Restrictive Covenants [§ 2.181]
- E. Genetic Testing [§ 2.182]
- F. Uniform Trade Secrets Act [§ 2.183]
- G. Employer Reference Checks [§ 2.184]

# XV. Miscellaneous Federal Personnel Laws [§ 2.185]

- A. Fair Credit Reporting Act (FCRA) [§ 2.186]
- B. Sarbanes-Oxley Act [§ 2.187]
- C. Defend Trade Secrets Act [§ 2.188]

#### PART II: THE EMPLOYMENT RELATIONSHIP

### CHAPTER 3

#### HIRING

by Robert K. Sholl

# I. Scope of Chapter [§ 3.1]

#### II. Discrimination in Hiring [§ 3.2]

- A. Fair-Employment Laws [§ 3.3]
  - 1. Sources of the Law [§ 3.4]
  - 2. Disparate Treatment and Disparate Impact [§ 3.5]
  - 3. Direct Inquiries [§ 3.6]
    - a. In General [§ 3.7]
    - b. Age [§ 3.8]
    - c. Arrest or Conviction Record [§ 3.9]
    - d. Disability [§ 3.10]

- e. Marital Status [§ 3.11]
- f. Domestic Partnership [§ 3.12]
- g. Military Service [§ 3.13]
- h. National Origin or Citizenship [§ 3.14]
- i. Race or Color [§ 3.15]
- j. Religion [§ 3.16]
- k. Sex [§ 3.17]
- 1. Sexual Orientation [§ 3.18]
- m. Use or Nonuse of Lawful Products [§ 3.19]
- n. Political Affiliations and Beliefs [§ 3.20]
- o. Unemployment Status [§ 3.21]
- 4. Indirect Inquiries [§ 3.22]
  - a. In General [§ 3.23]
  - b. Language Facility [§ 3.24]
  - c. Memberships [§ 3.25]
- 5. Facially Neutral Inquiries: Disparate Impact [§ 3.26]
  - a. In General [§ 3.27]
  - b. Education [§ 3.28]
  - c. Physical Criteria [§ 3.29]
  - d. Personal Finances [§ 3.30]
  - e. Relatives or Close Friends in Work Force [§ 3.31]
  - f. Compensation History [§ 3.32]
- 6. Bona Fide Occupational Qualifications [§ 3.33]
  - a. In General [§ 3.34]
  - b. Age [§ 3.35]
  - c. Religion [§ 3.36]
  - d. Sex [§ 3.37]
  - e. National Origin [§ 3.38]
- 7. Affirmative-Action Considerations [§ 3.39]
- B. Laws Prohibiting Union-Based Discrimination [§ 3.40]
  - 1. In General [§ 3.41]
  - 2. "Yellow Dog" Contracts [§ 3.42]
  - 3. Wisconsin's "Right to Work" Law [§ 3.43]
  - 4. Initial Hiring Terms [§ 3.44]
  - 5. Refusal to Hire [§ 3.45]
- C. Antiblacklisting Law [§ 3.46]

# III. Recruiting, Application Forms, and Interviews [§ 3.47]

A. Recruiting [§ 3.48]

- 1. In General [§ 3.49]
- 2. Advertising [§ 3.50]
  - a. In General [§ 3.51]
  - b. Fraudulent Advertising for Labor [§ 3.52]
  - c. Advertising When Strike or Lockout Exists [§ 3.53]
  - d. Notification of Position Openings:
    Affirmative-Action Considerations [§ 3.54]
- 3. Word-of-Mouth Recruiting [§ 3.55]
- B. Employment Application Forms [§ 3.56]
  - 1. In General [§ 3.57]
    - a. Introduction [§ 3.58]
    - b. Scope of Inquiries: Job-Relatedness [§ 3.59]
    - c. When Otherwise Prohibited Inquiries Are Justified [§ 3.60]
      - (1) In General [§ 3.61]
      - (2) To Meet Affirmative-Action Obligations [§ 3.62]
      - (3) To Meet Insurance Requirements [§ 3.63]
  - 2. Employment Application Statements [§ 3.64]
    - a. Equal Employment Opportunity [§ 3.65]
    - b. At-Will Employment Status [§ 3.66]
    - c. Arbitration Agreement [§ 3.67]
    - d. Truthfulness of Information Provided [§ 3.68]
    - e. Consent and Release [§ 3.69]
      - (1) Reference Information [§ 3.70]
      - (2) Testing [§ 3.71]
  - 3. Record Retention and Application Consideration Time Frames [§ 3.72]
- C. Interviews [§ 3.73]
  - 1. In General [§ 3.74]
  - 2. Scope of Inquiries: Job-Relatedness [§ 3.75]
  - 3. Job Descriptions and Ability to Perform Essential Functions [§ 3.76]
  - 4. Oral Promises [§ 3.77]
  - 5. Misrepresentations of Fact [§ 3.78]
  - 6. Social Media Protection Act [§ 3.79]

#### IV. Credit Reports and Reference Checks [§ 3.80]

- A. Credit Reports [§ 3.81]
- B. Reference Checking [§ 3.82]
  - 1. Defamation Concerns [§ 3.83]

- 2. Scope of Inquiries: Job-Relatedness [§ 3.84]
- 3. Confidentiality [§ 3.85]

# V. Testing and Screening [§ 3.86]

- A. In General [§ 3.87]
- B. Medical Examinations [§ 3.88]
  - 1. In General [§ 3.89]
  - 2. Payment of Costs [§ 3.90]
  - 3. Timing: Preemployment or After Job Offer Extended? [§ 3.91]
  - 4. HIV Testing [§ 3.92]
  - 5. Genetic Testing [§ 3.93]
  - 6. Disability Discrimination and Tort Claims [§ 3.94]
- C. Drug and Alcohol Testing [§ 3.95]
  - 1. In General [§ 3.96]
  - 2. Federal Statutory and Regulatory Provisions [§ 3.97]
    - a. In General [§ 3.98]
    - b. Drug-Free Workplace Act [§ 3.99]
    - c. Department of Transportation Rules [§ 3.100]
    - d. Department of Defense Rules [§ 3.101]
    - e. Americans with Disabilities Act and Rehabilitation Act [§ 3.102]
  - 3. Considerations for Unionized Employers [§ 3.103]
- D. Honesty Testing [§ 3.104]
  - 1. In General [§ 3.105]
  - 2. Federal Statute [§ 3.106]
  - 3. Wisconsin Statute [§ 3.107]
- E. Personality, Psychological, Ability, and Other Tests or Selection Procedures [§ 3.108]
  - 1. In General [§ 3.109]
  - 2. Disparate Impact [§ 3.110]
  - 3. Test Validation [§ 3.111]

# VI. The Hiring Decision [§ 3.112]

- A. Hiring Particular Categories of Persons [§ 3.113]
  - 1. Minors [§ 3.114]
    - a. In General [§ 3.115]
    - b. Limitations on Type and Place of Work Performed [§ 3.116]
    - c. Work Permits [§ 3.117]
  - 2. Strikebreakers [§ 3.118]

- 3. Employees' Relatives [§ 3.119]
- 4. Unauthorized Aliens [§ 3.120]
- B. Permissible Conditions on Employment [§ 3.121]
  - 1. "No Moonlighting" Policies [§ 3.122]
  - 2. Grooming, Dress, and Appearance Requirements [§ 3.123]
  - 3. Restrictive Covenants and Trade Secret Agreements [§ 3.124]
  - 4. Arbitration Agreements [§ 3.125]
- C. Requirements upon Hiring [§ 3.126]
  - 1. IRCA Verification and Record-Keeping Requirements [§ 3.127]
  - 2. Confirmation Letters [§ 3.128]
  - 3. Nondiscriminatory Compensation [§ 3.129]
  - 4. New-Hire Reporting [§ 3.130]
- D. Negligent Hiring [§ 3.131]
  - 1. In General [§ 3.132]
  - 2. Distinguished from Respondent Superior [§ 3.133]
  - 3. Foreseeable Risk of Harm to Third Parties [§ 3.134]
  - 4. Prohibition Against Arrest- or Conviction-Record Discrimination [§ 3.135]
  - 5. Worker's Compensation as Exclusive Remedy in Suit by Coemployee [§ 3.136]
- E. Withdrawing an Offer of At-Will Employment [§ 3.137]
- F. No-Rehire Policies [§ 3.138]

#### **VII.** Appendices [§ 3.139]

- A. Appendix 3A: Fair Hiring & Avoiding Discriminatory Interview Questions (DWD) [§ 3.140]
- B. Appendix 3B: Model Employee Verification, Authorization, and Release Statement [§ 3.141]
- C. Appendix 3C: Employment Eligibility Verification (USCIS [formerly INS] Form I-9) [§ 3.142]
- D. Appendix 3D: Summary of Rights Under the Fair Credit Reporting Act (12 C.F.R. app. K pt. 1022) [§ 3.143]

#### CHAPTER 4

#### EMPLOYMENT AGREEMENTS AND EMPLOYEE HANDBOOKS

by Nicholas E. Fairweather, Colin B. Good, Robert H. Buikema, and Marisa L. Roubik

#### I. Scope of Chapter [§ 4.1]

# II. Employment Contract Law in General [§ 4.2]

- A. Principles of Contract Formation [§ 4.3]
  - 1. Offer and Acceptance [§ 4.4]
    - a. The Offer [§ 4.5]
    - b. Acceptance [§ 4.6]
    - c. Offer Revocation Issues [§ 4.7]
  - 2. Consideration [§ 4.8]
    - a. Requirements of Consideration [§ 4.9]
    - b. The Preexisting Duty Rule [§ 4.10]
  - 3. Bilateral and Unilateral Contracts [§ 4.11]
    - a. In General [§ 4.12]
    - b. Bilateral Contracts [§ 4.13]
    - c. Unilateral Contracts [§ 4.14]
    - d. Bilateral Contracts in the Employment Relationship [§ 4.15]
    - e. Unilateral Contracts in the Employment Relationship [§ 4.16]
- B. Nature of the Relationship Between the Parties [§ 4.17]
  - 1. In General [§ 4.18]
  - 2. Employment Contract for a Definite Term Versus At-Will Employment [§ 4.19]
    - a. Employment Contract for a Definite Term [§ 4.20]
      - (1) In General [§ 4.21]
      - (2) Implied Just Cause Standard for Termination of Employment [§ 4.22]
      - (3) Entire Contract Versus Divisible Contract [§ 4.23]
      - (4) Rebuttable Presumption that Contract for Salary is Contract for Indefinite At-Will Employment [§ 4.24]
      - (5) Carrying Over into a New Term Without a New Agreement [§ 4.25]

- (6) Effect of Employer's Death On Contract [§ 4.26]
- (7) Effect of Employee's Death or Disability on Contract [§ 4.27]
- (8) Breaches and Remedies [§ 4.28]
- (9) Statutes of Limitation [§ 4.29]
- (10) Timing of Employee's Lawsuit [§ 4.30]
- (11) Teacher Contracts [§ 4.31]
- b. At-Will Employment [§ 4.32]
- c. Application of Covenant of Good Faith to Contracts Ancillary to At-Will Employment [§ 4.33]
- 3. Advantages and Disadvantages of an Employment Relationship [§ 4.34]
  - a. Employee's Viewpoint [§ 4.35]
  - b. Employer's Viewpoint [§ 4.36]
  - c. Contractual Entitlement to Wages and Benefits for Work Performed [§ 4.37]
- C. Oral Versus Written Employment Contracts [§ 4.38]
  - 1. Statute of Frauds [§ 4.39]
  - 2. Advantages and Disadvantages of Written and Oral Employment Contracts [§ 4.40]
- D. Express Versus Implied Employment Contracts [§ 4.41]
  - 1. In General [§ 4.42]
  - 2. When Claims of Implied Employment Contract Are Likely to Be Pressed [§ 4.43]
  - 3. Oral Statements as Implied Contracts [§ 4.44]
- E. Remedies for Breach of Employment Agreements [§ 4.45]
  - 1. In General [§ 4.46]
  - 2. Standard Contract Remedies [§ 4.47]
    - a. Expectation or Benefit-of-Bargain Damages [§ 4.48]
    - b. Rescission and Restitution [§ 4.49]
    - c. Specific Performance [§ 4.50]
  - 3. Employee's Damages [§ 4.51]
    - a. Breach of Employment Contract [§ 4.52]
    - b. Public-Policy Exception to At-Will Doctrine [§ 4.53]
    - c. Employee's Duty to Mitigate Damages [§ 4.54]
  - 4. Employer's Damages [§ 4.55]
  - 5. Liquidated Damages [§ 4.56]

