

WISCONSIN EMPLOYMENT LAW

An Employee's Guide to the Language and Procedure

**SKINNER AND ASSOCIATES
LAW OFFICES**

Welcome

Thank you for considering Skinner and Associates to represent your interests.

Your satisfaction is very important to us and forms the basis for our formal quality pledge:

- To provide the highest quality legal service to the clients we serve,
- To develop and maintain the highest personal and professional standards and reputation, and
- To provide a quality professional work opportunity for attorneys and staff.

We welcome your feedback at all times. This booklet has been written to acquaint you, in general, with how we handle cases like yours. We hope it will be helpful to you.

Employment Law Attorneys: Who are they? What do they do? How much will they charge?

Skinner and Associates has experienced attorneys with expertise in employment law matters. We employ skilled legal assistants to help you and your attorney with your file and to assure you of the best professional representation. In addition to a skilled and experienced staff, we utilize a complete professional research library, computerized research facilities, and the latest in computer technology and word processing equipment to help efficiently process your work.

One of our legal assistants will be specifically assigned to assist you and your attorney in handling your file. You are encouraged to contact the legal assistant regarding your file if the attorney is not available. A legal assistant is not a lawyer and is not permitted to give legal advice. However, there are many questions that the legal assistant can answer regarding your case. Questions calling for legal advice will be referred to your attorney by the legal assistant.

What Will Your Lawyer Do?

Your lawyer will advise you about the law and help you prepare and present your case. This may involve hiring or consulting with other professionals such as private investigators, physicians, psychologists or vocational rehabilitation experts.

We will keep you advised regarding the legal proceedings, give you our advice regarding any options or decisions you have and answer any questions you have.

What Does It Cost?

Clients of Skinner and Associates are charged for legal services on the basis of the time spent on the file, the amount of money involved, the experience and expertise of the attorney working on the file, the complexity of the issues presented and the result obtained. Time records are maintained for all work on the file, including telephone calls. These records are one of the factors used to calculate your bill unless you have a different fee agreement with your attorney.

The cost of an employment matter is difficult to accurately predict in advance. The total cost depends on the amount of work required of us, the number of witnesses and documents, the complexity of the legal issues involved, and the attitude and behavior of our opponent.

During the course of our representation, we may advance certain fees and costs for our clients. These include such items as filing fees, process servers' fees, telephone charges, photocopies and travel expenses. In some cases, these costs may be quite substantial when they include court reporter fees for depositions, witness subpoena fees, private investigator fees, psychologist fees, etc.

All clients are asked to deposit a nonrefundable retainer fee or initial fee. In addition, we may ask you to pay some or all of certain costs as your case proceeds. In all cases, you will be billed for the costs we advance on your case, in addition to attorney fees. In certain employment cases, a prevailing employee is entitled to recovery of attorney fees and costs.

It is essential that we have an agreement with you regarding fees and costs before any work is started. If, for any reason, you do not have a complete understanding and agreement regarding the fees to be paid, please discuss this with your lawyer immediately.

Telephone Calls

The telephone is an important tool for the ongoing communication between attorney and client. We welcome your calls with questions about your case or with new information that we need. When your attorney is in court or meeting with another client, your call will be referred to the legal assistant handling your case. Please be prepared to discuss the matter completely with the legal assistant. If it is essential that you talk personally to your attorney, leave a detailed message and your attorney will return the call as soon as possible.

Settlement

At various stages of the proceedings we will explore the possibility of settlement. We may do this by informal contact with the other attorney or by a formal settlement conference. Although we will initiate and participate in settlement discussions, you are the only one that can agree on a settlement. Settlement may not be possible or advisable until all facts and values have been uncovered through the discovery process. When we have all the facts, we will offer you our professional advice and recommendations for settlement based on the law and our view of the case.

Facts About Employment Law

Employment At-Will

In Wisconsin, most employment is *employment at-will*, meaning that an employee may generally be discharged at any time for any reason. Many employees think that if they have worked at a certain job for many years and have had no negative performance reviews, they cannot be fired. This is not true. In most cases, an employer has the right to terminate an employee for almost any reason or, in fact, for no reason at all. Similarly, the employee may choose to terminate his or her employment at any time and for any reason.

However, there are some specific situations which prevent an employer from terminating or otherwise changing the terms or conditions of employment. They are set out below.

Discrimination

An employer may not discharge an employee or otherwise affect the terms and conditions of employment on the basis of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, lawful use of a product off work premises, or membership in the national guard, state defense force or any reserve component of the armed forces.

