



FAIR EMPLOYMENT LAW BASICS

An Introduction



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- I. The Legal Framework
- II. Who is protected?
- III. What actions are illegal?
- IV. What actions are not illegal, but seem like they should be?
- V. Specific anti-discrimination rules
- VI. How does the investigation process work?

Legal Framework



- Sec. 111.31 - 111.395, Wisconsin Statutes
- Ch. DWD 218, Wis. Administrative Code
- Companion federal laws
 - Title VII, Civil Rights Act of 1964
 - Americans with Disabilities Act (ADA)
 - Age Discrimination in Employment Act (ADEA)
 - Equal Pay Act (EPA)

Legislative Intent



~~Problem~~
Solution

Legislative Intent



- Unlawful discrimination causes **grave injury** because it denies a person's right to a just and decent living standard
- Employers should evaluate people based on their individual qualifications
- The law must be broadly construed to ensure fair employment practices.

Protected Classes

<i>f</i>	Race	1945	<i>f</i>	Disability	1965
<i>f</i>	Color	1945	<i>s</i>	Arrest	1977
<i>f</i>	Creed	1945	<i>s</i>	Conviction	1977
<i>f</i>	Ancestry	1945	<i>s</i>	Sex'l Orientation	1982
<i>f</i>	Nat'l Origin	1945	<i>s</i>	Marital Status	1982
<i>f</i>	Age	1959	<i>s</i>	Military Service	1987
<i>f</i>	Sex	1961	<i>s</i>	Lawful Product	1992

f **State & Federal Laws**
s **State Law**

Actions Prohibited

s. 111.322

DISCRIMINATION



Actions Prohibited

s. 111.322



- To refuse to hire or promote, to terminate, to discipline or compensate differently, or permit different **terms, conditions or privileges** based on a person's protected class
- To print or circulate an ad, publication or application or make any inquiry that **implies or expresses** unlawful discrimination
- To **retaliate** against a person who opposes discrimination, complains or assists in a complaint

Fair & Legal Hiring

- Law applies in *all* hiring decisions:

Recruiting Application Forms

Advertising Interviews

- **Method** used in the above is up to employer, but the process must not be discriminatory
- Legal focus is on **results**—*does it tend to eliminate protected categories without legal basis?*

When to disclose

- Before an Offer of Employment
 - Employer may not ask
- After an Offer of Employment
 - May ask if they ask every employee
- After hire (reasonable accommodation needed)

Who is a person with a disability?



Person with a physical or mental impairment that...

ADA: *substantially limits one or more major life activities*

WIS: *makes achievement unusually difficult or **limits the capacity to work***

ADA: covers disability by “association”

Burden of Proof



Note: while a cancer diagnosis is likely going to be a disability, the employee still has the burden to show how it makes achievement unusually difficult through competent evidence.

Reasonable Accommodation



Changes to a **job**, the **environment** or **how things are done** that enables a person with a disability to enjoy work opportunities equal to similarly situated employees.

Note: employee is not entitled to preferred accommodation.

Interactive Process and Essential Functions



- Employer must engage in “interactive process” to determine what accommodations will allow the employee to work.
- Employee must still be able to perform “essential functions.”

Exception: Essential Functions



Note: while a cancer diagnosis is likely going to be a disability, the employee still has the burden to show how it makes achievement unusually difficult through competent evidence.

Retaliation



- In 2018, Retaliation claims under WFEL were almost 20% of the cases filed.
- You can be liable for retaliation even if there was no underlying discrimination
- Three elements of a retaliation complaint
 - Protected Activity
 - Adverse Action
 - Causal Connection

FMLA Coverage

	Wisconsin	Federal
Employers Covered	All public agencies 50 + workers in 6 of last 12 months	All public agencies 50 + workers in 20 weeks of current or last year
Employees Covered	Worked at least 1,000 hours in last 52 weeks Worked at least 52 consecutive weeks	Worked at least 1,250 hours in last 52 weeks Worked at least 12 months

**Length
of
Leave**

Wisconsin

- 6** weeks/year for birth or adoption
- 2** weeks/year to care for a spouse, domestic partner, child, parent, parent-in-law, or domestic partner's parent with a serious health condition
- 2** weeks/year for an employee's own serious health condition

Federal

- 12** weeks total per year for:
 - birth, adoption or placement for foster care
 - to care for an employee's own serious health condition or that of a spouse, child, or parent

	Wisconsin	Federal
Partial Leave	Family or Medical Leave can be taken in the <u>smallest increment</u> employer allows for other types of leave	Permits incremental medical leave only if medically necessary Employer decides on partial leave for birth or adoption
Substitution of paid leave	Employee <u>may substitute</u> paid or unpaid leave of any other type provided by employer.	Permits substitution of paid leave but doesn't require it Employer may require substitution

Serious Health Condition

Means a disabling physical or mental illness, injury, impairment or condition involving either:

- Inpatient care (overnight stay) in a hospital, nursing home, or hospice, or
- Outpatient care requiring continuing treatment or supervision by health care provider.

Notice & Medical Certification



- Employee must provide advance notice when leave is foreseeable
 - **Wis.** Notice to be given in a reasonable and practical manner
 - **Fed.** At least 30 days for family leave, if practical; as soon as possible for medical leave
- If possible, medical leave must be scheduled to avoid undue workplace disruption
- Employer may require medical certification to support leave request - must pay for 2nd opinion

Job and Benefits Protection



- After leave, employee must be restored to same or equivalent job (pay, benefits and terms & conditions).
- Use of leave may not result in loss of benefits accruing before leave began.
- Medical insurance must be maintained at the same level during the leave period.
- Employer may not interfere with, restrain or deny a right being exercised.
- Employer may not retaliate against a person who opposes unlawful practices or assists in a FMLA case.

Prohibited Conduct



- Interfering with, restraining, or denying the exercise of any right under the Act.
- Discharging or discriminating against a person who opposes a prohibited practice under the Act
- Discharging or discriminating against a person filing, testifying in, or assisting with proceedings under the Act.
- Posting violations – forfeiture of \$100

ERD Complaint Process



- Filed within 300 days
- Investigator assigned
- Early settlement explored
- Finding: Probable or No Probable cause
- If PC, case set for hearing
- If NPC, case is dismissed

Burden of Proof and Production



- Complainant must show **prima facie** case
 - *Is protected and qualified*
 - *Adverse employment action occurred*
 - *Person hired is not in the same class, or*
 - *Others were treated more favorably*
- Employer must show **legitimate**, non-discriminatory reason for its action
- If done, complainant must show **pretext**

Remedies for Complainants



Wisconsin

“Make Whole”

- ☐ Reinstatement
- ☐ Remedial Orders
- ☐ Back Pay + Interest
- ☐ Attorney Fees

Federal: additional remedies include compensatory and punitive damages.

Questions?



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