# III. Standard Provisions of Written Employment Contracts [§ 4.57]

- A. In General [§ 4.58]
- B. Consideration [§ 4.59]
- C. Employment Duties, Outside Business, and Personal Activities [§ 4.60]
- D. Confidentiality and Protection of Trade Secrets [§ 4.61]
- E. Restrictive Covenants [§ 4.62]
- F. Compensation and Benefits [§ 4.63]
- G. Duration of Employment [§ 4.64]
  - 1. In General [§ 4.65]
  - 2. Fixed Term [§ 4.66]
  - 3. At Will [§ 4.67]
  - 4. Standard for Determining Breach [§ 4.68]
- H. Grounds for Termination [§ 4.69]
- I. Liquidated Damages [§ 4.70]
- J. Settlement of Disputes [§ 4.71]
  - 1. Arbitration [§ 4.72]
  - 2. Alternatives to Arbitration [§ 4.73]
- K. Integration, Severability, and Choice of Law [§ 4.74]

# IV. Employee Handbooks and Other Personnel Documents as Contracts [§ 4.75]

- A. Employee Handbooks [§ 4.76]
  - 1. In General [§ 4.77]
  - 2. Employee Handbooks as Guidelines [§ 4.78]
  - 3. Employee Handbooks as Contracts [§ 4.79]
- B. Other Personnel Documents [§ 4.80]

### V. Standard Provisions of Employee Handbooks [§ 4.81]

- A. Statement of Purpose [§ 4.82]
- B. Disclaimer [§ 4.83]
  - 1. In General [§ 4.84]
  - 2. Specific Disclaimer Provision [§ 4.85]
  - 3. Receipt Disclaimer [§ 4.86]
- C. Employment Policies [§ 4.87]
  - 1. Management Rights [§ 4.88]
  - 2. Equal Employment Opportunity [§ 4.89]
  - 3. Harassment [§ 4.90]
- D. Operating Rules and Regulations [§ 4.91]
  - 1. Technology Use [§ 4.92]
  - 2. Solicitation and Distribution [§ 4.93]

- 3. Alcohol and Drugs [§ 4.94]
- 4. Rules of Conduct [§ 4.95]
- E. Working Conditions [§ 4.96]
  - 1. Work Schedules and Overtime [§ 4.97]
  - 2. Absences and Tardiness [§ 4.98]
  - 3. Work Performance [§ 4.99]
  - 4. Resignation or Termination [§ 4.100]
- F. Employee Benefits [§ 4.101]
  - 1. Insurance [§ 4.102]
  - 2. Jury and Witness Duty [§ 4.103]
  - 3. Leaves of Absence [§ 4.104]
  - 4. Vacations [§ 4.105]
  - 5. Holidays [§ 4.106]

#### **CHAPTER 5**

# WAGES AND HOURS

by James J. Chiolino

- I. Scope of Chapter [§ 5.1]
- II. Wages Defined [§ 5.2]
- III. Coverage Under Minimum-Wage and Overtime Laws [§ 5.3]
  - A. Employers [§ 5.4]
  - B. Employees [§ 5.5]
    - 1. In General [§ 5.6]
    - 2. Minimum-Wage Laws [§ 5.7]
    - 3. Overtime Laws [§ 5.8]
      - a. In General [§ 5.9]
      - b. Executive, Administrative, Professional, Highly-Compensated, and Computer Employees [§ 5.10]
        - (1) In General [§ 5.11]
        - (2) Executive Employees [§ 5.12]
        - (3) Administrative Employees [§ 5.13]
        - (4) Professional Employees [§ 5.14]
        - (5) Highly Compensated Employees [§ 5.15]
        - (6) Computer Employees [§ 5.16]
      - c. Outside Sales Personnel [§ 5.17]
  - C. Independent Contractors [§ 5.18]

# IV. Minimum-Wage Laws [§ 5.19]

- A. In General [§ 5.20]
- B. Minimum-Wage Rates [§ 5.21]
  - 1. In General [§ 5.22]
  - 2. Allowable Deductions for Board and Lodging [§ 5.23]
- C. Hours Worked [§ 5.24]
  - 1. In General [§ 5.25]
  - 2. Meal and Rest Breaks [§ 5.26]
  - 3. Nursing Breaks [§ 5.27]
  - 4. Sleeping Time [§ 5.28]
  - 5. Activities Before or After Regular Hours [§ 5.29]
  - 6. Seminar Time [§ 5.30]
  - 7. Travel Time [§ 5.31]
  - 8. Civic and Charitable Work [§ 5.32]

# V. Overtime Laws [§ 5.33]

- A. Overtime Rate [§ 5.34]
  - 1. In General [§ 5.35]
  - 2. Workweek [§ 5.36]
  - 3. Regular Rate of Pay and Calculation of Overtime [§ 5.37]
    - a. In General [§ 5.38]
    - b. Straight Hourly Rate [§ 5.39]
    - c. Piece Rate [§ 5.40]
    - d. Multiple Rates [§ 5.41]
    - e. Compensatory Time [§ 5.42]
- B. Joint Employment [§ 5.43]
- C. Remedial Training [§ 5.44]

# VI. Record Keeping [§ 5.45]

- A. Timekeeping and the Rounding of Time [§ 5.46]
- B. Information to Be Kept [§ 5.47]

# VII. Child Labor Laws and Regulations [§ 5.48]

- A. In General [§ 5.49]
- B. Work Permits [§ 5.50]
- C. Work Permitted [§ 5.51]
  - 1. Minors Under 12 [§ 5.52]
  - 2. Minors Under 14 [§ 5.53]
  - 3. Minors 14–17 [§ 5.54]
- D. Hours of Work [§ 5.55]
  - 1. In General [§ 5.56]

- 2. Canning and Processing [§ 5.57]
- 3. Florists [§ 5.58]
- E. Hazardous Employment Prohibited [§ 5.59]
- F. Volunteer Services by Minors [§ 5.60]
  - 1. In General [§ 5.61]
  - 2. Student Learners, High School Graduates, and Apprentices [§ 5.62]
  - 3. Student Worklike Activities [§ 5.63]
- G. Fees, Revocations, and Postings [§ 5.64]

# VIII. Enforcement of Minimum-Wage and Overtime Laws [§ 5.65]

- A. Wisconsin Compliance Audits and Penalties [§ 5.66]
  - 1. DWD Compliance Audits and Investigations [§ 5.67]
  - 2. Additional Civil Penalties Recoverable by Attorney General [§ 5.68]
  - 3. Criminal Penalties [§ 5.69]
  - 4. Employee-Instigated Litigation [§ 5.70]
- B. FLSA Compliance Audits and Penalties [§ 5.71]
  - 1. U.S. Department of Labor Compliance Audits and Litigation [§ 5.72]
  - 2. Criminal Penalties [§ 5.73]
  - 3. Employee-Instigated Litigation [§ 5.74]
- C. Statutes of Limitation [§ 5.75]

#### IX. Miscellaneous Provisions [§ 5.76]

- A. Frequency of Wage Payments [§ 5.77]
- B. Payroll Withholding [§ 5.78]
  - 1. State and Federal Taxes [§ 5.79]
    - a. In General [§ 5.80]
    - b. Delinquent State Taxes [§ 5.81]
  - 2. Child Support [§ 5.82]
- C. Termination Pay [§ 5.83]
- D. Accrual and Loss of Vacation (PTO) [§ 5.84]
- E. Deductions for Faulty Workmanship, Loss, Theft, or Damage [§ 5.85]
- F. Mass Layoffs and Plant Closings [§ 5.86]
- G. Garnishments [§ 5.87]
  - 1. Wisconsin Garnishment Statute [§ 5.88]
  - 2. Discharge for Garnishments [§ 5.89]
    - a. Wisconsin Garnishment Statute [§ 5.90]

- b. Wisconsin Consumer Act [§ 5.91]
- c. Federal Consumer Credit Protection Act [§ 5.92]
- H. Equal Pay/Comparable Worth [§ 5.93]
- I. Prevailing Wage Law [§ 5.94]

# X. Migrant and Seasonal Agricultural Workers [§ 5.95]

- A. In General [§ 5.96]
- B. Contracting [§ 5.97]
- C. Record Keeping [§ 5.98]
- D. Hours of Work [§ 5.99]
- E. Frequency of Wage Payments [§ 5.100]
- F. Enforcement [§ 5.101]

# **XI.** Appendices [§ 5.102]

- A. Appendix 5A: Labor Standards Bureau Wage Policy Statement Regarding Managerial Employees [§ 5.103]
- B. Appendix 5B: Wisconsin Minimum Wage Rates/Maximum Allowances for Board and Lodging [§ 5.104]
- C. Appendix 5C: Outline of DWD Audit Procedure [§ 5.105]
- D. Appendix 5D: Letter from James L. Stelsel, Director, Labor Standards Bureau, to Daniel T. Dennehy, Attorney, von Briesen & Purtell, S.C. (July 30, 1993)
   [§ 5.106]
- E. Appendix 5E: U.S. Department of Labor Comparison of FLSA Exemptions from Minimum Wage and Overtime Pay [§ 5.107]
- F. Appendix 5F: Letter from Jim Chiolino, Section Chief, Labor Standards Bureau, to Daniel T. Dennehy, Attorney, von Briesen & Roper, S.C. (Oct. 19, 2004) [§ 5.108]
- G. Appendix 5G: Federal Minimum-Wage Poster [§ 5.109]
- H. Appendix 5H: Notice to Wisconsin Workers with Disabilities Paid at Special Minimum Wage [§ 5.110]
- I. Appendix 5I: Hours and Times of Day Minors May Work in Wisconsin [§ 5.111]
- J. Appendix 5J: U.S. Department of Labor Fact Sheet: Proposed Rule Changes Concerning In-Home Care Industry Under the FLSA [§ 5.112]

# CHAPTER 6 EMPLOYEE BENEFITS

by Greg W. Renz and Carmen N. Decot

# I. Scope of Chapter [§ 6.1]

### II. Sources of the Law [§ 6.2]

- A. Enactment of ERISA [§ 6.3]
- B. Amendment History [§ 6.4]
- C. Preemption [§ 6.5]

# III. Qualified Retirement Plans [§ 6.6]

- A. Definitions [§ 6.7]
  - 1. Qualified Plan; Pension Plan [§ 6.8]
  - 2. Employer [§ 6.9]
- B. Types of Plans [§ 6.10]
  - 1. In General [§ 6.11]
  - 2. Defined Benefit Plans [§ 6.12]
  - 3. Defined Contribution Plans [§ 6.13]
    - a. In General [§ 6.14]
    - b. Profit Sharing [§ 6.15]
    - c. Stock Bonus [§ 6.16]
    - d. Money Purchase [§ 6.17]
    - e. 401(k) [§ 6.18]
    - f. ESOP [§ 6.19]
  - 4. Hybrid Plans [§ 6.20]
    - a. Target Benefit [§ 6.21]
    - b. Cash Balance [§ 6.22]
- C. Tax Advantages [§ 6.23]
  - 1. Timing of Income Recognition by Employee [§ 6.24]
  - 2. Timing of Deductibility by Employer [§ 6.25]
  - 3. Exempt Status of Trust Income [§ 6.26]
  - 4. Special Employee Income Tax Options [§ 6.27]
    - a. In General [§ 6.28]
    - b. After-Tax Contributions to Plan [§ 6.29]
    - c. Rollovers [§ 6.30]
    - d. 10-Year Averaging [§ 6.31]
    - e. Net Unrealized Appreciation [§ 6.32]
    - f. Capital Gains [§ 6.33]
  - 5. Wisconsin Income Tax [§ 6.34]

- D. Participation and Coverage Requirements [§ 6.35]
  - 1. Minimum Age and Years of Service [§ 6.36]
  - 2. Nondiscriminatory Coverage [§ 6.37]
- E. Nondiscrimination Rules [§ 6.38]
  - 1. In General [§ 6.39]
  - 2. Coverage [§ 6.40]
  - 3. Accruals [§ 6.41]
  - 4. Benefits, Rights, and Features [§ 6.42]
  - 5. Plan Amendments [§ 6.43]
- F. Vesting Requirements [§ 6.44]
- G. Limitations on Contributions and Benefits [§ 6.45]
- H. Distribution [§ 6.46]
  - 1. Forms of Distribution to Participants [§ 6.47]
    - a. In General [§ 6.48]
    - b. Qualified Joint and Survivor Annuity [§ 6.49]
    - c. Other Annuities [§ 6.50]
    - d. Lump Sum [§ 6.51]
    - e. Installments [§ 6.52]
    - f. Employer Securities [§ 6.53]
  - 2. Timing and Amount of Distributions to

Participants [§ 6.54]