Employers sometimes give reasons for decisions affecting your employment which appear to be legal — such as downsizing, performance problems or other “acceptable” reasons. If the real reason for the decision lies in one of the protected areas identified above, you may have an employment discrimination claim. However, “having a hunch” and being able to prove a case in court are two different things. That is why it is very important to document remarks or other conduct which leads you to believe discrimination exists.

Employment discrimination takes many forms. For example, it may be that you were terminated because of your age, or denied promotion because of your sex. Either of these actions would constitute employment discrimination. Another form of employment discrimination is allowing a sexually intimidating or harassing environment to prevail after an employee has complained about it. An employer is required to provide all employees with a work atmosphere free from such intimidation or harassment.

Breach of Contract

While it is generally not the case, some employees do have a contract of employment with their employer providing for a specific term of employment, or promising that an employee will not be terminated unless good cause is shown. Employers who want to be able to terminate employees freely are using such contracts less frequently.

Employees who are members of a union have a **collective bargaining agreement** which normally protects them from termination without just cause.

Courts have interpreted some employee handbooks as a form of written employment contract. This usually happens where the handbook makes specific assurances of continued employment, or provides for a program of progressive discipline. For example, if the employer guarantees that an employee will receive a verbal and written warning and a suspension prior to termination, the courts will normally require the employer to follow through with those steps prior to termination. You should read through your employee handbook and understand the terms of your employment, even before retaining an attorney.

Sometimes, breach of contract occurs when an employer verbally makes promises to the employee which are not kept. An example would be an employee who is lured away from an existing job to take employment with a new employer, only to be terminated a short time later for no apparent reason. The best protection for employees in these or similar circumstances is to obtain as much **written** information as possible from the employer or his/her representative regarding any promises made.

Violation of Public Policy

Courts may also intervene in an employment decision when the discipline or termination of an employee violates **public policy**. Examples of this would include an employee being terminated for filing a worker's compensation claim, for testifying against an employer in a court of law, or for refusing to violate a law, regulation or statute when requested to do so by the employer. In addition, it is illegal to fire or discriminate against an employee for taking action the employee is legally required to take in the interest of public policy. For example, a nurse cannot be fired or demoted for reporting suspected abuse or neglect of a patient.

An employee is also absolutely protected by statute from being reprimanded or discharged for engaging in union activities.

Our courts strictly construe employment issues to preserve the employment at-will status **unless** employment discrimination, breach of contract or violation of public policy is clearly proven. You cannot prove age discrimination merely by showing that you happened to be over the age of 40 and were terminated. You must prove that the employer terminated you **because** of your age. Similarly, it is not employment discrimination for a supervisor to terminate you simply because s/he does not like you, or is "out to get you."

If you cannot prove that a prohibited basis was used in your adverse employment decision, you will not be successful in proving employment discrimination.

What Is "Constructive Discharge?"

The term "constructive discharge" means that an employee quits as a result of working conditions no reasonable person could or should have to endure. A court may interpret an employee's quitting as if s/he had actually been unjustly fired given the unreasonable conditions under which the employee was working immediately before quitting. In all situations, a "constructive discharge" question needs to be determined based on the particular facts of each case. Therefore, it is not wise to quit before getting competent legal advice.

State and Federal Laws

There are several state and federal laws dealing with employment issues.

State Laws

The more commonly used Wisconsin state employment laws include:

Wisconsin Fair Employment Act (WFEA)

Prohibits discrimination in terms and conditions of employment on the basis of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, membership in the national guard, state defense force, or any military reserve unit, or the use or nonuse of lawful products off the employer's premise during non-working hours. Applies to employers who have one or more employees. (§ 111 Wis. Stats.)

Wisconsin Family and Medical Leave Act

Requires unpaid leave of up to six weeks per year for the birth or adoption of a child, and up to two weeks for a serious health condition of an employee or member of an employee's immediate family. Requires continuation of whatever health insurance was provided to the employee before the leave. Job reinstatement rights are protected. Applies to employers with 50 or more permanent employees. (§ 103.10 Wis. Stats.) (30 day statute of limitations)

Wisconsin Employment Peace Act

Provides an employee with the right of self organization and the right to form, join or assist labor organizations; prohibits employers from interfering with an employee's right to engage in any such union related activities. Applies to any employer having one or more employees. (Does not include the state or any political subdivision, but these entities are covered by the State Employment Labor Relations Act, which is similar in scope). (§ 111.01 Wis. Stats.) (One year statute of limitations)

Wage and Hour Laws

Requires payment of overtime wages, sets maximum hours and minimum wages, requires payment of wages to a terminated employee within the next regularly scheduled pay period, requires employers to produce and/or copy personnel files if requested in writing within seven business days. Applies to employers who have one or more employees. (§ 103 Wis. Stats.)

There are also state laws regarding worker's compensation and unemployment compensation which are beyond the scope of this guide.

