Table of Contents

CHAPTER 1 OVERVIEW OF FAIR-EMPLOYMENT LAWS

- I. Scope of Chapter [§ 1.1]
- II. Wisconsin Fair Employment Act [§ 1.2]
 - A. Prohibited Bases of Discrimination [§ 1.3]
 - B. Prohibited Conduct [§ 1.4]
 - C. Coverage [§ 1.5]
 - 1. In General [§ 1.6]
 - 2. Employers and Employees/Independent Contractors [§ 1.7]
 - 3. Labor Organizations [§ 1.8]
 - 4. Employment Agencies [§ 1.9]
 - 5. Other Persons [§ 1.10]
 - D. Enforcement and Remedies [§ 1.11]

III. Federal Fair-Employment Laws [§ 1.12]

- A. In General [§ 1.13]
- B. Title VII [§ 1.14]
- C. Age Discrimination in Employment Act [§ 1.15]
- D. Americans with Disabilities Act [§ 1.16]
- E. Other Federal Fair-Employment Laws [§ 1.17]

IV. Local Fair-Employment Laws [§ 1.18]

- A. Madison Equal Opportunities Ordinance [§ 1.19]
- B. Milwaukee Equal Rights Ordinance [§ 1.20]

CHAPTER 2 PROOF OF DISCRIMINATION UNDER WFEA

- I. Scope of Chapter [§ 2.1]
- II. Basic Theories of Proof [§ 2.2]
 - A. In General [§ 2.3]

- B. Disparate-Treatment Theory [§ 2.4]
 - 1. In General [§ 2.5]
 - 2. The *McDonnell Douglas* Method of Indirect Proof [§ 2.6]
 - 3. Proof of Pretext [§ 2.7]
- C. Disparate-Impact Theory [§ 2.8]

III. Mixed-Motive Cases [§ 2.9]

CHAPTER 3 PROHIBITED BASES OF DISCRIMINATION UNDER WFEA

I. Scope of Chapter [§ 3.1]

- II. Age [§ 3.2]
 - A. In General [§ 3.3]
 - B. Exceptions [§ 3.4]
 - 1. In General [§ 3.5]
 - 2. Inability to Perform Duties [§ 3.6]
 - 3. Retirement Plans [§ 3.7]
 - 4. Insurance Plans [§ 3.8]
 - 5. Managerial and Executive Positions [§ 3.9]
 - 6. Hazardous Employment [§ 3.10]
 - 7. School-Bus Drivers [§ 3.11]
 - C. Differences Between ADEA's and WFEA's Age-

Discrimination Provisions [§ 3.12]

- 1. In General [§ 3.13]
- 2. BFOQ and RFOA [§ 3.14]
- 3. Executive Positions and Top Policy Makers [§ 3.15]
- 4. Voluntary Waivers of Age-Discrimination Claims [§ 3.16]
- 5. Retirement and Insurance Plans [§ 3.17]

III. Arrest Record and Conviction Record [§ 3.18]

- A. In General [§ 3.19]
- B. Exceptions [§ 3.20]
 - 1. In General [§ 3.21]
 - 2. Substantial-Relationship Defense [§ 3.22]
 - 3. Individual Not Bondable Because of Conviction Record [§ 3.23]

- 4. Security-Related Businesses [§ 3.24]
- 5. Conviction for Refusal to Register with Selective Service System [§ 3.25]
- 6. Convictions for Using False Academic Credentials [§ 3.26]
- 7. Schools and Other Educational Agencies [§ 3.27]
- 8. Child Care Centers, Nursing Homes, Hospitals, and Other Care Facilities/Caregiver Background Laws [§ 3.28]
- C. Employment Inquiries [§ 3.29]

