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Law and Practice

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Contents

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1. Current Socio-Economic, Political and Legal Climate; Context Matters

1.1 "Gig" Economy and Other Technological Advances

While the 'gig' economy typically evokes images of an employment marketplace that has only recently come about due to the proliferation of technology, it has been present for quite some time in the form of an increasing number of independent contractor relationships. Unfortunately, there is no one way to define 'independent contractor' in Wisconsin, and the determination as to who is properly classified as such—as opposed to being an 'employee'—differs depending on the law under which the relationship is being evaluated. Common law, the Wisconsin Worker's Compensation Act (Wis. Stat. § 102.08), the Wisconsin Unemployment Insurance Law (Wis. Stat. § 108.02(12)(bm)), and Wisconsin's wage and hour laws all define the term 'independent contractor' somewhat differently. Whether an individual is properly considered an independent contractor pursuant to any of those laws can be significant in establishing a company's legal obligations and liabilities.

The common law test is used to determine whether, under tort law, an employer can be held liable for tortious actions committed by a worker. With the exception of non-delegable duties, employers will generally not be held vicariously liable for acts committed by independent contractors. The Wisconsin Worker's Compensation Act and the Wisconsin Unemployment Insurance Law cover only employees, so employers are not required to obtain worker's compensation insurance coverage or pay unemployment insurance and other payroll taxes for independent contractors. Similarly, Wisconsin's wage and hour laws, which address matters such as overtime, minimum wage and meal/rest breaks, do not apply to independent contractors. Independent contractor status is also governed by federal laws enforced by the Department of Labor and the Internal Revenue Service.

Wisconsin does, however, have a statute that governs transportation network companies, such as ride-share companies. Although this law is not focused specifically on the employment aspect of these companies and their drivers, it explicitly states that such a company is "not considered to control, direct, or manage" the drivers who participate in its network (Wis. Stat. § 440.41(2)).

Regardless of the type of industry involved, a company that wishes to establish a presence in Wisconsin should ensure that its independent contractors—including its 'gig' workers—are properly classified as such. Misclassification of workers has become a focus of regulators and lawmakers, and employers who do not take care to ensure that their workers have the proper status may be subject to fines, penalties and lawsuits.

1.2 "Me Too" and Other Movements

Although the 'Me Too' movement has garnered a great deal of attention both within and outside of the United States, it has not fundamentally altered the Wisconsin or federal laws that govern sexual harassment in the workplace. The movement has, however, brought heightened awareness to this issue, and it is no coincidence that complaints of sexual harassment are on the rise.

To help curtail this trend, employers should have in place a policy that confirms that the company will not tolerate illegal workplace harassment and that sets forth a process by which employees are able to report such behavior. A policy should list more than one individual to whom harassment may be reported, as the designation of only one individual (for example, the immediate supervisor) leaves open the possibility that a complainant may be required to report harassment to the very person who committed the harassment.

Equally important is the employer's investigation of these complaints, which should be conducted as promptly, thoroughly and discreetly as possible. Employers should ensure that such complaints are taken seriously and that appropriate remedial action, whether it be termination or a lesser form of discipline, is taken.

1.3 Decline in Union Membership

Union membership, as a whole, has been declining in the United States since the 1980s, and Wisconsin has witnessed this same trend. Wisconsin is a 'right-to-work' state, meaning employees cannot be compelled to join a union or pay union dues (Wis. Stat. § 111.04(3)(a)). However, recent changes in the political leadership within the state may affect the popularity and influence of unions in the near future. See **2.4 Collective Bargaining Relationship or Union Organizational Campaign** for an additional discussion of union-specific issues.

1.4 National Labor Relations Board

Unions in the private sector are governed, on a national level, by the National Labor Relations Act. The National Labor Relations Board ('NLRB') is comprised of five members appointed by the President. Shifting Board membership leads to frequent changes in how the relevant laws and regulations are interpreted. Republican presidents, for example, generally appoint members who are more likely to rule in favor of employers, while Democrat presidents tend to appoint those who will render more employee-friendly decisions.