Federal Laws

The more commonly used federal employment laws include:

Civil Rights Act of 1964 (Amended in 1991)

Prohibits discrimination in terms and conditions of employment on the basis of race, sex, color, national origin and religion. Applies to employers who have 15 or more employees. (42 USC § 2001(e))

Age Discrimination in Employment Act (ADEA)

Prohibits discrimination in terms and conditions of employment on the basis of age. Protects persons over the age of 40. Applies to employers who have 20 or more employees. (29 USC § 621)

Americans with Disabilities Act (ADA)

Prohibits discrimination in terms and conditions of employment on the basis of disability. Protects persons who are disabled or who are perceived as being disabled, who can perform the job with or without reasonable accommodation. Employers are required to provide reasonable accommodation if requested. Applies to employers with 15 or more employees. (42 USC § 12101)

Family and Medical Leave Act (FMLA)

Requires unpaid leave of up to twelve weeks per year for either the birth or adoption of a child, or for a serious health condition of an employee or member of the employee's immediate family. Requires continuation of whatever health insurance was provided to the employee before the leave. Job reinstatement rights are protected. Applies to employers who have 50 or more employees, who can be employed at more than one job site, as long as the sites are within 75 miles of each other. (29 USC § 2601) (Two year statute of limitations; three years if willful)

Equal Pay Act (EPA)

Prohibits gender-based wage discrimination for equal work. Applies to employers covered by the Fair Labor Standards Act (which is generally any employer engaged in any type of interstate activity). (29 USC § 206) (Two year statute of limitations; three years if willful)

Procedure

Personnel File

The first thing employees should do if they suspect they are being treated unfairly is to request a copy of their personnel file. This request should be made in writing and mailed to the employer by certified mail. The employer

then has seven business days within which to provide a copy of the file and can charge no more than the actual copying charges. If an employer fails to honor this request, the employer is subject to fines ranging from \$10 to \$100 per day for each day of continued violation.

Once you have a copy of your personnel file, bring the file and any employee handbook you have received, to your next visit with your attorney.

Filing A Claim

Unless otherwise noted above, **discrimination claims, whether state or federal, must be filed within 300 days of the date the discriminatory action occurred.** Most discrimination claims are filed with the Equal Rights Division (ERD), a state agency, or the Equal Employment Opportunity Commission (EEOC), a federal administrative agency. Wisconsin state employee claims are filed with the Wisconsin Personnel Commission.

The employer will be notified of your complaint, and an investigation is commenced. The investigator from the administrative agency will contact those witnesses you have named who can provide information concerning your claim. It is important that witnesses know you have given their names to the administrative agency so they are prepared and can respond favorably and truthfully. The investigator normally sends named witnesses a questionnaire rather than contacting them personally or by telephone. This stage of the process normally takes many months and sometimes more than a year to complete. Your attorney will keep you informed of all significant developments.

Once an investigation is completed, the administrative agency will decide in writing whether or not there is **probable cause** to believe discrimination has occurred. If an initial determination of probable cause is issued, there will be a conciliation period during which the parties are encouraged to settle the matter. If settlement is not achieved, the case will be set for hearing. At the hearing, we will present your case using witnesses and testimony to show why you believe discrimination occurred. The employer will also use witnesses to try to prove otherwise. These hearings are heard by an administrative law judge, rather than a jury, and are less formal than a court trial. On the other hand, if the investigator determines that there is no probable cause to believe discrimination occurred, the employee may appeal and automatically has a right to a hearing on the issue of probable cause. The investigation may also lead you to decide to drop the matter because you most likely will not prevail at hearing.

Federal or State Court

After your case has been filed with an administrative agency, you have the right to move the case to state or federal court in most circumstances. The advantage to doing this is that it gives you the right to a jury trial and, in some cases, compensatory and punitive damages. Some cases involve claims under both state and federal law. Claims involving breach of contract or violations of public policy are normally brought in the Wisconsin court of the county in which the employer is located. Employment discrimination claims under the Civil Rights Act or other federal law may be presented in either a federal or Wisconsin court, and may be heard by a jury. The decision as to whether your claim should be brought under state or federal law will be made by you and your attorney after you have discussed the matter thoroughly. A claim brought in state or federal court is more formal than a claim before the Equal Rights Division, and is usually more costly to pursue.

Collecting Information

In addition to the information gathered from you, we will use several other methods to collect information. We may employ private investigators or expert witnesses such as vocational rehabilitation specialists. The law also provides an opportunity to get information from your employer through a process called "discovery." "Discovery" gives us four basic tools to obtain information.

Interrogatories

Interrogatories are written questions directed to the other party regarding employment practices or other relevant information. Interrogatories are used to obtain information in preparation for trial and must be answered under oath by the party to whom they are directed.