- a. In General [§ 6.55]
- b. Distributions Before Normal Retirement Age [§ 6.56]
- c. Distributions After Normal Retirement Age [§ 6.57]
- d. Excess Distributions and Accumulations [§ 6.58]
- 3. Preretirement Death Benefits [§ 6.59]
- I. Assignment and Alienation of Benefits [§ 6.60]
  - 1. In General [§ 6.61]
  - 2. Qualified Domestic Relations Orders [§ 6.62]
- J. Reporting and Disclosure [§ 6.63]
  - 1. In General [§ 6.64]
  - 2. Requirements [§ 6.65]
    - a. Annual Report [§ 6.66]
    - b. Summary Plan Description [§ 6.67]
    - c. Benefit Statements [§ 6.68]
  - 3. Penalties for Noncompliance [§ 6.69]
- K. Fiduciaries [§ 6.70]
  - 1. In General [§ 6.71]
  - 2. Standards of Care [§ 6.72]

- a. Prudent Person Standard [§ 6.73]
- b. Exclusive Purpose Standard [§ 6.74]
- 3. Duty to Diversify Investments [§ 6.75]
- 4. Prohibited Transactions [§ 6.76]
  - a. In General [§ 6.77]
  - b. Transactions with Parties in Interest [§ 6.78]
  - c. Acquisition of Employer Stock or Real Property [§ 6.79]
  - d. Other Prohibited Transactions [§ 6.80]
- 5. Cofiduciary Duties [§ 6.81]
- 6. Liability for Breach of Duty [§ 6.82]
  - a. Penalties [§ 6.83]
  - b. Fiduciary Insurance [§ 6.84]
- L. Disputes [§ 6.85]
  - 1. ERISA Claims Procedure [§ 6.86]
  - 2. Litigation [§ 6.87]
- M. Funding [§ 6.88]
  - 1. In General [§ 6.89]
  - 2. Single Employer Pension Plans [§ 6.90]
  - 3. Multiemployer Pension Plans [§ 6.91]
    - a. In General [§ 6.92]
    - b. Complete Withdrawal [§ 6.93]
    - c. Partial Withdrawal [§ 6.94]
    - d. Amount of Withdrawal Liability [§ 6.95]
  - 4. Pension Benefit Guaranty Corporation [§ 6.96]
- N. Bankruptcy [§ 6.97]
- O. Marital Property [§ 6.98]

#### IV. Other Retirement Plans [§ 6.99]

- A. In General [§ 6.100]
- B. Nonqualified Deferred-Compensation Arrangements [§ 6.101]
  - 1. Types of Plans [§ 6.102]
  - 2. Tax Advantages and Limitations [§ 6.103]
    - a. Timing of Income Recognition by Employee [§ 6.104]
    - b. Timing of Deductibility by Employer [§ 6.105]
  - 3. ERISA Requirements [§ 6.106]
    - a. In General [§ 6.107]
    - b. Excess Benefit Plans [§ 6.108]
    - c. Top Hat Plans [§ 6.109]

- C. Individual Retirement Accounts [§ 6.110]
  - 1. In General [§ 6.111]
  - 2. Traditional IRAs [§ 6.112]
  - 3. Roth IRAs [§ 6.113]
- D. Simplified Employee Pensions [§ 6.114]
- E. SIMPLE Plans [§ 6.115]

# V. Welfare Benefit Plans [§ 6.116]

- A. In General [§ 6.117]
- B. Health Plans [§ 6.118]
  - 1. In General [§ 6.119]
  - 2. Allocation of Cost [§ 6.120]
  - 3. Allocation of Risk [§ 6.121]
  - 4. Mandated Benefits [§ 6.122]
  - 5. Subrogation and Coordination of Benefits [§ 6.123]
  - 6. Health Maintenance Organizations [§ 6.124]
  - 7. Continuation and Conversion Rights [§ 6.125]
    - a. Federal Law [§ 6.126]
      - (1) In General [§ 6.127]
      - (2) Applicability [§ 6.128]
      - (3) Qualified Beneficiaries [§ 6.129]
      - (4) Qualifying Events [§ 6.130]
      - (5) Benefits [§ 6.131]
      - (6) Election and Cost [§ 6.132]
    - b. Wisconsin Law [§ 6.133]
    - c. Compliance with Federal and State Law [§ 6.134]
- C. Death Benefits [§ 6.135]
- D. Disability Benefits [§ 6.136]
- E. Dependent Care Benefits [§ 6.137]
- F. Cafeteria Plans [§ 6.138]

# VI. Vacation, Holidays, and Other Time Off Work [§ 6.139]

- A. Vacation [§ 6.140]
- B. Holidays [§ 6.141]
  - 1. Secular [§ 6.142]
  - 2. Religious [§ 6.143]
- C. Military Service [§ 6.144]
- D. Jury Duty [§ 6.145]
- E. Absence to Testify Under Subpoena [§ 6.146]
- F. Voting [§ 6.147]

### VII. Family and Medical Leave [§ 6.148]

- A. Federal Law [§ 6.149]
- B. Wisconsin Law [§ 6.150]
  - 1. Coverage [§ 6.151]
  - 2. Amount and Type of Leave Available [§ 6.152]
    - a. Family Leave [§ 6.153]
      - (1) In General [§ 6.154]
      - (2) Birth or Adoption of Child [§ 6.155]
      - (3) Care of Sick Child, Spouse, Domestic Partner, or Parent [§ 6.156]
    - b. Medical Leave [§ 6.157]
  - 3. Medical Certification [§ 6.158]
    - a. In General [§ 6.159]
    - b. Second and Third Medical Opinions [§ 6.160]
    - c. Definitions [§ 6.161]
      - (1) Serious Health Condition [§ 6.162]
      - (2) Health-Care Provider [§ 6.163]
  - 4. Advance Notice and Scheduling Requirements [§ 6.164]
    - a. Advance Notice [§ 6.165]
    - b. Scheduling [§ 6.166]
      - (1) In General [§ 6.167]
      - (2) Partial Absences [§ 6.168]
      - (3) Consecutive Leave [§ 6.169]
  - 5. Substitution of Employer-Provided Leave for Statutory Leave [§ 6.170]
    - a. By Employee [§ 6.171]
    - b. By Employer [§ 6.172]
  - 6. Rights and Benefits During Leave [§ 6.173]
  - 7. Rights and Benefits upon Return from Leave [§ 6.174]
  - 8. Prohibited Acts by Employers [§ 6.175]
  - 9. Required Postings [§ 6.176]
  - 10. Enforcement Procedure [§ 6.177]

#### VIII. Modification and Elimination of Benefits [§ 6.178]

- A. Qualified Retirement Plans [§ 6.179]
- B. Other Retirement and Welfare Benefit Plans [§ 6.180]

# **IX.** Appendices [§ 6.181]

A. Appendix 6A: Additional Sources [§ 6.182]

- B. Appendix 6B: Fact Sheet on Continuation Rights in Health Insurance Policies [§ 6.183]
- C. Appendix 6C: Comparison of Federal and Wisconsin Family and Medical Leave Laws [§ 6.184]

#### CHAPTER 7

#### OCCUPATIONAL SAFETY AND HEALTH

by Eric E. Hobbs and Jesse R. Dill

# I. Scope of Chapter [§ 7.1]

# II. Relationship of Federal and State Laws [§ 7.2]

- A. Scope of OSHAct and OSHA Standards and Regulations [§ 7.3]
  - 1. In General [§ 7.4]
  - 2. Civil Provisions [§ 7.5]
  - 3. Criminal Provisions [§ 7.6]
- B. Scope of Wisconsin Statutory and Regulatory Laws [§ 7.7]
- C. OSHAct's Preemption of State Law [§ 7.8]
  - 1. Civil Law [§ 7.9]
  - 2. Criminal Law [§ 7.10]

#### III. Wisconsin Law [§ 7.11]

- A. Civil Statutes and Regulations [§ 7.12]
  - 1. Safe-Place Statute [§ 7.13]
  - 2. Public-Employee Safety and Health Statute [§ 7.14]
  - 3. Safety and Health Regulations [§ 7.15]
  - 4. Employees' Right-to-Know Law [§ 7.16]
  - 5. Smoking Prohibited Statute [§ 7.17]
  - 6. Concealed Carry Law [§ 7.18]
  - 7. Miscellaneous Requirements [§ 7.19]
    - a. Fire Detection and Prevention [§ 7.20]
    - b. Lunchrooms [§ 7.21]
- B. Civil Administration and Enforcement [§ 7.22]
  - 1. Inspections by the Division of Industry Services [§ 7.23]
    - a. In General [§ 7.24]
    - b. At Employer's Request [§ 7.25]

- c. Upon Occupational Injury [§ 7.26]
- d. At Request of Persons Other than Employer [§ 7.27]
- 2. Hearings by Department of Safety and Professional Services [§ 7.28]
- 3. Remedies [§ 7.29]
  - a. Safe-Place Statute: Worker's Compensation Benefits Increase [§ 7.30]
  - b. Employees' Right-to-Know Law [§ 7.31]
    - (1) Abatement Order [§ 7.32]
    - (2) Make-Whole Relief to Employee Retaliated Against [§ 7.33]
    - (3) Civil Penalty [§ 7.34]
  - c. Smoking Prohibited Statute [§ 7.35]
    - (1) Civil Penalty [§ 7.36]
    - (2) Court Injunction [§ 7.37]
- C. Criminal Prosecution for Occupational Safety and

Health–Related Conduct [§ 7.38]

- 1. Criminal Statutes [§ 7.39]
- 2. Enforcement [§ 7.40]
- 3. Sanctions [§ 7.41]
- 4. Preemption by OSHAct [§ 7.42]

#### V. OSHAct and OSHA Standards and Regulations [§ 7.43]

- A. OSHAct's Coverage [§ 7.44]
  - 1. In General [§ 7.45]
  - 2. Employers [§ 7.46]
  - 3. Employees [§ 7.47]
  - 4. Interstate Commerce [§ 7.48]
- B. OSHAct's Requirements [§ 7.49]
  - 1. In General [§ 7.50]
  - 2. General-Duty Clause [§ 7.51]
  - 3. Safety and Health Standards—Generally [§ 7.52]
    - a. Promulgation and Challenge [§ 7.53]
    - b. Interpretation [§ 7.54]
    - c. Variances [§ 7.55]
      - (1) In General [§ 7.56]
      - (2) Application Procedure and Content [§ 7.57]
      - (3) Interim Orders [§ 7.58]
      - (4) Types of Variances [§ 7.59]
      - (5) Modification or Revocation of Variances [§ 7.60]

- 4. Regulations—Generally [§ 7.61]
- 5. Posting of Employee Rights [§ 7.62]
- 6. Recordkeeping and Reporting [§ 7.63]
  - a. In General [§ 7.64]
  - b. Access to Exposure and Medical Records [§ 7.65]
  - c. Reporting of Mechanical Power Press Injuries [§ 7.66]
- 7. Multiemployer Worksites [§ 7.67]
- 8. Burden of Proof for Establishing Violation [§ 7.68]
- C. Employee Right and Responsibilities [§ 7.69]
  - 1. In General [§ 7.70]
  - 2. Employee Rights [§ 7.71]
    - a. To Initiate and to Participate in Inspections [§ 7.72]
    - b. To Participate in Enforcement Proceedings [§ 7.73]
    - c. To Enjoin Unsafe Working Conditions [§ 7.74]
    - d. To Refuse to Perform Work Alleged to Be Hazardous [§ 7.75]
      - (1) In General [§ 7.76]
      - (2) Under NLRA [§ 7.77]
      - (3) Under OSHAct and OSHA's Recordkeeping Regulation [§ 7.78]
    - e. To Exercise Rights Under OSHAct Without Retaliation [§ 7.79]
      - (1) In General [§ 7.80]
      - (2) Complaint and Complaint-Resolution Procedures [§ 7.81]
      - (3) Remedies [§ 7.82]
    - f. To Be Ensured Equal Employment Opportunity in Consideration of Sex-Related Safety Concerns [§ 7.83]
    - g. To Access Employer Records and Information [§ 7.84]
  - 3. Employee Responsibilities [§ 7.85]
- D. Civil Enforcement [§ 7.86]
  - 1. In General [§ 7.87]
  - 2. Inspection [§ 7.88]
    - a. In General [§ 7.89]