Neither Wisconsin law, nor the political climate of the state, affects the Board or its decision-making process.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

Employment

Generally speaking, an employee is one who is "employed to perform services for another in his affairs and who... is subject to the other's control or right of control". Heims v. Hanke, 5 Wis. 2d 465, 468, 93 N.W.2d 455 (1958) (adopting Restatement (Second) of Agency § 220 (1958)), overruled on other grounds by Butzow v. Wausau Mem'l Hosp., 51 Wis. 2d 281, 187 N.W.2d 349 (1971). This type of relationship is ideal for entities that want to control the processes those working for it use to achieve the organization's goals.

Wisconsin, like many other states, is an 'at-will' employment state. This means an employer may end a relationship with an employee for any reason within the bounds of the law. An employer can forgo an at-will relationship by entering into an employment contract that restricts the employer's ability to terminate an employee.

Limiting an employer's ability to terminate an employee opens the entity to a breach of contract claim if the employer terminates the employee for a reason other than one permitted under the contract.

Joint Employment

Wisconsin law recognizes circumstances in which two employers may be legally responsible for actions taken against a single employee. This is called joint employment. One common example of joint employment is when a temporary employment agency places an employee with another employer. If the temporary agency and its customer both control important aspects of the employment relationship, the two organizations may be considered joint employers and could both be held liable for any legal violations involving the employee.

Global entities should be aware of the potential risks associated with being a joint employer.

Franchising

Franchising allows an organization to distribute products or services under its own trademark or name using a predetermined system set by the franchisor. Franchisees often pay a fee in exchange for the right to run a business using the franchisor's name and business model. In exchange, the franchisor will provide the franchisee with training, supplies and other guidelines on how to do business.

To maintain uniform standards amongst franchisees, franchisors often include quality control mechanisms in their franchise agreements. Because the franchisor maintains some control over the franchisee and, in turn, its employees, some states view franchisor-franchisee relationships as a type of joint employment relationship. Wisconsin law actually protects franchisors from this categorization by providing that a franchisor will not be treated as a joint employer for purposes such as unemployment insurance, employment discrimination, and minimum wage and wage payments, simply because it enforces quality control standards (Wis. Stat. § 104.015).

Independent Contractors

Organizations throughout the United States have begun to forgo the traditional employment relationship in favor of utilizing independent contractors. Independent contractors often do the job an employee would otherwise do, but, unlike traditional employees, are not under the employer's control. By choosing to use independent contractors, organizations can control the final product but not the method used to reach that outcome.

While there are some benefits to using independent contractors over employees—for instance, the contractor takes on much of the production cost—an organization looking to control the process workers use to achieve the final outcome may want to concede that its workers are its employees. Organizations looking to implement a 'gig' economy model and use independent contractors need to focus on outcome and not on process. For more information about the gig economy, see **1.1 "Gig" Economy and Other Technological Advances.**

2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity

At-Will Employment

Wisconsin, like most states, is an at-will employment state.. For more information on at-will employment, see **2.1 Defining and Understanding the Relationship**.

At-will employment issues may arise in the context of employee handbooks. Generally speaking, an employee handbook is a guide that outlines an employer's rules, policies, and expectations for its employees. However, certain language can sometimes inadvertently transform an employee handbook from a set of guidelines into an enforceable contract. Wisconsin employers who want to maintain at–will employment relationships should be cautious when drafting employee handbooks and should include a clause affirming the at-will nature of its employment relationships. If an employer wants to implement contractually binding policies such as confidentiality or non-compete agreements, it should do so in a separate document, and that document should also affirm the at-will nature of the employment relationship.

Wage and Hour Laws

The federal Fair Labor Standards Act ('FLSA') and Wisconsin's wage and hour laws govern Wisconsin employers. The

Department of Workforce Development ('DWD') administers Wisconsin's wage and hour laws. Entities operating in Wisconsin should familiarize themselves with the DWD's website: https://dwd.wisconsin.gov.

Wisconsin's minimum wage is the same as the federal minimum wage: USD7.25 per hour for non-tipped employees. Wisconsin's minimum wage coverage applies to nearly all private-sector employees, making its coverage more robust than the FLSA.