IV. Disability [§ 3.30]

- A. In General [§ 3.31]
- B. Standards and Burdens of Proof in Disability Cases [§ 3.32]
 - 1. In General [§ 3.33]
 - 2. Essential Elements of Proof [§ 3.34]
 - 3. Proof of Disability [§ 3.35]
 - 4. Proof That Employment Action Based on Disability [§ 3.36]
 - a. Mental Health Disabilities [§ 3.37]
 - b. Alcoholism [§ 3.38]
 - c. Attendance [§ 3.39]
 - 5. Job-Relatedness Defense [§ 3.40]
 - a. In General [§ 3.41]
 - b. Ability to Perform Job [§ 3.42]
 - c. Present and Future Hazards [§ 3.43]
 - d. Case-by-Case Evaluation [§ 3.44]
 - e. Employer's Duty to Reasonably Accommodate [§ 3.45]
- C. Differences Between Disability Under WFEA and Serious Health Condition Under Family and Medical Leave Act [§ 3.46]
- D. Differences Between WFEA's and ADA's Disability Provisions [§ 3.47]
 - 1. In General [§ 3.48]
 - 2. Definitions of Disability [§ 3.49]
 - a. Mitigating Measures [§ 3.50]
 - 3. Exclusions [§ 3.51]
 - 4. Job-Relatedness Defense/Ability to Perform Job [§ 3.52]
 - 5. Future-Hazard Defense [§ 3.53]

- 6. Reasonable Accommodation [§ 3.54]
- 7. Alcoholism and Illegal Use of Drugs [§ 3.55]
- 8. Medical Examinations and Inquiries [§ 3.56]
- 9. ADA's Association Provision [§ 3.57]
- E. Worker's Compensation Exclusivity in Disability-Discrimination Cases [§ 3.58]

V. Marital Status [§ 3.59]

- A. In General [§ 3.60]
- B. Insurance Coverage [§ 3.61]
- C. Spousal Identity/Antinepotism and No-Spouse Rules [§ 3.62]

VI. Military Service [§ 3.63]

VII. National Origin; Ancestry [§ 3.64]

- A. In General [§ 3.65]
- B. Discriminatory Employment Practices [§ 3.66]
 - 1. Language Requirements [§ 3.67]
 - 2. Height and Weight Requirements [§ 3.68]
 - 3. Harassment Related to Ancestry or National Origin [§ 3.69]
- C. BFOQ for National Origin [§ 3.70]
- D. Citizenship [§ 3.71]

VIII. Race; Color [§ 3.72]

- A. In General [§ 3.73]
- B. Racial Harassment [§ 3.74]
- C. Disparate Impact [§ 3.75]
- D. Reverse Discrimination/Affirmative Action [§ 3.76]

IX. Religion (Creed) [§ 3.77]

- A. In General [§ 3.78]
- B. Exceptions [§ 3.79]
 - 1. In General [§ 3.80]
 - 2. Limitations [§ 3.81]
- C. Employer's Duty to Reasonably Accommodate Religious Practices [§ 3.82]

X. Sex [§ 3.83]

- A. In General [§ 3.84]
- B. BFOQ [§ 3.85]

- C. Pregnancy, Childbirth, and Maternity [§ 3.86]
- D. Sexual Harassment [§ 3.87]
 - 1. In General [§ 3.88]
 - 2. Quid Pro Quo vs. Hostile-Environment Harassment [§ 3.89]
 - 3. Employer Liability for Sexual Harassment [§ 3.90]
 - 4. Employer Liability for Sexual Harassment by Owner or High-Level Agent [§ 3.91]
 - 5. Worker's Compensation Exclusivity in Sexual Harassment Cases [§ 3.92]
 - 6. Sexual Favoritism [§ 3.93]
- E. Gender-Based Harassment [§ 3.94]
- F. Sexual Orientation [§ 3.95]
- G. Equal Pay [§ 3.96]

XI. Use or Nonuse of Lawful Products [§ 3.97]

- A. In General [§ 3.98]
- B. Exceptions [§ 3.99]
 - 1. In General [§ 3.100]
 - 2. Exceptions Enumerated in Wis. Stat. § 111.35(2) [§ 3.101]
 - 3. Exception for Nonprofit Corporations [§ 3.102]
 - 4. Exception Relating to Insurance Coverage [§ 3.103]
 - 5. Exception for Firefighters [§ 3.104]

CHAPTER 4 OTHER RESTRICTIONS UNDER WFEA

- I. Scope of Chapter [§ 4.1]
- II. Genetic Testing [§ 4.2]
 - A. In General [§ 4.3]
 - B. Exceptions [§ 4.4]
 - C. Criminal Penalty [§ 4.5]
- III. Honesty Testing [§ 4.6]
- IV. Retaliation [§ 4.7]
 - A. In General [§ 4.8]
 - B. Under WFEA [§ 4.9]
 - 1. In General [§ 4.10]