- b. Triggering Events [§ 7.90]
  - (1) Programmed Inspections [§ 7.91]
  - (2) Employee or Employee Representative Complaint [§ 7.92]
  - (3) Imminent Danger [§ 7.93]
  - (4) Fatality and Catastrophe [§ 7.94]
  - (5) Referral [§ 7.95]
  - (6) Abatement Follow-Up [§ 7.96]
  - (7) National or Local Special-Emphasis Program [§ 7.97]
  - (8) Severe Violators Emphasis Program [§ 7.98]
- c. Authority to Inspect [§ 7.99]
  - (1) Establishment [§ 7.100]
  - (2) Employer Logs and Records [§ 7.101]
  - (3) Work at Home-Telecommuting [§ 7.102]
- d. Employer Safety and Health Self-Audits [§ 7.103]
- e. Scope [§ 7.104]
  - (1) Comprehensive [§ 7.105]
  - (2) Partial [§ 7.106]
- f. Opening Conference [§ 7.107]
- g. Employee Interviews [§ 7.108]
- h. Right of Employer and Employee Representatives to Accompany [§ 7.109]
- i. Subpoenas [§ 7.110]
- j. Trade Secrets and Confidential Information [§ 7.111]
- k. Audio and Video Recording [§ 7.112]
- 1. Employer's Use of Written Policy Regarding Inspection [§ 7.113]
- m. Closing Conference [§ 7.114]
- 3. Classification of Violations [§ 7.115]
  - a. In General [§ 7.116]
  - b. De Minimis [§ 7.117]
  - c. Other-than-Serious [§ 7.118]
  - d. Serious [§ 7.119]
  - e. Repeat [§ 7.120]
  - f. Willful [§ 7.121]
  - g. Failure to Abate [§ 7.122]
- 4. Calculation of Proposed Penalties [§ 7.123]
  - a. Final Proposed Penalty Calculation [§ 7.124]
  - b. Authority [§ 7.125]

- c. For Other-than-Serious and Serious Alleged Violations [§ 7.126]
  - (1) In General [§ 7.127]
  - (2) Gravity-Based Penalty [§ 7.128]
  - (3) Penalty Adjustment Factors [§ 7.129]
- d. For Repeat and Willful Alleged Violations [§ 7.130]
  - (1) In General [§ 7.131]
  - (2) Repeat Alleged Violations [§ 7.132]
  - (3) Willful Alleged Violations [§ 7.133]
- e. Failure to Abate [§ 7.134]
- f. Egregious Cases [§ 7.135]
- g. Recordkeeping and Reporting Alleged Violations [§ 7.136]
  - (1) Recordkeeping Alleged Violations [§ 7.137]
  - (2) Medical and Exposure Records Access Violations [§ 7.138]
  - (3) Authorized Employee Representative Notice Violation [§ 7.139]
  - (4) Abatement Certification Violation [§ 7.140]
  - (5) Reporting Violations [§ 7.141]
  - (6) Commission Considerations in Reviewing Proposed Penalties [§ 7.142]
- 5. Citation and Notification of Proposed Penalty [§ 7.143]
  - a. Elements [§ 7.144]
  - b. Issuance of Citation [§ 7.145]
    - (1) With Reasonable Promptness [§ 7.146]
    - (2) Statute of Limitation [§ 7.147]
  - c. Posting [§ 7.148]
  - d. Amendment [§ 7.149]
- 6. Challenges to Citation and Notification of Proposed Penalty [§ 7.150]
  - a. In General [§ 7.151]
  - b. Informal Conference and Settlement [§ 7.152]
  - c. Notice of Contest and Settlement or Litigation [§ 7.153]
    - (1) Notice of Contest by Employer [§ 7.154]
    - (2) Notice of Contest by Employee/Employee Representative [§ 7.155]
    - (3) Posting and Notice to Contesting Parties [§ 7.156]

- (4) Settlement and Litigation [§ 7.157]
- (5) Failure to File Notice of Contest [§ 7.158]
- d. Defenses Available for Settlement or at Hearing [§ 7.159]
  - (1) In General [§ 7.160]
  - (2) Substantive Defenses [§ 7.161]
  - (3) Procedural Defenses [§ 7.162]
- 7. Abatement [§ 7.163]
  - a. In General [§ 7.164]
  - b. Effect of Contest on Obligation [§ 7.165]
  - c. Petition for Modification of Abatement [§ 7.166]
  - d. Failure to Abate [§ 7.167]
- E. Criminal Prosecution [§ 7.168]
  - 1. In General [§ 7.169]
  - 2. Violations Subject to Prosecution Under OSHAct [§ 7.170]
    - a. Willful Violations Leading to Death [§ 7.171]
    - b. False Statements and Reports [§ 7.172]
    - c. Forceful Interference with CSHO [§ 7.173]
    - d. Unauthorized Advance Notice of Inspection [§ 7.174]
  - 3. Referral by OSHA [§ 7.175]
  - 4. Department of Justice Discretion [§ 7.176]
  - 5. Possible Defendants [§ 7.177]
    - a. Corporations [§ 7.178]
    - b. Individuals [§ 7.179]
  - 6. Sanctions [§ 7.180]
    - a. Fines [§ 7.181]
      - (1) Under OSHAct [§ 7.182]
      - (2) Under Comprehensive Crime Control and Criminal Fine Collection Act [§ 7.183]
    - b. Imprisonment [§ 7.184]

#### V. Appendices [§ 7.185]

- A. Appendix 7A: Additional Sources [§ 7.186]
- B. Appendix 7B: Log of Work-Related Injuries and Illnesses (OSHA 300 Log) [§ 7.187]
- C. Appendix 7C: Injury and Illness Incident Report (OSHA 301) [§ 7.188]
- D. Appendix 7D: OSHA Wisconsin Offices [§ 7.189]

- E. Appendix 7E: Notice of Alleged Imminent Danger (OSHA 8) [§ 7.190]
- F. Appendix 7F: Notice to OSHA of Warrant Policy [§ 7.191]
- G. Appendix 7G: Notice of Protest of Inspection [§ 7.192]
- H. Appendix 7H: Citation and Notification of Penalty (OSHA 2) [§ 7.193]
- I. Appendix 7I: Notice to Employees (OSHA) [§ 7.194]
- J. Appendix 7J: Recordkeeping Change Chart [§ 7.195]

# CHAPTER 8 WORKER'S COMPENSATION

by Joseph Danas, Jr.

# I. Scope of Chapter [§ 8.1]

# II. Coverage [§ 8.2]

- A. Employers Subject to WCA [§ 8.3]
- B. Employees Subject to WCA [§ 8.4]
- C. Test of Employment Relationship [§ 8.5]
  - 1. In General [§ 8.6]
  - 2. Independent Contractor [§ 8.7]
  - 3. Loaned Employees [§ 8.8]
  - 4. Contractor Over [§ 8.9]

#### III. Conditions of Liability [§ 8.10]

- A. In General [§ 8.11]
- B. Covered and Noncovered Injuries [§ 8.12]
  - 1. Traumatic Injury [§ 8.13]
  - 2. Occupational Disease [§ 8.14]
  - 3. Self-Inflicted Injury [§ 8.15]
- C. Injury Sustained in Course of Employment [§ 8.16]
  - 1. In General [§ 8.17]
  - 2. Premises Rule [§ 8.18]
    - a. In General [§ 8.19]
    - b. Going and Coming on Premises [§ 8.20]
    - c. Parking Lot [§ 8.21]
    - d. Spilled-Over Danger Rule [§ 8.22]
    - e. Commuting [§ 8.23]

- f. Work at Home [§ 8.24]
- g. Work-Connected Recreation [§ 8.25]
- 3. Personal Comfort Doctrine [§ 8.26]
- 4. Deviations from Usual Employment [§ 8.27]
- 5. Horseplay [§ 8.28]
- 6. Fighting [§ 8.29]
- 7. Violations of Work Rules [§ 8.30]
- 8. Traveling [§ 8.31]
- D. Injury Arising out of Employment [§ 8.32]
  - 1. In General [§ 8.33]
  - 2. Legal Causation [§ 8.34]
    - a. In General [§ 8.35]
    - b. Usual-Work Rule [§ 8.36]
    - c. "As Is" Rule [§ 8.37]
    - d. Compensable Reinjury and Intervening Cause [§ 8.38]
  - 3. Medical Causation [§ 8.39]
    - a. In General [§ 8.40]
    - b. Traumatic Injury [§ 8.41]
    - c. Occupational Disease [§ 8.42]
  - 4. Positional-Risk Doctrine [§ 8.43]
- E. Statute of Limitation [§ 8.44]

# IV. Exclusivity of Remedy [§ 8.45]

- A. In General [§ 8.46]
- B. Coemployee Exclusion [§ 8.47]
- C. Dual-Persona Doctrine [§ 8.48]
- D. Federal Preemption [§ 8.49]

#### V. Benefits [§ 8.50]

- A. In General [§ 8.51]
- B. Temporary Disability Benefits [§ 8.52]
  - 1. In General [§ 8.53]
  - 2. Wage Loss [§ 8.54]
  - 3. Healing Period [§ 8.55]
  - 4. Temporary Work Restrictions [§ 8.56]
  - 5. Ancillary Benefits [§ 8.57]
- C. Permanent Disability Benefits [§ 8.58]
  - 1. In General [§ 8.59]
  - 2. Schedule Injury [§ 8.60]
  - 3. Nonschedule Injury [§ 8.61]
  - 4. Disfigurement [§ 8.62]

- D. Vocational Rehabilitation Benefits [§ 8.63]
- E. Medical Expenses [§ 8.64]
  - 1. Choice and Mode of Treatment [§ 8.65]
  - 2. Reasonableness of Fees and Necessity of Treatment [§ 8.66]
  - 3. Treatment Unrelated to Injury [§ 8.67]
  - 4. Exception [§ 8.68]
- F. Death Benefits [§ 8.69]
  - 1. In General [§ 8.70]
  - 2. Potential Dependents [§ 8.71]
  - 3. Distribution of Payments [§ 8.72]
  - 4. Secondary Benefits [§ 8.73]

# VI. Violations and Penalties [§ 8.74]

- A. In General [§ 8.75]
- B. Unsafe Practices [§ 8.76]
  - 1. By Employer or Employer's Agents [§ 8.77]
    - a. In General [§ 8.78]
    - b. Elements of Proving Prima Facie Case [§ 8.79]
    - c. Defenses to Prima Facie Case [§ 8.80]
  - 2. By Employee [§ 8.81]
- C. Unreasonable Refusal to Rehire [§ 8.82]
- D. Illegal Employment of Minors [§ 8.83]
- E. Bad Faith [§ 8.84]
- F. Inexcusable Delay in Payment [§ 8.85]
- G. Fraudulent Claims [§ 8.86]

# VII. Practice and Procedure [§ 8.87]

- A. Pleadings [§ 8.88]
- B. Amendments to Pleadings [§ 8.89]
- C. Prehearing Procedure [§ 8.90]
  - 1. Discovery [§ 8.91]
  - 2. Medical or Vocational Examinations [§ 8.92]
  - 3. Disclosure and Exchange of Information [§ 8.93]
  - 4. Prehearing Conference [§ 8.94]
  - 5. Settlements [§ 8.95]
    - a. Compromise [§ 8.96]
    - b. Stipulation [§ 8.97]
    - c. Medicare Consideration in Worker's Compensation Settlements [§ 8.98]
- D. Formal Hearing [§ 8.99]
  - 1. Notice and Location of Hearing [§ 8.100]
  - 2. Filing Deadlines [§ 8.101]

- a. Medical Reports [§ 8.102]
- b. Vocational Reports [§ 8.103]
- c. Medical Expenses [§ 8.104]
- d. Employee's Statement [§ 8.105]
- 3. Postponements and Continuances [§ 8.106]
- 4. Burden of Proof [§ 8.107]
- 5. Rules of Evidence [§ 8.108]
- 6. Order [§ 8.109]
- E. Posthearing Procedure and Appeal [§ 8.110]
  - 1. Mistake or Newly Discovered Evidence [§ 8.111]
  - 2. Administrative Review [§ 8.112]
  - 3. Judicial Review [§ 8.113]
    - a. Appeal to Circuit Court [§ 8.114]
    - b. Appeals to Wisconsin Court of Appeals and Wisconsin Supreme Court [§ 8.115]
    - c. Standard of Judicial Review [§ 8.116]

#### VIII. Appendices [§ 8.117]

- A. Appendix 8A: Employer's First Report of Injury or Disease [§ 8.118]
- B. Appendix 8B: Practitioner's Report on Accident or Industrial Disease in Lieu of Testimony [§ 8.119]
- C. Appendix 8C: Methods of Determining Compensation Wage [§ 8.120]
- D. Appendix 8D: Maximum Wage and Rate Chart [§ 8.121]
- E. Appendix 8E: Request for Social Security Information [§ 8.122]
- F. Appendix 8F: Hearing Application [§ 8.123]
- G. Appendix 8G: Sample Fee Agreement [§ 8.124]
- H. Appendix 8H: Answer to Hearing Application [§ 8.125]
- I. Appendix 8I: Statement of Medical Treatment [§ 8.126]
- J. Appendix 8J: Uninsured Employers Fund Claim Information [§ 8.127]
- K. Appendix 8K: VR Program Policy [§ 8.128]
- L. Appendix 8L: Wisconsin Worker's Compensation Pool Policy, Part Three: Other States' Insurance [§ 8.129]
- M. Appendix 8M: Worker's Compensation Insurance Letter [§ 8.130]