Like the FLSA, Wisconsin's overtime law does exempt certain employees from overtime pay, including executive, administrative, or professional employees, as well as outside sales personnel. If an employee does not qualify for one of the exempt categories, then the employer must pay the employee at least one-and-a-half times the amount of the employee's normal hourly wage for any time worked over the standard 40 hours in a seven-day workweek. Employers should ensure employees are correctly classified as exempt or non-exempt. Misclassification may lead to increased legal exposure. Global entities should also remember that employees who are exempt from the overtime laws are likely not exempt from Wisconsin's minimum wage law and should be paid a minimum of USD7.25 per hour.

Wisconsin is not immune from calls for state and federal legislatures to raise the minimum wage to USD15.00 per hour. Thus far, only a handful of states or municipalities have passed legislation raising the minimum wage to USD15.00. Wisconsin's current political makeup makes it unlikely that the state legislature will implement such a minimum wage increase. If the political makeup of the state legislature changes from a Republican majority to a Democrat majority, a minimum wage increase might occur.

Employees, Independent Contractors and Union Employees

Section **2.1 Defining and Understanding the Relationship** outlines the various Wisconsin rules and regulations that affect different types of work relationships. An employer should consider these nuances when deciding how to structure its organization and those who serve it.

2.3 Immigration and Related Foreign Workers

Global entities should look to US federal immigration law when forming a Wisconsin entity and hiring international workers. There are several different types of visas for foreign workers in the United States, each with its own application process and rules. When hiring a non-US citizen, employers should verify the individual's legal status so as to comply with federal immigration law. An employer should not hire someone if the potential employee cannot verify his legal status. Finally, it is illegal for Wisconsin employers to discriminate against someone in the hiring, firing, recruitment, or referral process because of his or her citizenship status.

Currently, there is a heightened focus on immigration law and policies on a national and state level. Global entities should note that federal immigration law is in flux and rules and regulations currently in place may change in the near future.

More information on foreign workers in the United States can be found here: https://www.uscis.gov/working-us.

2.4 Collective Bargaining Relationship or Union Organizational Campaign

Wisconsin is a right-to-work state, meaning private sector employees are not required to join a union or to pay union dues (Wis. Stat. § 111.04(3)(a)). This rule does not extend to public employees. Wisconsin's right-to-work law has come under several legal challenges, to date all unsuccessful.

Agreements between employers and unions, known as collective bargaining agreements ('CBA'), are largely governed by the National Labor Relations Act ('NLRA') and, when called for, are reviewed by the National Labor Relations Board ('NLRB'). Under the NLRA, an entity acquiring a business may or may not be required to assume the seller's CBA(s). Whether an acquiring entity must adopt a CBA depends on the nature of the transaction and the language in the seller's CBA. An acquiring entity purchasing stock is probably bound by the seller's CBA. In contrast, an organization acquiring a company through an asset purchase may be able to negotiate a new CBA with the union. An even more fundamental issue is whether the acquiring entity must recognize an incumbent union.

3. Interviewing Process

3.1 Legal and Practical Constraints

Many pre-employment inquiries are governed nationally by federal laws including the Fair Credit Reporting Act ('FCRA'), the Americans with Disabilities Act ('ADA'), the Genetic Information Nondiscrimination Act ('GINA'), and Title VII of the Civil Rights Act of 1964.

Under FCRA, employers are permitted to run a credit check on prospective employees by obtaining a 'consumer report' from any number of consumer reporting agencies. In order to do so, however, an employer must, among other things, obtain written consent from the applicant and, if the information that appears on that report leads the employer to decline making an offer of employment, it must also provide the applicant with an adverse action notice. These requirements, while not complex, are quite specific, and failure to comply with seemingly minor technical aspects of the law may result in a lawsuit.

Under the ADA, an employer is barred during the pre-offer period from asking an applicant questions that are likely

to lead the applicant to reveal the existence of a disability. Even if an applicant has an obvious disability, an employer is generally prohibited from asking him or her whether a reasonable accommodation is required to perform the essential functions of the job. After an offer of employment has been made, the employer may ask the applicant to undergo a medical examination, provided the employer typically asks the same of other applicants.

GINA contains similar restrictions and forbids employers from requesting genetic information about applicants other than in specific, narrow circumstances.