- 2. Standards and Burdens of Proof [§ 4.11]
- 3. Unlawful Retaliatory Acts [§ 4.12]
- C. Under Statutes Other Than WFEA [§ 4.13]
- D. Refusal to Attend Employer-Sponsored Meeting Involving Political or Religious Matters [§ 4.14]

V. Misclassifying Employees as Independent Contractors [§ 4.15]

CHAPTER 5 PROCEDURES UNDER WFEA

- I. Scope of Chapter [§ 5.1]
- II. Equal Rights Division [§ 5.2]
- III. Filing the Complaint [§ 5.3]
 - A. In General [§ 5.4]
 - B. Standing to File [§ 5.5]
 - C. Exhaustion of Administrative Remedies Not Required [§ 5.6]
 - D. Statute of Limitation [§ 5.7]
 - 1. In General [§ 5.8]
 - 2. Triggering Date [§ 5.9]
 - 3. Waiver and Tolling [§ 5.10]
 - 4. Continuing Violations (Generally) [§ 5.11]
 - 5. Continuing Violations in Pay Discrimination Cases [§ 5.12]
 - E. Amendments to the Complaint [§ 5.13]

IV. Review of Jurisdiction; Preliminary Determinations [§ 5.14]

- V. Investigation [§ 5.15]
 - A. In General [§ 5.16]
 - B. Service of Complaint [§ 5.17]
 - C. Respondent's Position Statement and Responses to Investigator's Requests for Information [§ 5.18]
 - D. Interviews with Respondent's Employees [§ 5.19]
 - E. Complainant's Involvement in Investigation [§ 5.20]
 - F. Procedural Dismissals Prior to Completion of Investigation [§ 5.21]

- G. Initial Determination [§ 5.22]
 - 1. Definition of Probable Cause [§ 5.23]
 - 2. Initial Determination of Probable Cause [§ 5.24]
 - 3. Initial Determination of No Probable Cause [§ 5.25]

VI. Settlement and Mediation [§ 5.26]

VII. Hearings [§ 5.27]

- A. Prehearing Procedures [§ 5.28]
 - 1. Certification to Hearing [§ 5.29]
 - 2. Prehearing Telephone Conferences [§ 5.30]
 - 3. Notice of Hearing [§ 5.31]
 - 4. Respondent's Answer to Complaint [§ 5.32]
 - 5. Requests for Postponement of Hearing [§ 5.33]
 - 6. Discovery [§ 5.34]
 - 7. Disclosure of Witnesses and Exhibits/The 10-Day Rule [§ 5.35]
 - 8. Subpoenas [§ 5.36]
 - 9. Motions [§ 5.37]
 - 10. Procedural Dismissals Before Hearing [§ 5.38]
- B. Hearing Procedures [§ 5.39]
 - 1. In General [§ 5.40]
 - 2. Right to Representation [§ 5.41]
 - 3. Role of ALJ at Hearing [§ 5.42]
 - 4. Evidence at Hearing [§ 5.43]
 - a. In General [§ 5.44]
 - b. Hearsay [§ 5.45]
 - c. Standards of Proof [§ 5.46]
 - d. Official Notice [§ 5.47]
 - 5. Failure to Appear at Hearing [§ 5.48]
 - 6. Hearing Record [§ 5.49]
 - 7. Issuance of Decision [§ 5.50]
 - a. In General [§ 5.51]
 - b. Decision Issued After Probable-Cause Hearing [§ 5.52]
 - c. Decision Issued After Hearing on Merits [§ 5.53]

VIII. Appeals [§ 5.54]

- A. Labor and Industry Review Commission [§ 5.55]
- B. Judicial Review [§ 5.56]

CHAPTER 6 PROCEDURES UNDER FEDERAL AND LOCAL FAIREMPLOYMENT LAWS

I. Scope of Chapter [§ 6.1]

II. Equal Employment Opportunity Commission [§ 6.2]

- A. In General [§ 6.3]
- B. Filing the Charge [§ 6.4]
- C. Investigation [§ 6.5]
- D. Letter of Determination [§ 6.6]
- E. EEOC Mediation Program [§ 6.7]
- F. Conciliation [§ 6.8]
- G. Litigation [§ 6.9]
 - 1. EEOC Litigation [§ 6.10]
 - 2. Private Litigation [§ 6.11]