# CHAPTER 9

#### PRIVACY AND INDIVIDUAL RIGHTS

by Katherine L. Charlton and Summer Murshid

# I. Scope of Chapter [§ 9.1]

# II. Right of Privacy [§ 9.2]

- A. Introduction [§ 9.3]
- B. Sources of the Law [§ 9.4]
  - 1. In General [§ 9.5]
  - 2. Wisconsin Statutory Right of Privacy [§ 9.6]
    - a. In General [§ 9.7]
    - b. Prohibited Invasions [§ 9.8]
      - (1) In General [§ 9.9]
      - (2) Intrusion [§ 9.10]
      - (3) Use of Name or Likeness [§ 9.11]
      - (4) Public Disclosure of Private Facts [§ 9.12]
    - c. Defenses [§ 9.13]
    - d. Remedies [§ 9.14]
    - e. Frivolous Actions [§ 9.15]
    - f. Interception of Wire, Electronic, or Oral Communication [§ 9.16]
    - g. Exclusive Remedy Under Other Statutes [§ 9.17]
  - 3. Constitutional Rights [§ 9.18]
  - 4. Defamation [§ 9.19]
    - a. In General [§ 9.20]
    - b. Publication [§ 9.21]
    - c. Privilege [§ 9.22]
    - d. Exclusive Remedy Under Worker's Compensation Act [§ 9.23]

# III. Honesty Testing [§ 9.24]

- A. Introduction [§ 9.25]
- B. Federal Law [§ 9.26]
- C. Wisconsin Law [§ 9.27]
  - 1. Prohibitions [§ 9.28]
  - 2. Notice of Protection [§ 9.29]
  - 3. Exemptions [§ 9.30]
  - 4. Disclosure of Test Results [§ 9.31]
  - 5. Remedies [§ 9.32]

# IV. AIDS [§ 9.33]

- A. Introduction [§ 9.34]
- B. Prohibition on Testing [§ 9.35]
- C. Disclosure of Test Results [§ 9.36]
- D. Provision of Care [§ 9.37]
- E. Insurance [§ 9.38]
- F. Employer Liability for HIV Transmission [§ 9.39]

# V. Arrest and Conviction Records [§ 9.40]

- A. Introduction [§ 9.41]
- B. Statutory Definitions [§ 9.42]
- C. Statutory Prohibition of Discrimination and Exceptions [§ 9.43]
- D. Judicial Interpretation [§ 9.44]
  - 1. Substantial-Relationship Exception [§ 9.45]
  - 2. Definition of Arrest Record [§ 9.46]

#### VI. Drug and Alcohol Policies and Testing [§ 9.47]

- A. Introduction [§ 9.48]
- B. Testing [§ 9.49]
  - 1. In General [§ 9.50]
  - 2. Constitutional Protection Against Unreasonable Searches and Seizures [§ 9.51]
  - 3. Prohibition of Disability and Other Discrimination [§ 9.52]
  - 4. Mandatory Bargaining Requirement for Unionized Employers [§ 9.53]
  - 5. Discharge for Misconduct Under Unemployment Insurance Law [§ 9.54]
- C. Disclosure of Test Results [§ 9.55]
- D. Federally Mandated Programs [§ 9.56]

# VII. Personnel and Medical Records [§ 9.57]

- A. Introduction [§ 9.58]
- B. Statutory Right to Inspect and Copy Records [§ 9.59]
  - 1. In General [§ 9.60]
  - 2. Exceptions [§ 9.61]
  - 3. Right to Correct Records [§ 9.62]
  - 4. Right to Copy Records [§ 9.63]
  - 5. Enforcement and Penalties [§ 9.64]
- C. Disclosure [§ 9.65]
  - 1. Statutory Requirements [§ 9.66]

- a. In General [§ 9.67]
- b. Public Records Law [§ 9.68]
- 2. Protection of Personal Information [§ 9.69]
- 3. Avoiding Liability for Disclosure [§ 9.70]
- D. Disposal of Personnel Records—the "Dumpster Diving" Law [§ 9.71]

# VIII. Investigation and Monitoring of Employees [§ 9.72]

- A. Introduction [§ 9.73]
- B. Monitoring and Surveillance [§ 9.74]
  - 1. In General [§ 9.75]
  - 2. At the Workplace [§ 9.76]
    - a. In General [§ 9.77]
    - b. Telephone Use [§ 9.78]
    - c. Computers and Email [§ 9.79]
      - (1) In General [§ 9.80]
      - (2) Applicable Federal Statutes [§ 9.81]
      - (3) Common-Law Claims [§ 9.82]
      - (4) Employee Expectations of Privacy in Email [§ 9.83]
    - d. Internet Use [§ 9.84]
    - e. Social Media [§ 9.85]
    - f. Stored Communications Act Decisions [§ 9.86]
  - 3. Off Duty [§ 9.87]
- C. Searches and Seizures [§ 9.88]
  - 1. In General [§ 9.89]
  - 2. Specific Types of Searches [§ 9.90]
    - a. Automobiles [§ 9.91]
    - b. Offices, Desks, and Computers [§ 9.92]
    - c. Lockers and Personal Belongings [§ 9.93]
  - 3. Workplace Searches by Law-Enforcement Personnel [§ 9.94]

# IX. Other Privacy Issues [§ 9.95]

- A. Genetic, Psychological, and Other Tests or Screening Devices [§ 9.96]
- B. Inquiries About Former Employees [§ 9.97]
- C. Employees' Political Beliefs, Affiliations, and Activities [§ 9.98]

#### CHAPTER 10

#### PERSONNEL MANAGEMENT AND RECORDS

by Kerry Mohan

## I. Scope of Chapter [§ 10.1]

## II. Approaches to Personnel Management [§ 10.2]

- A. In General [§ 10.3]
- B. No Written Policies or Disclaimer [§ 10.4]
- C. Disclaimer [§ 10.5]
- D. Contract or Written Policies Without Disclaimer [§ 10.6]
- E. Combined Disclaimer and Employee Handbook [§ 10.7]

#### III. Probationary Periods [§ 10.8]

#### IV. Performance Appraisals [§ 10.9]

- A. Advantages and Disadvantages [§ 10.10]
- B. Elements of a Good System [§ 10.11]
  - 1. Clear Purpose [§ 10.12]
  - 2. Accurate Job Descriptions; Job-Relatedness [§ 10.13]
  - 3. Inclusiveness [§ 10.14]
  - 4. Supervisor Training [§ 10.15]
  - 5. Employee Response [§ 10.16]
  - 6. Regular Schedule [§ 10.17]
  - 7. System Audits [§ 10.18]

#### V. Progressive Discipline [§ 10.19]

- A. Advantages and Disadvantages [§ 10.20]
- B. Elements of a Good System [§ 10.21]

#### VI. Transfers, Promotions, and Demotions [§ 10.22]

- A. Legal Significance [§ 10.23]
- B. Elements of a Good System [§ 10.24]
  - 1. Transfers and Promotions [§ 10.25]
  - 2. Demotions [§ 10.26]

#### VII. Seniority vs. Merit [§ 10.27]

- A. Legal Significance of Seniority [§ 10.28]
- B. Seniority and Merit Compared [§ 10.29]

## VIII. Alternative Dispute Resolution [§ 10.30]

- A. In General [§ 10.31]
- B. Advantages to Employer [§ 10.32]
- C. Advantages to Employee [§ 10.33]
- D. Disadvantages [§ 10.34]
- E. Elements of a Good System [§ 10.35]

## IX. Personnel Records [§ 10.36]

- A. In General [§ 10.37]
- B. Required Records [§ 10.38]
  - 1. Tax Forms [§ 10.39]
  - 2. USCIS Employment Eligibility Verification (Form I-9) [§ 10.40]
  - 3. Wage and Hour Records [§ 10.41]
  - 4. Worker's Compensation Records [§ 10.42]
  - 5. Employer New Hire Reports [§ 10.43]
  - 6. OSHA Records [§ 10.44]
  - 7. EEOC Reports [§ 10.45]
- C. Recommended Records [§ 10.46]
- D. Maintenance of Records [§ 10.47]
- E. Employees' Right to Inspect Records [§ 10.48]
  - 1. Statutory Requirements [§ 10.49]
  - 2. Additional Considerations [§ 10.50]
- F. Record Retention [§ 10.51]

## X. Posters [§ 10.52]

- A. In General [§ 10.53]
- B. State Laws [§ 10.54]
- C. Federal Laws [§ 10.55]

## **XI.** Appendices [§ 10.56]

- A. Appendix 10A: Sample Introductory Period Statement [§ 10.57]
- B. Appendix 10B: Wisconsin Fair Employment Law Poster [§ 10.58]
- C. Appendix 10C: Wisconsin Child Labor and Street Trades Employment Information Poster [§ 10.59]
- D. Appendix 10D: Wisconsin Unemployment Insurance Law Poster [§ 10.60]
- E. Appendix 10E: Wisconsin Family and Medical Leave Act Poster [§ 10.61]

- F. Appendix 10F: Wisconsin Plant-Closing Law Poster [§ 10.62]
- G. Appendix 10G: Wisconsin Employee Protections Against Use of Honesty Testing Devices Poster [§ 10.63]
- H. Appendix 10H: Notice to Wisconsin Workers with Disabilities Paid at Special Minimum Wage [§ 10.64]
- I. Appendix 10I: Public Employee Safety and Health Poster [§ 10.65]
- J. Appendix 10J: Hazardous Chemicals Poster [§ 10.66]
- K. Appendix 10K: Wisconsin Minimum Wage Rates Poster [§ 10.67]
- L. Appendix 10L: Wisconsin Maximum Allowances for Board and Lodging Poster [§ 10.68]
- M. Appendix 10M: Wisconsin Notification Required for Cessation of Health Care Benefits [§ 10.69]
- N. Appendix 10N: Retaliation Protection for Health Care Workers in Wisconsin [§ 10.70]
- O. Appendix 10O: Federal Equal Employment Opportunity Consolidated Poster [§ 10.71]
- P. Appendix 10P: Federal Minimum Wage Poster [§ 10.72]
- Q. Appendix 10Q: Federal Occupational Safety and Health Act Poster [§ 10.73]
- R. Appendix 10R: Federal Employee Polygraph Protection Act Poster [§ 10.74]
- S. Appendix 10S: Federal Family and Medical Leave Act Poster [§ 10.75]
- T. Appendix 10T: Notice to All Employees Working on Federal or Federally Financed Construction Projects [§ 10.76]
- U. Appendix 10U: Federal USERRA Poster [§ 10.77]
- V. Appendix 10V: Employer Personnel-Related Posters [§ 10.78]

#### CHAPTER 11

#### TERMINATION OF EMPLOYMENT

by Bradden C. Backer and Peter L. Albrecht

#### I. Scope of Chapter [§ 11.1]

## II. Types of Termination [§ 11.2]

- A. In General [§ 11.3]
- B. Voluntary Termination or Quit [§ 11.4]
- C. Involuntary Termination or Discharge [§ 11.5]
- D. Constructive Discharge [§ 11.6]
- E. Leave [§ 11.7]
  - 1. In General [§ 11.8]
  - 2. Layoffs [§ 11.9]
  - 3. Strikes or Lockouts [§ 11.10]
  - 4. Medical Leaves of Absence [§ 11.11]
  - 5. Personal Leaves of Absence [§ 11.12]
  - 6. Miscellaneous Leaves Guaranteed by Statute [§ 11.13]

# III. Limitations on an Employer's Right to Terminate [§ 11.14]

- A. In General [§ 11.15]
- B. Complications Arising in the Reduction-in-Force Context [§ 11.16]
- C. Contracts [§ 11.17]
  - 1. In General [§ 11.18]
  - 2. Collective Bargaining Agreements [§ 11.19]
  - 3. Individual Written Employment Contracts [§ 11.20]
  - 4. Oral Agreements [§ 11.21]
  - 5. Application of the Promissory Estoppel Doctrine [§ 11.22]
  - 6. Written Personnel Policies and Handbooks [§ 11.23]
- D. Statutes [§ 11.24]
  - 1. Fair-Employment Laws [§ 11.25]
  - 2. Whistleblower and Antiretaliation Laws [§ 11.26]
    - a. In General [§ 11.27]
    - b. Wisconsin Laws [§ 11.28]
    - c. Federal Laws [§ 11.29]
  - 3. Other Laws Protecting Conduct or Status [§ 11.30]
    - a. In General [§ 11.31]
    - b. Wisconsin Laws [§ 11.32]
    - c. Federal Laws [§ 11.33]
  - 4. Veterans' Reemployment Laws [§ 11.34]
  - 5. Plant-Closing Laws [§ 11.35]
- E. Public Policy [§ 11.36]