Title VII does not specifically articulate the types of information employers can and cannot solicit during the hiring process. However, it does make it illegal to discriminate against an applicant on the basis of his or her race, color, religion, sex, or national origin. Similarly, employers are prohibited from discriminating against applicants based on their age, genetic information, or disability under the Age Discrimination in Employment Act, GINA, and the ADA, respectively. The Wisconsin Fair Employment Act, the state anti-discrimination law, lists the following as protected categories, the basis upon which discrimination is unlawful: "age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters" (Wis. Stat. § 111.321).

In Wisconsin, employers are expressly permitted, pursuant to recent legislation, to ask applicants about their salary history (Wis. Stat. § 103.36(1)–(2)). There is also no statewide ban on asking applicants about their criminal history, though a City of Madison ordinance prohibits certain employers who have contracts with the city from inquiring about arrest and conviction records (Madison, Wis., Code of Ordinances § 39.03 (2019)). Employers may not, in most circumstances, inquire about an applicant's past arrest record. Pending charges and convictions, however, may be addressed, but how such information is used may lead to liability.

Social media and employee privacy have become popular topics of discussion, perhaps in large part due to the prominence of technology in people's personal and professional lives. To that end, the Wisconsin legislature enacted a law that restricts an employer's ability to compel certain information during either the application or employment stage (Wis. Stat. § 111.322). Under state law, employers cannot ask that employees or applicants disclose their username and password or other information that would grant the employer access to their social media accounts.

4. Terms of the Relationship

4.1 Restrictive Covenants

One type of restrictive covenant recognized in Wisconsin, known as a non-compete agreement, prevents an employee from working in a substantially similar position for an employer's direct competitor for a specific period of time after his or her employment ends. Another type of restrictive covenant prevents a former employee from soliciting customers for a specific period of time after employment ends. A third type of restrictive covenant prevents a former employee from soliciting certain employees at his or her former place of employment. (Manitowoc Co. v. Lanning, 2018 WI 6, 379 Wis. 2d 189, 906 N.W.2d 130). Finally, a fourth type of restrictive covenant, a confidentiality agreement, prevents an employee from sharing certain information about his or her former employer.

In Wisconsin, such restrictive convents are enforceable only if they are reasonably necessary to protect the employer (Wis. Stat. § 103.465). The agreement must be limited to a reasonable period of time; two years after the termination of the employment relationship is a common term.

When an employer sues its former employee for violating a restrictive covenant, the employee will often argue that the agreement is invalid. If an employee challenges a restrictive covenant's enforceability, a Wisconsin court will consider five factors:

- is the agreement necessary for the employer's protection;
- does the agreement provide a reasonable time period;
- does the agreement cover a reasonable territory;
- is the agreement unreasonable as to the employee; and
- is the agreement unreasonable as to the general public (Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157, 163, 98 N.W.2d 415 (1959)).

Unlike some states, Wisconsin does not allow courts to alter, or 'blue pencil', a restrictive covenant to make it enforceable. A court must make its decision based on the parties' original agreement.

4.2 Privacy Issues

Trade Secrets

Wisconsin and federal law protect an entity's trade secrets. Wisconsin law defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique or process" which both "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use" and "is the subject of efforts to maintain its secrecy that are reasonable under the circumstances" (Wis. Stat. § 134.90(1)(c)).

Trade secrets generally fall into two categories: technological or marketing. Examples of technological trade secrets include actual processes or formulas used by an organization to manufacture a product. Examples of marketing trade secrets include client lists and pricing strategies. Wisconsin courts use the same definition listed above to determine whether information qualifies as a technological or marketing trade secret.

When determining whether something is a trade secret, Wisconsin courts will also look to six additional factors taken from the Restatement of Torts:

- the extent to which the information is known outside the organization;
- the extent to which employees and others involved in the business know about the information;
- the extent of measures taken by the entity to guard the secrecy of the information;
- the value of the information to the entity and to the entity's competitors;
- he amount of money or effort put into developing the information; and
- the ease or difficulty with which the information could be acquired or duplicated by others. (Minuteman, Inc. v. Alexander, 147 Wis. 2d 842, 851, 434 N.W.2d 773 (1989) (citing Restatement (First) of Torts § 757)).

Individual Privacy

Wisconsin law provides private sector employees with a right to privacy in the workplace. An invasion of privacy can be one of four things:

- an "[i]ntrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass";
- "[t]he use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his parent or guardian";
- "[p]ublicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed"; or
- conduct dealing with representations of nudity (eg, photographs, videos) taken without an individual's knowledge and consent (Wis. Stat. § 995.50(2)).