III. Local Fair-Employment Agencies [§ 6.12]

- A. Madison Equal Opportunities Commission [§ 6.13]
 - 1. In General [§ 6.14]
 - 2. Filing the Complaint; Investigation [§ 6.15]
 - 3. Initial Determination [§ 6.16]
 - a. No Probable Cause [§ 6.17]
 - b. Probable Cause [§ 6.18]
 - 4. Hearings [§ 6.19]
 - 5. Appeals [§ 6.20]
- B. Milwaukee Equal Rights Commission [§ 6.21]
 - 1. In General [§ 6.22]
 - 2. Complaints; Investigations [§ 6.23]
 - 3. Probable-Cause Determination [§ 6.24]
 - 4. Hearings [§ 6.25]

CHAPTER 7 REMEDIES UNDER WFEA

- I. Scope of Chapter [§ 7.1]
- **II.** In General [§ 7.2]
- III. Back Pay [§ 7.3]
 - A. Liability for Back Pay [§ 7.4]

- B. Calculation of Back Pay [§ 7.5]
 - 1. In General [§ 7.6]
 - 2. Fringe Benefits [§ 7.7]
 - 3. Prejudgment Interest [§ 7.8]
 - 4. Statutory Offsets [§ 7.9]
 - a. Interim Earnings/Duty to Mitigate [§ 7.10]
 - b. Unemployment Insurance and Welfare Benefits [§ 7.11]
- C. Circumstances Terminating Back-Pay Liability [§ 7.12]
 - 1. In General [§ 7.13]
 - 2. Respondent's Unconditional Offer of Reinstatement [§ 7.14]
 - 3. Complainant's Voluntary Termination of Employment with Respondent [§ 7.15]
 - 4. Complainant's Unavailability for Employment [§ 7.16]
 - 5. Respondent's Sale or Closure of Business [§ 7.17]

IV. Front Pay [§ 7.18]

V. Compensatory and Punitive Damages [§ 7.19]

VI. Attorney Fees [§ 7.20]

- A. In General [§ 7.21]
- B. Calculation of Attorney Fees [§ 7.22]
 - 1. Basic Formula [§ 7.23]
 - 2. Reasonable Time Expended [§ 7.24]
 - 3. Reasonable Hourly Rate [§ 7.25]
 - 4. Upward Adjustments [§ 7.26]
 - 5. Downward Adjustments [§ 7.27]
- C. ERD Procedures for Awarding Attorney Fees [§ 7.28]

VII. Injunctive Relief [§ 7.29]

- A. In General [§ 7.30]
- B. Specific Types of Injunctive Orders [§ 7.31]
 - 1. Cease-and-Desist Orders [§ 7.32]
 - 2. Orders to Hire or Reinstate [§ 7.33]
 - a. In General [§ 7.34]
 - b. Front Pay in Lieu of Reinstatement [§ 7.35]
 - 3. Other Types of Injunctive Relief [§ 7.36]

CHAPTER 8 REMEDIES UNDER FEDERAL AND LOCAL FAIREMPLOYMENT LAWS

- I. Scope of Chapter [§ 8.1]
- II. Federal Laws [§ 8.2]
 - A. Title VII [§ 8.3]
 - B. Other Federal Fair-Employment Laws [§ 8.4]
- III. Local Laws [§ 8.5]
 - A. Madison Equal Opportunities Ordinance [§ 8.6]
 - B. Milwaukee Equal Rights Ordinance [§ 8.7]

CHAPTER 9 RELATIONSHIP BETWEEN FEDERAL, STATE, AND LOCAL FAIR-EMPLOYMENT LAWS

- I. Scope of Chapter [§ 9.1]
- II. Cross-Filing; Worksharing Agreements [§ 9.2]
- III. Choosing the Appropriate Forum [§ 9.3]

Appendices

- A Prohibited Bases of Employment Discrimination Under Federal, State, and Local Law
- B Arrest and Conviction Record
- C Harassment in the Workplace
- D Pregnancy or Childbirth
- E Disability
- F Race, Color, National Origin, and Ancestry
- G Fair Employment Law and Complaint Process
- H Age Discrimination in the Workplace

TABLE OF CONTENTS

- I Settlement: An Alternative to Investigation and Hearing
- J Discrimination Complaint (ERD Form)
- K Subpoena (DWD Form)
- L Sample Harassment Policy
- M Investigating a Sexual Harassment Complaint
- N Sexual Orientation Protection
- O Early Referral Mediation Program
- P Retaliation Complaint