#### IV. The Termination Decision [§ 11.37]

- A. In General [§ 11.38]
- B. Pretermination Considerations [§ 11.39]
  - 1. In General [§ 11.40]
  - 2. Review of Relevant Records, Practices, and Issues [§ 11.41]
  - 3. Consistency of Decision-Making [§ 11.42]
  - 4. Fairness and Due Process Considerations [§ 11.43]
  - 5. Property and Information Concerns [§ 11.44]
- C. Communicating the Decision [§ 11.45]
  - 1. In General [§ 11.46]
  - 2. Meeting with Employee [§ 11.47]
  - 3. Characterization of Termination [§ 11.48]
  - 4. Implementation of Decision [§ 11.49]

## V. Termination Payments [§ 11.50]

- A. In General [§ 11.51]
- B. Required Payments and Benefits After Separation of Employment [§ 11.52]
  - 1. Wage Payments and Deductions from Wages [§ 11.53]
  - 2. Insurance Continuation and Conversion Rights [§ 11.54]
- C. Discretionary Payments [§ 11.55]
  - 1. Gratuitous Payments [§ 11.56]
  - 2. Payments Made Under Separation and Release Agreements [§ 11.57]
    - a. In General [§ 11.58]
    - b. Release of Federal Age-Discrimination Claims [§ 11.59]

## VI. Legal Issues in Providing References [§ 11.60]

- A. In General [§ 11.61]
- B. Liability for Termination Decision [§ 11.62]
- C. Defamation [§ 11.63]
- D. Privacy [§ 11.64]
- E. Negligent Referral or Duty to Warn [§ 11.65]
- F. Retaliation [§ 11.66]

#### **VII.** Appendices [§ 11.67]

A. Appendix 11A: Employment Termination Checklist [§ 11.68]

#### CHAPTER 12

#### **UNEMPLOYMENT INSURANCE**

by Tracey L. Schwalbe

## I. Scope of Chapter [§ 12.1]

#### II. Coverage [§ 12.2]

- A. In General [§ 12.3]
- B. Private Employment [§ 12.4]
  - 1. In General [§ 12.5]
  - 2. Sole Proprietorships, Partnerships, Close Corporations, and Limited Liability Companies [§ 12.6]
  - 3. Family Corporations [§ 12.7]
  - 4. Independent Contractors [§ 12.8]
    - a. In General [§ 12.9]
    - b. The First Standard [§ 12.10]
    - c. The Second Standard [§ 12.11]
  - 5. Exclusions [§ 12.12]
- C. Public Employment [§ 12.13]
- D. Nonprofit Organizations [§ 12.14]
- E. Indian Tribes [§ 12.15]

#### III. Benefit Qualifications [§ 12.16]

- A. In General [§ 12.17]
- B. Sufficient Base-Period Wages [§ 12.18]
- C. Work Registration and Reemployment [§ 12.19]
- D. Work Search [§ 12.20]
- E. Weekly Claims [§ 12.21]

## IV. Benefit Disqualifications [§ 12.22]

- A. In General [§ 12.23]
- B. Discharge [§ 12.24]
  - 1. In General [§ 12.25]
  - 2. Discharge for Misconduct Under Wis. Stat.
    - § 108.04(5) [§ 12.26]
    - a. Effect of Finding of Misconduct [§ 12.27]
    - b. General Standard for Misconduct [§ 12.28]
    - c. Specific Cases [§ 12.29]
      - (1) In General [§ 12.30]
      - (2) Absenteeism and Tardiness [§ 12.31]

- (3) Insubordination and Poor Attitude [§ 12.32]
- (4) Dishonesty [§ 12.33]
- (5) Poor Job Performance [§ 12.34]
- 3. Discharge for Substantial Fault Under Wis. Stat. § 108.04(5g) [§ 12.35]
  - a. Standard for Discharge for Substantial Fault [§ 12.36]
  - b. Disciplinary Suspensions [§ 12.37]
- C. Voluntary Leaving [§ 12.38]
  - 1. Effect of Finding of Voluntary Termination [§ 12.39]
  - 2. Standards for Finding Voluntary Termination [§ 12.40]
    - a. In General [§ 12.41]
    - b. Forced Quit/Constructive Discharge [§ 12.42]
    - c. Constructive Quit [§ 12.43]
    - d. Close Corporations Ceasing Business [§ 12.44]
    - e. Effect of Accelerating Date of Quit or Discharge [§ 12.45]
  - 3. Sufficient Reasons for Quitting [§ 12.46]
    - a. Good Cause Attributable to Employing Unit [§ 12.47]
    - b. Claimant's or Family Member's Health [§ 12.48]
    - c. Shift Transfer Resulting in Lack of Child Care [§ 12.49]
    - d. Good Cause After Trial Period [§ 12.50]
    - e. Quit to Take Other Employment [§ 12.51]
    - f. Domestic Abuse [§ 12.52]
    - g. Quitting to Follow a Spouse [§ 12.53]
- D. Suitable-Work Provision [§ 12.54]
  - 1. Effect of Refusal of Suitable Work [§ 12.55]
  - 2. Refusal of Suitable Work [§ 12.56]
    - a. In General [§ 12.57]
    - b. Offer of New Work [§ 12.58]
    - c. Recall by Former Employer [§ 12.59]
    - d. Employer Pre-employment Drug Testing [§ 12.60]
  - 3. Exceptions [§ 12.61]
    - a. In General [§ 12.62]
    - b. Lower Wage or Skill [§ 12.63]

- c. Protection-of-Labor Standards [§ 12.64]
- d. Good Cause for Refusal [§ 12.65]
- e. Enrollment in Approved Training Course [§ 12.66]
- E. Availability-for-Work Provisions [§ 12.67]
  - 1. In General [§ 12.68]
  - 2. At Most Recent Employer [§ 12.69]
  - 3. In General Labor Market [§ 12.70]
- F. Labor-Dispute Provision [§ 12.71]
  - 1. In General [§ 12.72]
  - 2. Effect of Prior Layoff or Subsequent Discharge [§ 12.73]
  - 3. Employees Not in Striking Bargaining Unit [§ 12.74]
  - 4. Nature of Employer's Establishment [§ 12.75]
- G. Reasonable Assurance of Comparable Employment [§ 12.76]
  - 1. Teachers and Other Educational Employees [§ 12.77]
  - 2. Professional Athletes [§ 12.78]
- H. Undocumented Workers [§ 12.79]
- I. Failing a Department-Required Drug Test [§ 12.80]
- J. Receipt of Other Statutory Benefits [§ 12.81]

## V. Claiming Benefits [§ 12.82]

- A. In General [§ 12.83]
  - 1. Introduction [§ 12.84]
  - 2. Challenge to Claim [§ 12.85]
  - 3. Determination [§ 12.86]
- B. Benefit Claims [§ 12.87]
  - 1. Weekly Benefit Rate [§ 12.88]
  - 2. Adjustments to Benefit Amount [§ 12.89]
    - a. In General [§ 12.90]
    - b. Part-Time Employment [§ 12.91]
    - c. Holiday, Vacation, Termination, and Sick Pay [§ 12.92]
    - d. Pension Payments [§ 12.93]
    - e. Self-Employment Income [§ 12.94]
    - f. Back Pay [§ 12.95]
    - g. Bonuses [§ 12.96]
  - 3. Overpayments and Misrepresentation [§ 12.97]
- C. Benefit Extensions [§ 12.98]

## VI. Litigation [§ 12.99]

- A. In General [§ 12.100]
- B. Evaluating Claims [§ 12.101]
- C. Discovery [§ 12.102]
- D. Issue Preclusion [§ 12.103]
- E. Attorney Fees [§ 12.104]
- F. Stipulations [§ 12.105]
- G. Hearing Before Appeal Tribunal [§ 12.106]
  - 1. In General [§ 12.107]
  - 2. Notice of Hearing [§ 12.108]
  - 3. Presumption of Eligibility and Burden of Proof [§ 12.109]
  - 4. Applicable Rules of Evidence [§ 12.110]
  - 5. Hearing Procedure [§ 12.111]
  - 6. Findings of Fact and Decision [§ 12.112]
- H. Appeal to Labor and Industry Review Commission [§ 12.113]
  - 1. In General [§ 12.114]
  - 2. Briefing Schedule and Transcripts [§ 12.115]
  - 3. Findings of Fact and Decision [§ 12.116]
- I. Judicial Review [§ 12.117]
  - 1. In General [§ 12.118]
  - 2. Grounds for Review [§ 12.119]
  - 3. Procedure for Commencing Judicial Review [§ 12.120]
- J. Appellate Review [§ 12.121]

## **VII.** Appendices [§ 12.122]

- A. Appendix 12A: Research Tools [§ 12.123]
- B. Appendix 12B: Medical Report to Determine Unemployment Insurance Eligibility (UCB-474) [§ 12.124]
- C. Appendix 12C: Form UCB-16 Separation Notice [§ 12.125]
- D. Appendix 12D: Unemployment Insurance (UI) Drug Report: Obtaining and Sealing the Specimen Performing the Test Analysis [§ 12.126]
- E. Appendix 12E: Drug Test Report [§ 12.127]

#### PART III: COMMON EMPLOYMENT CLAIMS AND DEFENSES

#### CHAPTER 13

#### WRONGFUL DISCHARGE

by Michael Aldana and Christopher L. Nickels

## I. Scope of Chapter [§ 13.1]

#### II. Claims [§ 13.2]

- A. In General [§ 13.3]
- B. Breach of Contract [§ 13.4]
  - 1. In General [§ 13.5]
  - 2. Express Contracts [§ 13.6]
    - a. In General [§ 13.7]
    - b. Employee Handbooks and Employer Policies [§ 13.8]
  - 3. Implied Contracts [§ 13.9]
  - 4. Oral Contracts [§ 13.10]
  - 5. Promissory Estoppel [§ 13.11]
- C. Torts [§ 13.12]
  - 1. In General [§ 13.13]
  - 2. Claims Attacking Discharge Itself [§ 13.14]
    - a. Bad-Faith Discharge [§ 13.15]
    - b. Public-Policy Violations [§ 13.16]
    - c. Misrepresentation [§ 13.17]
  - 3. Claims Arising from Ancillary Injuries [§ 13.18]
    - a. Defamation [§ 13.19]
    - b. Infliction of Emotional Distress [§ 13.20]
    - c. Invasion of Privacy [§ 13.21]
  - 4. Third-Party Claims: Tortious Interference [§ 13.22]

#### III. Defenses [§ 13.23]

- A. Public-Policy Violation Defenses [§ 13.24]
- B. Good Cause [§ 13.25]
- C. Traditional Contract Defenses [§ 13.26]
- D. Statute of Frauds [§ 13.27]
- E. Statute of Limitation [§ 13.28]
- F. Alternative Remedies [§ 13.29]
  - 1. Statutory Remedies [§ 13.30]
  - 2. Private Remedies [§ 13.31]

- G. Waiver and Release [§ 13.32]
- H. Preemption [§ 13.33]
- I. Claim Preclusion and Issue Preclusion [§ 13.34]
  - 1. Claim Preclusion [§ 13.35]
  - 2. Issue Preclusion [§ 13.36]
- J. Failure to Mitigate [§ 13.37]
- K. Offset [§ 13.38]

## IV. Remedies [§ 13.39]

- A. In General [§ 13.40]
- B. Back Pay [§ 13.41]
- C. Reinstatement [§ 13.42]
- D. Injunctive Relief [§ 13.43]
- E. Front Pay [§ 13.44]
- F. Prejudgment Interest [§ 13.45]
- G. Attorney Fees, Costs, and Expenses [§ 13.46]
- H. Damages for Pain and Suffering; Consequential Damages [§ 13.47]
- I. Punitive Damages [§ 13.48]
- J. Liquidated Damages [§ 13.49]