Employees can usually waive their right to privacy by consenting to what would otherwise be an invasion of privacy. Further, employees who voluntarily disclose otherwise private information may also waive their right to privacy.

Technological advancements such as data storage and social media have amplified the issue of employee privacy in the workplace. Global entities should proceed with caution when handling or requesting employee data.

4.3 Discrimination, Harassment and Retaliation Issues

Wisconsin and federal law collectively prevent employers from discriminating against employees because of their age, arrest or conviction record, disability, marital status, military service, national origin, citizenship, race, religion, sex, sexual orientation, alcohol or tobacco use, or for declining to discuss political or religious beliefs. This prohibition applies during the employee's hiring, employment, and termination. Some Wisconsin municipalities have ordinances containing additional protected characteristics, such as homelessness and political beliefs. See, eg, Madison, Wis., Code of Ordinances § 39.03 (2019).

Wisconsin and federal law also prohibit harassment—a pattern of verbal abuse, derogatory language, lewd or offensive gestures, or offensive jokes—that targets an employee based on one of the protected characteristics listed above. Finally, Wisconsin employers cannot retaliate against employees who engage in certain forms of protected conduct or activities such as opposing an employer's discriminatory practice or filing a complaint against the employer.

For additional information on the implications of discrimination, harassment, and retaliation in Wisconsin, see **6.2. Discrimination, Harassment and Retaliation Claims.** For more information on retaliation, see **6.4 Whistle-blower/ Retaliation Claims.**

Implicit Bias

Implicit bias refers to unconscious attitudes or stereotypes, often related to race, ethnicity, age, or gender, that affect how individuals interact with others. Individuals are often unaware of their own implicit biases.

Implicit bias in the workplace can lead to illegal discrimination, harassment, or retaliation. It is important for employers to train employees to recognize their implicit biases. This may help employers avoid potential legal issues that arise from an employee acting on his implicit biases. Implicit bias training is particularly important today, as movements such as the Me Too movement, discussed in **1.2 "Me Too" and Other Movements**, have brought heightened attention and scrutiny to discrimination in the workplace.

4.4 Workplace Safety

The majority of private sector workplace safety rules and regulations are administered and enforced by the Occupational Safety and Health Administration ('OSHA'), a federal agency tasked with overseeing workplace safety. OSHA requires employers to meet certain workplace safety standards. If

someone submits a safety violation claim to OSHA, the agency will investigate the workplace and evaluate whether it meets national safety standards. While Wisconsin does have its own workplace safety law, it is largely pre-empted by OSHA's rules and regulations.

When an employee has a work-related injury or illness, the employer may be subject to a worker's compensation claim. OSHA does not supersede state worker's compensation laws which means that, under Wisconsin's safety law, the Wisconsin Worker's Compensation Division has the power to increase or decrease the maximum compensation an employee is awarded for workplace injuries.

Wisconsin has a law governing the possession of firearms in the workplace (Wis. Stat. § 941.23). Wisconsin is a concealed carry state, meaning that anyone with a valid conceal-carry license may carry a concealed weapon anywhere in Wisconsin unless the law, property owner or occupant expressly prohibits concealed weapons on its property. Persons with a valid conceal-carry license must have it with them at all times. Employers who wish to prohibit individuals from bringing concealed weapons onto their property must post signs in prominent locations near each building entrance and near all likely access points around the building (eg, a parking lot). Signs must be five inches by seven inches and should be posted in conspicuous locations. As it relates to employees specifically, an employer should include a policy about weapons in the workplace in its employee handbook. It should be noted, though, that Wisconsin expressly allows for license holders to keep their weapons in their vehicles parked on company property.

4.5 Compensation and Benefits

Employee benefit plans are mostly governed by the federal Employee Retirement Income Security Act (ERISA). ERISA pre-empts most state laws relating to employee benefit plans. If a global entity has questions about ERISA compliance or employee benefit plans, it should contact an attorney who specializes in ERISA.

Most US employers offer health insurance plans that assist employees and their dependents with health care costs. Health insurance plans typically cover medical problems and the associated costs. Some health plans also reduce the cost of prescription drugs, cover vision costs or reduce the cost of dental care.

The Consolidated Omnibus Budget Reconciliation Act of 1985 ('COBRA') allows employees (and their dependents) to continue receiving coverage under an employer's group health plan after a 'qualifying event' such as an employment termination. An employer who terminates an employee must notify its health plan administrator within 30 days. The administrator will then notify the employee of his or her right to receive continued health care coverage through COBRA. Employers should always notify their plan administrator as soon as possible, as there are penalties if an employee is not notified of the right to continued health insurance in a timely fashion.

The Wisconsin Family and Medical Leave Act ('WFMLA') and the federal Family and Medical Leave Act ('FMLA') both grant an eligible employee the right to take a period of unpaid leave for certain medical and family reasons. If there is a conflict between the Wisconsin and federal laws, the employer should apply whatever rule is more beneficial to the employee. If an employee requests unpaid leave, the employer should check both the WFMLA and the FMLA before structuring the employee's leave.

5. Termination of the Relationship

5.1 Addressing Issues of Possible Termination of the Relationship

Unless an employee and employer have an agreement to the contrary, employment relationships in Wisconsin are considered at-will; that is, either party may end the relationship at any time and for any reason, without advance notice, as long as the employer does not terminate the employee on a basis prohibited by law.

In the context of a reduction in force ('RIF'), an employer may be required to provide advance notice to affected employees if the RIF constitutes a 'mass layoff' or 'plant closing'. These notices and the events that trigger them are governed by both Wisconsin and federal law (29 U.S.C. § 2102; Wis. Stat. § 109.07). Both require that covered employers provide 60 days written notice to affected employees and certain governmental agencies and officials. Under the federal Worker Adjustment and Retraining Notification ('WARN') Act, employers must provide this notice upon either a "permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees," or a mass layoff that results in the reduction of 50 employees, who comprise at least 33% of the total employees, or at least 500 employees (29 U.S.C. § 2101(a)).

Wisconsin has its own 'mini-WARN Act' called the Wisconsin Business Closing and Mass Layoff Law. Notice is required upon either a "permanent or temporary shutdown of an employment site or of one or more facilities or operating units at an employment site or within a single municipality that affects 25 or more employees," or a reduction of at least 25% of the workforce or 25 employees (whichever is greater) or at least 500 employees at an employment site or within a single municipality (Wis. Stat. § 109.07(1)).

Severance pay is not required by Wisconsin law and generally is not a guaranteed benefit upon termination, but many employers choose to offer a severance benefit as part of a release of claims against the company. Without a severance payment (or other benefit) to which the employee is not otherwise entitled, the release will be unenforceable for lack of consideration. Some claims, such as those under the federal Fair Labor Standards Act, cannot be released through a traditional severance or separation agreement. If the employee is 40 years old or older, the Older Workers Benefit Protection Act imposes additional requirements for these agreements, most notably that an employee be given at least 21 days to consider the offer (45 days if the termination involves a 'group termination') and at least seven days to revoke his or her acceptance of the offer.

6. Employment Disputes: Claims; Dispute Resolution Forums; Relief

6.1 Contractual Claims

Because employment relationships in Wisconsin are generally at-will, contractual employment claims arise only in limited circumstances. For those employees bound by an employment agreement or individuals with whom the employer has an independent contractor agreement, those agreements will govern many aspects of the relationship between the parties and may, in the case of an employment agreement, articulate the type of conduct that constitutes for-cause termination. As noted in **2.1 Defining and Understanding the Relationship**, employment contracts can be implied by certain language used in an employee handbook, so employers should take care to not inadvertently create a contractual employment relationship.

Employees who are wrongfully terminated pursuant to an employment agreement may pursue an action in court or through arbitration, particularly if the latter is required by the agreement. Remedies in the event of a breach by either party may also be included in the agreement, but the dispute will generally be adjudicated or resolved as a common law breach of contract claim.

6.2 Discrimination, Harassment and Retaliation Claims

As discussed previously, federal law prohibits employers from discriminating against employees and applicants on the basis of race, color, religion, sex, national origin, age, genetic information, or disability. Wisconsin law is more comprehensive and makes it unlawful for employers to discriminate against employees and applicants because of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters. In this context, discrimination includes decisions and actions at all stages of the employment relationship, including hiring, recruitment, pay, benefits, promotion, training, licensing and layoffs.