#### CHAPTER 14

#### **EMPLOYMENT DISCRIMINATION**

by Rose Ann Wasserman

## I. Scope of Chapter [§ 14.1]

#### II. Fair-Employment Laws: Overview [§ 14.2]

- A. In General [§ 14.3]
- B. Wisconsin Fair Employment Act [§ 14.4]
  - 1. Prohibited Bases of Discrimination [§ 14.5]
  - 2. Prohibited Conduct [§ 14.6]
  - 3. Coverage [§ 14.7]
    - a. In General [§ 14.8]
    - b. Employers and Employees/Independent Contractors [§ 14.9]
    - c. Labor Organizations [§ 14.10]
    - d. Employment Agencies [§ 14.11]
    - e. Other Persons [§ 14.12]
  - 4. Enforcement and Remedies [§ 14.13]

- C. Federal Fair-Employment Laws [§ 14.14]
  - 1. In General [§ 14.15]
  - 2. Title VII [§ 14.16]
  - 3. Age Discrimination in Employment Act [§ 14.17]
  - 4. Americans with Disabilities Act [§ 14.18]
  - 5. Other Federal Fair-Employment Laws [§ 14.19]
- D. Local Fair-Employment Laws [§ 14.20]
  - 1. Madison Equal Opportunities Ordinance [§ 14.21]
  - 2. Milwaukee Equal Rights Ordinance [§ 14.22]

## III. Proof of Discrimination Under WFEA [§ 14.23]

- A. In General [§ 14.24]
- B. Basic Theories of Proof [§ 14.25]
  - 1. In General [§ 14.26]
  - 2. Disparate-Treatment Theory [§ 14.27]
    - a. In General [§ 14.28]
    - b. The *McDonnell Douglas* Method of Indirect Proof [§ 14.29]
    - c. Proof of Pretext [§ 14.30]
  - 3. Disparate-Impact Theory [§ 14.31]
- C. Mixed-Motive Cases [§ 14.32]

# IV. Prohibited Bases of Discrimination Under WFEA [§ 14.33]

- A. Age [§ 14.34]
  - 1. In General [§ 14.35]
  - 2. Exceptions [§ 14.36]
    - a. In General [§ 14.37]
    - b. Inability to Perform Duties [§ 14.38]
    - c. Retirement Plans [§ 14.39]
    - d. Insurance Plans [§ 14.40]
    - e. Managerial and Executive Positions [§ 14.41]
    - f. Hazardous Employment [§ 14.42]
    - g. School Bus Drivers [§ 14.43]
  - 3. Differences Between ADEA's and WFEA's Age-Discrimination Provisions [§ 14.44]
    - a. In General [§ 14.45]
    - b. BFOQ and RFOA [§ 14.46]
    - c. Executive Positions and Top Policy Makers [§ 14.47]
    - d. Voluntary Waivers of Age-Discrimination Claims [§ 14.48]
    - e. Retirement and Insurance Plans [§ 14.49]

- B. Arrest Record and Conviction Record [§ 14.50]
  - 1. In General [§ 14.51]
  - 2. Exceptions [§ 14.52]
    - a. In General [§ 14.53]
    - b. Substantial-Relationship Defense [§ 14.54]
    - c. Individual Not Bondable Because of Conviction Record [§ 14.55]
    - d. Security-Related Businesses [§ 14.56]
    - e. Conviction for Refusal to Register with Selective Service System [§ 14.57]
    - f. Convictions for Using False Academic Credentials [§ 14.58]
    - g. Schools and Other Educational Agencies [§ 14.59]
    - h. Child Care Centers, Nursing Homes, Hospitals, and Other Care Facilities/Caregiver Background Laws [§ 14.60]
  - 3. Employment Inquiries [§ 14.61]
- C. Disability [§ 14.62]
  - 1. In General [§ 14.63]
  - 2. Standards and Burdens of Proof in Disability Cases [§ 14.64]
    - a. In General [§ 14.65]
    - b. Essential Elements of Proof [§ 14.66]
    - c. Proof of Disability [§ 14.67]
    - d. Proof That Employment Action Was Based on Disability [§ 14.68]
      - (1) Mental Health Disabilities [§ 14.69]
      - (2) Alcoholism [§ 14.70]
      - (3) Attendance [§ 14.71]
    - e. Job-Relatedness Defense [§ 14.72]
      - (1) In General [§ 14.73]
      - (2) Ability to Perform Job [§ 14.74]
      - (3) Present and Future Hazards [§ 14.75]
      - (4) Case-by-Case Evaluation [§ 14.76]
    - f. Employer's Duty to Reasonably Accommodate [§ 14.77]
  - 3. Differences Between Disability Under WFEA and Serious Health Condition Under Family and Medical Leave Act [§ 14.78]
  - 4. Differences Between WFEA's and ADA's Disability Provisions [§ 14.79]
    - a. In General [§ 14.80]

- b. Definition of Disability [§ 14.81]
- c. Mitigating Measures [§ 14.82]
- d. Exclusions [§ 14.83]
- e. Job-Relatedness Defense/Ability to Perform Job [§ 14.84]
- f. Future-Hazard Defense [§ 14.85]
- g. Reasonable Accommodation [§ 14.86]
- h. Alcoholism and Illegal Use of Drugs [§ 14.87]
- i. Medical Examinations and Inquiries [§ 14.88]
- j. ADA's Association Provision [§ 14.89]
- 5. Worker's Compensation Exclusivity in Disability-Discrimination Cases [§ 14.90]
- D. Marital Status [§ 14.91]
  - 1. In General [§ 14.92]
  - 2. Insurance Coverage [§ 14.93]
  - 3. Spousal Identity/Antinepotism and No-Spouse Rules [§ 14.94]
- E. Military Service [§ 14.95]
- F. National Origin; Ancestry [§ 14.96]
  - 1. In General [§ 14.97]
  - 2. Discriminatory Employment Practices [§ 14.98]
    - a. Language Requirements [§ 14.99]
    - b. Height and Weight Requirements [§ 14.100]
    - c. Harassment Related to Ancestry or National Origin [§ 14.101]
  - 3. BFOQ for National Origin [§ 14.102]
  - 4. Citizenship [§ 14.103]
- G. Race; Color [§ 14.104]
  - 1. In General [§ 14.105]
  - 2. Racial Harassment [§ 14.106]
  - 3. Disparate Impact [§ 14.107]
  - 4. Reverse Discrimination/Affirmative Action [§ 14.108]
- H. Religion (Creed) [§ 14.109]
  - 1. In General [§ 14.110]
  - 2. Exceptions [§ 14.111]
    - a. In General [§ 14.112]
    - b. Limitations [§ 14.113]
  - 3. Employer's Duty to Reasonably Accommodate Religious Practices [§ 14.114]
- I. Sex [§ 14.115]
  - 1. In General [§ 14.116]

- 2. BFOQ [§ 14.117]
- 3. Pregnancy, Childbirth, and Maternity [§ 14.118]
- 4. Sexual Harassment [§ 14.119]
  - a. In General [§ 14.120]
  - b. Quid Pro Quo vs. Hostile-Environment Harassment [§ 14.121]
  - c. Employer Liability for Sexual Harassment [§ 14.122]
  - d. Employer Liability for Sexual Harassment by Owner or High-Level Agent [§ 14.123]
  - e. Worker's Compensation Exclusivity in Sexual-Harassment Cases [§ 14.124]
  - f. Sexual Favoritism [§ 14.125]
- 5. Gender-Based Harassment [§ 14.126]
- 6. Sexual Orientation [§ 14.127]
- 7. Equal Pay [§ 14.128]
- J. Use or Nonuse of Lawful Products [§ 14.129]
  - 1. In General [§ 14.130]
  - 2. Exceptions [§ 14.131]
    - a. In General [§ 14.132]
    - b. Exceptions Enumerated in Wis. Stat. § 111.35(2) [§ 14.133]
    - c. Exception for Nonprofit Corporations [§ 14.134]
    - d. Exception Relating to Insurance Coverage [§ 14.135]
    - e. Exception for Firefighters [§ 14.136]

#### V. Other Restrictions Under WFEA [§ 14.137]

- A. Genetic Testing [§ 14.138]
  - 1. In General [§ 14.139]
  - 2. Exceptions [§ 14.140]
  - 3. Criminal Penalty [§ 14.141]
- B. Honesty Testing [§ 14.142]
- C. Retaliation [§ 14.143]
  - 1. In General [§ 14.144]
  - 2. Under WFEA [§ 14.145]
    - a. In General [§ 14.146]
    - b. Standards and Burdens of Proof [§ 14.147]
    - c. Unlawful Retaliatory Acts [§ 14.148]
  - 3. Under Statutes Other Than WFEA [§ 14.149]

- 4. Refusal to Attend Employer-Sponsored Meeting Involving Political or Religious Matters [§ 14.150]
- D. Misclassifying Employees as Independent Contractors [§ 14.151]

## VI. Procedures Under the WFEA [§ 14.152]

- A. Equal Rights Division [§ 14.153]
- B. Filing the Complaint [§ 14.154]
  - 1. In General [§ 14.155]
  - 2. Standing to File [§ 14.156]
  - 3. Exhaustion of Administrative Remedies Not Required [§ 14.157]
  - 4. Statute of Limitation [§ 14.158]
    - a. In General [§ 14.159]
    - b. Triggering Date [§ 14.160]
    - c. Waiver and Tolling [§ 14.161]
    - d. Continuing Violations (Generally) [§ 14.162]
    - e. Continuing Violations in Pay Discrimination Cases [§ 14.163]
  - 5. Amendments to the Complaint [§ 14.164]
- C. Review of Jurisdiction; Preliminary Determinations [§ 14.165]
- D. Investigation [§ 14.166]
  - 1. In General [§ 14.167]
  - 2. Service of Complaint [§ 14.168]
  - 3. Respondent's Position Statement and Responses to Investigator's Requests for Information [§ 14.169]
  - 4. Interviews with Respondent's Employees [§ 14.170]
  - 5. Complainant's Involvement in Investigation [§ 14.171]
  - 6. Procedural Dismissals Before Completion of Investigation [§ 14.172]
- E. Initial Determination [§ 14.173]
  - 1. Definition of Probable Cause [§ 14.174]
  - 2. Initial Determination of Probable Cause [§ 14.175]
  - 3. Initial Determination of No Probable Cause [§ 14.176]
- F. Settlement and Mediation [§ 14.177]
- G. Hearings [§ 14.178]
  - 1. Prehearing Procedures [§ 14.179]
    - a. Certification to Hearing [§ 14.180]

- b. Prehearing Conferences [§ 14.181]
- c. Notice of Hearing [§ 14.182]
- d. Respondent's Answer to Complaint [§ 14.183]
- e. Requests for Postponement of Hearing [§ 14.184]
- f. Discovery [§ 14.185]
- g. Disclosure of Witnesses and Exhibits/The 10-Day Rule [§ 14.186]
- h. Subpoenas [§ 14.187]
- i. Motions [§ 14.188]
- j. Procedural Dismissals Before Hearing [§ 14.189]
- 2. Hearing Procedures [§ 14.190]
  - a. In General [§ 14.191]
  - b. Right to Representation [§ 14.192]
  - c. Role of ALJ at Hearing [§ 14.193]
  - d. Evidence at Hearing [§ 14.194]
    - (1) In General [§ 14.195]
    - (2) Hearsay [§ 14.196]
    - (3) Standards of Proof [§ 14.197]
    - (4) Official Notice [§ 14.198]
  - e. Failure to Appear at Hearing [§ 14.199]
  - f. Hearing Record [§ 14.200]
  - g. Issuance of Decision [§ 14.201]
    - (1) In General [§ 14.202]
    - (2) Decision Issued After Probable-Cause Hearing [§ 14.203]
    - (3) Decision Issued After Hearing on Merits [§ 14.204]
- H. Appeals [§ 14.205]
  - 1. Labor and Industry Review Commission [§ 14.206]
  - 2. Judicial Review [§ 14.207]

# VII. Procedures Under Federal and Local Fair-Employment Laws [§ 14.208]

- A. Equal Employment Opportunity Commission (EEOC) [§ 14.209]
  - 1. In General [§ 14.210]
  - 2. Filing the Charge [§ 14.211]
  - 3. Investigation [§ 14.212]
  - 4. Letter of Determination [§ 14.213]

- 5. EEOC Mediation Program [§ 14.214]
- 6. Conciliation [§ 14.215]
- 7. Litigation [§ 14.216]
  - a. EEOC Litigation [§ 14.217]
  - b. Private Litigation [§ 14.218]
- B. Local Fair-Employment Agencies [§ 14.219]
  - 1. Madison Equal Opportunities Commission [§ 14.220]
    - a. In General [§ 14.221]
    - b. Filing the Complaint; Investigation [§ 14.222]
    - c. Initial Determination [§ 14.223]
      - (1) No Probable Cause [§ 14.224]
      - (2) Probable Cause [§ 14.225]
    - d. Hearings [§ 14.226]
    - e. Appeals [§ 14.227]
  - 2. Milwaukee Equal Rights Commission [§ 14.228]
    - a. In General [§ 14.229]
    - b. Complaints; Investigations [§ 14.230]
    - c. Probable-Cause Determination [§ 14.231]
    - d. Hearings [§ 14.232]

#### VIII. Remedies Under WFEA [§ 14.233]

- A. In General [§ 14.234]
- B. Back Pay [§ 14.235]
  - 1. Liability for Back Pay [§ 14.236]
  - 2. Calculation of Back Pay [§ 14.237]
    - a. In General [§ 14.238]
    - b. Fringe Benefits [§ 14.239]
    - c. Prejudgment Interest [§ 14.240]
    - d. Statutory Offsets [§ 14.241]
      - (1) Interim Earnings/Duty to Mitigate [§ 14.242]
      - (2) Unemployment Insurance and Welfare Benefits [§ 14.243]
  - 3. Circumstances Terminating Back-Pay Liability [§ 14.244]
    - a. In General [§ 14.245]
    - b. Respondent's Unconditional Offer of Reinstatement [§ 14.246]
    - c. Complainant's Voluntary Termination of Employment with Respondent [§ 14.247]
    - d. Complainant's Unavailability for Employment [§ 14.248]
    - e. Respondent's Sale or Closure of Business [§ 14.249]

- C. Front Pay [§ 14.250]
- D. Compensatory and Punitive Damages [§ 14.251]
- E. Attorney Fees [§ 14.252]
  - 1. In General [§ 14.253]
  - 2. Calculation of Attorney Fees [§ 14.254]
    - a. Basic Formula [§ 14.255]
    - b. Reasonable Time Expended [§ 14.256]
    - c. Reasonable Hourly Rate [§ 14.257]
    - d. Upward Adjustments [§ 14.258]
    - e. Downward Adjustments [§ 14.259]
  - 3. ERD Procedures for Awarding Attorney Fees [§ 14.260]
- F. Injunctive Relief [§ 14.261]
  - 1. In General [§ 14.262]
  - 2. Specific Types of Injunctive Orders [§ 14.263]
    - a. Cease-and-Desist Orders [§ 14.264]
    - b. Orders to Hire or Reinstate [§ 14.265]
      - (1) In General [§ 14.266]
      - (2) Front Pay in Lieu of Reinstatement [§ 14.267]
    - c. Other Types of Injunctive Relief [§ 14.268]

## IX. Remedies Under Federal and Local Fair-Employment Laws [§ 14.269]

- A. Federal Laws [§ 14.270]
  - 1. Title VII [§ 14.271]
  - 2. Other Federal Fair-Employment Laws [§ 14.272]
- B. Local Laws [§ 14.273]
  - 1. Madison Equal Opportunities Ordinance [§ 14.274]
  - 2. Milwaukee Equal Rights Ordinance [§ 14.275]

## X. Relationship Between Federal, State, and Local Fair-Employment Laws [§ 14.276]

- A. Cross-Filing; Worksharing Agreements [§ 14.277]
- B. Choosing the Appropriate Forum [§ 14.278]

#### **XI.** Appendices [§ 14.279]

- A. Appendix 14A: Prohibited Bases of Employment Discrimination Under Federal, State, and Local Law [§ 14.280]
- B. Appendix 14B: Arrest and Conviction Record [§ 14.281]
- C. Appendix 14C: Harassment in the Workplace [§ 14.282]

- D. Appendix 14D: Pregnancy or Childbirth [§ 14.283]
- E. Appendix 14E: Disability [§ 14.284]
- F. Appendix 14F: Race, Color, National Origin, and Ancestry [§ 14.285]
- G. Appendix 14G: Fair Employment Law and Complaint Process [§ 14.286]
- H. Appendix 14H: Age Discrimination in the Workplace [§ 14.287]
- I. Appendix 14I: Settlement: An Alternative to Investigation and Hearing [§ 14.288]
- J. Appendix 14J: Discrimination Complaint (ERD Form) [§ 14.289]
- K. Appendix 14K: Subpoena (DWD Form) [§ 14.290]
- L. Appendix 14L: Sample Harassment Policy [§ 14.291]
- M. Appendix 14M: Investigating a Sexual Harassment Complaint [§ 14.292]
- N. Appendix 14N: Sexual Orientation Protection [§ 14.293]
- O. Appendix 14O: Early Referral Mediation Program [§ 14.294]
- P. Appendix 14P: Retaliation Complaint [§ 14.295]
- Q. Appendix 14Q: Online Hearing Instructions and Visual Aids [§ 14.296]

# CHAPTER 15 POSTEMPLOYMENT COMPETITION

by David Lucey

#### I. Scope of Chapter [§ 15.1]

#### II. Restrictive Covenants [§ 15.2]

- A. Sources of the Law [§ 15.3]
- B. Applicability of Wis. Stat. § 103.465 [§ 15.4]
  - 1. In General [§ 15.5]
  - 2. Employment Agreements [§ 15.6]
  - 3. Contracts with Independent Contractors [§ 15.7]
  - 4. Contracts for Sale of Business [§ 15.8]
  - 5. Partnership Agreements [§ 15.9]
  - 6. Agreements Providing for Forfeiture of Future Benefits [§ 15.10]
  - 7. Nondisclosure Agreements [§ 15.11]

- C. Enforceability [§ 15.12]
  - 1. Five-Part Test [§ 15.13]
    - a. In General [§ 15.14]
    - b. Employer's Need for Restriction [§ 15.15]
      - (1) In General [§ 15.16]
      - (2) Covenant Based on Customer Contacts [§ 15.17]
      - (3) Covenant Based on Access to Confidential Information [§ 15.18]
    - c. Length of Restriction [§ 15.19]
      - (1) In General [§ 15.20]
      - (2) Covenant Based on Customer Contacts [§ 15.21]
      - (3) Covenant Based on Access to Confidential Information [§ 15.22]
    - d. Territorial and Activity Restriction [§ 15.23]
      - (1) In General [§ 15.24]
      - (2) Covenant Based on Customer Contacts [§ 15.25]
      - (3) Covenant Based on Access to Confidential Information [§ 15.26]
    - e. Reasonableness as to Employee [§ 15.27]
    - f. Reasonableness as to General Public [§ 15.28]
  - 2. Particular Occupations [§ 15.29]
    - a. Doctors [§ 15.30]
    - b. Lawyers [§ 15.31]
    - c. Insurance Agents [§ 15.32]
- D. Defenses and Counterclaims [§ 15.33]
  - 1. Overbreadth [§ 15.34]
  - 2. Lack of Consideration [§ 15.35]
  - 3. Fraud in Inducement [§ 15.36]
  - 4. Superseding Breach [§ 15.37]
  - 5. Bad-Faith Termination [§ 15.38]
  - 6. Ineffective Assignment [§ 15.39]
  - 7. Counterclaims [§ 15.40]
- E. Relief [§ 15.41]
  - 1. Injunctions [§ 15.42]
  - 2. Damages [§ 15.43]
  - 3. Liquidated Damages [§ 15.44]
- F. Procedural Issues [§ 15.45]
  - 1. Arbitration [§ 15.46]
  - 2. Statute of Limitation [§ 15.47]
  - 3. Which Law Applies [§ 15.48]
  - 4. Burden of Proof [§ 15.49]
  - 5. Rules of Interpretation [§ 15.50]
  - 6. Issues of Fact Versus Issues of Law [§ 15.51]
  - 7. Removal [§ 15.52]
  - 8. Compulsory Counterclaims [§ 15.53]

## III. Trade Secrets [§ 15.54]

- A. Sources of the Law [§ 15.55]
- B. Availability of Trade Secret Protection [§ 15.56]
  - 1. Introduction [§ 15.57]
  - 2. Technological Information [§ 15.58]
    - a. In General [§ 15.59]
    - b. Restatement Factor 1: Extent to Which Information Is Known Outside Plaintiff's Business [§ 15.60]
      - (1) In General [§ 15.61]
      - (2) General Knowledge in Industry [§ 15.62]
      - (3) Disclosure [§ 15.63]
    - c. Restatement Factor 2: Extent to Which Information Is Known by Employees and Others in Plaintiff's Business [§ 15.64]
    - d. Restatement Factor 3: Extent of Measures Taken to Guard Secrecy [§ 15.65]
    - e. Restatement Factor 4: Value of Information to Plaintiff and Competitors [§ 15.66]
    - f. Restatement Factor 5: Amount of Effort or Money Expended in Developing Information [§ 15.67]
    - g. Restatement Factor 6: Ease or Difficulty with Which Information Could Be Duplicated [§ 15.68]
  - 3. Marketing Information [§ 15.69]
    - a. Overview [§ 15.70]
    - b. Restatement Factors [§ 15.71]
    - c. Route-Nonroute Distinction [§ 15.72]
- C. Misappropriation [§ 15.73]
- D. Relief [§ 15.74]
  - 1. In General [§ 15.75]
  - 2. Criminal Liability [§ 15.76]
  - 3. Injunctions [§ 15.77]
  - 4. Damages [§ 15.78]
  - 5. Punitive Damages [§ 15.79]
  - 6. Attorney Fees [§ 15.80]
- E. Procedural Issues [§ 15.81]
  - 1. Statute of Limitation [§ 15.82]
  - 2. Burden of Proof [§ 15.83]
  - 3. Issues of Fact Versus Issues of Law; Summary Judgment [§ 15.84]
  - 4. Confidentiality and Disclosure [§ 15.85]
  - 5. Mootness [§ 15.86]

#### IV. Nondisclosure Agreements [§ 15.87]

## V. Other Claims [§ 15.88]

- A. Tortious Interference with Contract [§ 15.89]
- B. Civil Conspiracy; Wis. Stat. § 134.01 [§ 15.90]
- C. Breach of Employee Loyalty [§ 15.91]
- D. Antitrust Violations [§ 15.92]
- E. RICO and WOCCA Violations [§ 15.93]
- F. Unfair Competition [§ 15.94]
- G. Other Claims [§ 15.95]

## VI. Appendix [§ 15.96]

A. Appendix 15A: Sample Restrictive Covenant Provisions [§ 15.97]

#### **CHAPTER 16**

#### ADVISING LGBT CLIENTS ABOUT EMPLOYMENT LAW

by Katherine L. Charlton

- I. Scope of Chapter [§ 16.1]
- II. A General Legislative, Administrative, and Case Law Overview [§ 16.2]
- III. From "Sexual Orientation" to "Gender Identity" Terms That Matter [§ 16.3]
- IV. Employment Law and the LGBTQ Client [§ 16.4]
- V. Initial Interview with LGBTQ Client [§ 16.5]
- VI. Wisconsin Fair Employment Act (WFEA) [§ 16.6]
  - A. In General [§ 16.7]
  - B. Overview of WFEA Protections for Sexual Orientation [§ 16.8]
  - C. Selected Reported Cases Under Wis. Stat. § 111.36(1)(d) [§ 16.9]
  - D. Retaliation [§ 16.10]

#### VII. Federal Employment Laws [§ 16.11]

- A. In General [§ 16.12]
- B. Equal Pay Act [§ 16.13]

- C. Title VII of the Civil Rights Act of 1964 (Title VII) [§ 16.14]
  - 1. History of the Construction of "Sex" Under Title VII [§ 16.15]
  - 2. Current Law [§ 16.16]
- D. Age Discrimination in Employment Act (ADEA) [§ 16.17]
- E. The Rehabilitation Act and the ADA [§ 16.18]
- F. Federal and State Family Medical Leave Acts [§ 16.19]

#### VIII. Local Discrimination Laws [§ 16.20]

- A. In General [§ 16.21]
- B. Madison Equal Opportunities Ordinance (MEOC) [§ 16.22]
- C. Milwaukee Equal Rights Commission (MERC) [§ 16.23]
- D. City of Appleton [§ 16.24]
- E. City of Cudahy [§ 16.25]
- F. City of Janesville [§ 16.26]
- G. City of Stevens Point [§ 16.27]

# IX. Legal Protections Applicable in the Hiring Process [§ 16.28]

### X. Employment Contracts [§ 16.29]

#### XI. Privacy Rights [§ 16.30]

- A. Introduction [§ 16.31]
- B. Invasion of Privacy [§ 16.32]
- C. Defamation and Public Disclosure of Private Facts [§ 16.33]
- D. HIV Testing [§ 16.34]
- E. Hate Crimes [§ 16.35]

## XII. Resources [§ 16.36]

- A. Organizations and Websites [§ 16.37]
- B. Books and Governmental Guidance [§ 16.38]

## **INDEX**