Likewise, state and federal law prohibit harassment on the basis of any of the aforementioned protected characteristics. Employers that establish a presence in Wisconsin should develop a policy, memorialized in an employee handbook, which confirms that the company is an equal opportunity employer and does not unlawfully discriminate against employees or applicants on any basis prohibited by federal, state, or municipal law. This policy should also confirm that the company will not tolerate unlawful harassment or discrimination and that any employee who is the victim of or who witnesses any such action or behavior should report it to a designated individual.

An anti-retaliation clause should be included in that policy. Employees should feel free to voice concerns about the conduct of colleagues and supervisors without fear of reprisal. The policy should state that employees who bring a good-faith complaint to the attention of management will not be subject to disciplinary or other adverse action for doing so or for participating in an investigation led by the employer or a government agency.

Employers who do not appropriately respond to these complaints put themselves at risk of legal action, which could result in an award for lost wages, emotional distress, or, in egregious cases, punitive damages. Beyond the legal ramifications, failing to address these types of issues in the workplace can lead to a loss of positive company culture, a decline in employee morale and higher turnover.

6.3 Wage and Hour Claims

Under both the federal Fair Labor Standards Act and Wisconsin's wage and hour laws, non-exempt employees who work more than 40 hours per week are entitled to payment of one-and-a-half times their regular rate of pay. Wage and hour claims, especially when litigated as a class action, are not unusual and there are common mistakes employers make that a global entity should be mindful of when establishing a presence in Wisconsin or anywhere else in the United States.

Employers should ensure that employees are properly classified as exempt or non-exempt (see **2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity** for a more detailed discussion of this distinction); employers who fail to pay non-exempt employees overtime because of a mistaken belief that those employees are exempt may face significant risk of litigation. Failure to pay non-exempt employees for time spent 'working' can also lead to liability on an individual or class basis. This is especially important with respect to

non-exempt employees who have access to email or other work-related activities on a mobile phone or home computer and perform their job duties 'off the clock'. Employers must also be mindful of applicable minimum wage laws, which may be subject to change and are a current topic of discussion among the political leadership in Wisconsin. Improper deductions from wages, including for lost or stolen property or damage to property (Wis. Stat. § 103.455) and for improper time-rounding policies, can also create legal exposure for violations of wage and hour law.

6.4 Whistle-blower/Retaliation Claims

Wisconsin and federal law prohibit an employer from terminating an employee because the employee opposed illegal acts, filed a complaint against the organization, cooperated with government investigators or testified against the employer in a legal proceeding. These practices are colloquially known as 'whistle-blowing'.

Wisconsin's whistle-blower law applies to a broad range of activities, from filing a complaint with a government agency to enforcing a statutory mandate for overtime requirements. An employee does not need to admit to engaging in a protected activity to qualify for protection under Wisconsin's whistle-blower law. The employer merely needs to believe the employee is or may be engaged in a protected activity.

Conduct not protected by Wisconsin law may be protected by federal whistle-blower laws. A global entity should proceed with caution if it suspects or knows an employee has engaged in whistle-blowing activity.

6.5 Dispute Resolution Forums

Many of the most common disputes and complaints that arise in employment law fall within the jurisdiction of a federal administrative agency or, in the case of discrimination complaints, an equivalent state agency. In Wisconsin, charges of discrimination may be filed with either the federal Equal Opportunity Employment Commission ('EEOC') or the Wisconsin Department of Workforce Development's Equal Rights Division ('ERD'). The nature of the allegations and the laws under which they fall will typically determine which agency will process the charge. The National Labor Relations Board is charged with enforcing the National Labor Relations Act ('NLRA'), which governs employees' rights to engage in union activities and protected concerted activities related to wages and working conditions. Although it is most frequently associated with unionized workforces, the NLRA applies in both union and non-union settings.

Employment disputes that involve common law claims—for example, breach of contract and breach of duty of loyalty—as well as claims related to state or federal wage and hour laws are generally adjudicated in court or through arbitration. The ultimate determination as to the proper forum for these disputes can depend on a number of factors. Some employers will have employees sign an arbitration agreement upon hire which, if properly drafted, could require that such disputes be resolved through arbitration instead of the judicial system. If no such valid agreement is in place, the parties may choose to use a third-party mediator to resolve the disagreement. The aggrieved party may also file a lawsuit in state or federal court. The residency of the parties, the amount in controversy, and the specific allegations and claims at issue are some of the factors that determine whether the action will be adjudicated at the state or federal level.

6.6 Class or Collective Actions

Class actions brought in federal court are governed by Rule 23 of the Federal Rules of Civil Procedure. In order to bring a class action under the Rule, employees must establish the following:

- the class is so numerous that joinder of all members is impracticable;
- there are questions of law or fact common to the class;
- the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- the representative parties will fairly and adequately protect the interests of the class.

In other words, in the context of employment law claims, class actions are appropriate when a significant number of employees have all suffered the same or similar harm, particularly when such harm is caused by an unlawful common policy or practice. Because all class action members' claims are adjudicated as one claim, there are procedural hurdles that employees must surmount before the court can address the merits of the claims. Specifically, the employees must demonstrate to the court that their claims meet the four requirements stated above. If they fail to do so, the employees will have to proceed with their claims individually. The parallel Wisconsin class action statute (Wis. Stat. § 803.08) was recently revised to more closely track Rule 23.

The Fair Labor Standards Act ('FLSA') also contains a procedure by which employees can collectively bring an action against their employer for alleged violations of federal wage and hour laws. Although this is a separate and distinct procedural mechanism from Rule 23 class actions, the standards employees must meet in order to maintain a collective action under the FLSA are very similar to those under Rule 23.

Class and collective action lawsuits can be time-consuming and costly to defend and can potentially lead to a significant award for employees. For this reason, many employers elect to include class action waivers in their agreements with employees. While the validity of such provisions had been uncertain, the US Supreme Court recently held that these waivers do not unlawfully encroach on employee rights under the NLRA and, if otherwise properly drafted, are enforceable (Epic Corp. v. Lewis, 138 S. Ct. 1612 (2018)).

The entire class does not have to waive the class action for the agreement to be enforceable; an employee may individually waive this right. Including enforceable class action waiver language in an employment agreement can compel employees to resolve their employment law claims on an individual basis.

6.7 Possible Relief

The type of relief available to employees who have been harmed by the actions of their employer varies depending on the type of conduct at issue, the particular law under which the claim is brought, and whether the relationship is governed by an agreement. Not all relief is monetary, however; for example, employees can seek an injunction requiring an employer to cease engaging in particular conduct (eg, harassment, retaliation, discrimination).

Monetary awards can take many forms, but frequently consist of back pay, which is intended to compensate the employee for actual harm suffered. Front pay can be awarded if the employee has been unlawfully terminated or constructively discharged and reinstatement is not appropriate. Most employment laws also provide for attorneys' fees and some allow for punitive damages if the violation is intentional.

Title VII includes a cap on the amount of compensatory and punitive damages an employee can recover. For small employers, the limit is USD50,000; this amount increases as the size of the employer (measured by number of employees) increases, but can be no greater than USD300,000. For employees whose claims of discrimination under the Wisconsin Fair Employment Act proceed through the state administrative forum (the ERD), compensatory and punitive damages are not recoverable.

Employment agreements can include language regarding particular relief available to the parties; for example, a restrictive covenant may specifically allow an employer to seek an injunction. Generally, however, the relief available to an aggrieved party is similar to any other breach of contract claim; that is, a monetary award for the actual damages incurred.

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7. Extraterritorial Application of Law

While Wisconsin employment laws generally apply to those employees who perform work within the state, a global entity should consult the specific law at issue, as the term 'employee' or other definitions related to the scope of the law can differ, and the applicability of one Wisconsin statute to an employee does not necessarily mean that another statute covers that same employee. Employers cannot contract around or otherwise dictate the applicability (or non-applicability) of any given state or federal law.

Nevertheless, when drafting employment agreements, employers can attempt to dictate that the law of any given state apply with respect to the obligations under that agreement. The enforceability of such choice of law provisions, however, depends on the particular circumstances, for example, whether the agreement is at odds with the public policy of the state in which the action to enforce that obligation is brought.