Depositions

Depositions are opportunities for an attorney to ask opposing parties oral questions and get oral answers. The witness being deposed is under oath and the questions and answers are recorded by a court reporter. A transcript is prepared which can be used by the attorney at trial. If your deposition is being taken, it is important that you confer

with your attorney about your preparation for the deposition because this is a very important step in your case. Your attorney will want you to view a video tape about depositions and, in addition, will discuss with you the facts of your case so that you are prepared to answer questions completely and honestly at deposition.

Request for Documents

A request to produce documents is a legal request requiring a party to a lawsuit to produce documents in his/her possession. Such documents may include wage statements, notes kept by the employer, personnel policy manuals, etc.

Request to Admit

A request for an admission as to the truth of a matter relevant to your case may be used to narrow the issues at the time of trial. For example, we may ask the employer to admit that its upper management work force consists solely of males under the age of 40, thus eliminating the need to produce witnesses to testify to this at trial.

Your Involvement

The other side also has a right to “discovery,” so it is likely that you will also be asked to answer questions and produce documents.

For claims brought in state or federal court, you and your attorney will do most of the investigation rather than an administrative agency investigator. As such, discovery may commence immediately, meaning that you may have your deposition taken and your attorney may take the depositions of the employer and other witnesses.

Time

Whether your case is before an administrative agency or a state or federal court, it is likely to take months, at a minimum, and perhaps years before your case is heard by a hearing officer, court or jury. During this time, it is best to attempt to get on with your life as best you can. This means continuing to look for work and documenting all efforts made. While it is not necessary to take a job requiring none of the skills that you possess, you may not unreasonably refuse a job offer simply to “get back at the employer.” You will be far better off keeping busy and getting back in the work force as quickly as possible. This is true even if the salary you receive from your new job might reduce some of the damages you receive from the employer you are suing.

It is important to not only document your search for work, but also statements that are made to you, feelings that you may have, or other facts that are relevant to the case. If you do not document, you may forget important details by the time you are asked to testify about them. For this same reason, your attorney may take written statements from favorable witnesses.

Witnesses

Those witnesses who can support your story are extremely important to your case. However, the truth of the matter is that in employment cases, witnesses are often reluctant to testify for fear of losing their own job. While it is difficult not to take this personally, you must be prepared for the possibility of witnesses failing to back up your claim. On the other hand, witnesses who tell you they don’t want to be involved, **will** often tell the truth when faced with a subpoena.

We will attempt to assure your witnesses that their employer is prohibited from retaliating against them in any way for testifying against the employer.

It is also possible that by the time your case comes to trial, some witnesses will no longer be employed by the same employer, and will therefore be more willing to speak freely about what really happened. For that reason, it is very important to keep track of your witnesses’ whereabouts, even if they are reluctant to be involved.

Damages

What you can hope to recover financially from an employment case varies with the type of claim you are making. In successful employment discrimination cases filed with the Equal Rights Division, the Personnel Commission or the EEOC, you will be entitled to back pay with interest, job reinstatement and attorney fees. If the employment discrimination was a refusal to promote you, the employer may be ordered to promote you, or to pay the salary you would have been earning had you received the promotion, together with back pay and attorney fees.

If your claim is made under the Civil Rights Act, ADA, ADEA or other federal law, you are entitled, in many cases, to a jury trial. A successful claimant can be awarded liquidated, compensatory and/or punitive damages in addition to the other damages mentioned. Compensatory damages may include pain and suffering or mental anguish.

Generally, successful claims for breach of contract or for employment decisions made in violation of public policy will result in you being put back in the position you would have been in if the breach of contract or violation of public policy hadn't occurred. For example, you might receive job reinstatement with back pay, or a sum of money to compensate you for the losses you have incurred because of the unlawful conduct. These kinds of claims, however, do not entitle you to attorney fees, as in employment discrimination claims.

Concluding Your Case

If your case does not result in a settlement of all issues prior to trial, your case will be decided by the court or a jury, and an order (judgment) will be rendered.

If, prior to trial, a settlement is agreed upon by both sides, the terms of the settlement will be reduced to writing and signed by all parties. You will be asked to sign a release of all claims which, in effect, releases the employer from any and all claims you may have against the employer whether known or unknown. In other words, once you sign a release, you may no longer sue the employer for any claims related to that employment. The exception to this would be if you continued to be employed by that employer and future conduct arose which was unlawful, such as the employer retaliating against you for suing him/her. It is important that you understand all the documents that you are asked to sign, and agreements into which you enter. All such documents should be carefully reviewed by your attorney before you sign them.

As we proceed with your case, please feel free to discuss any and all questions or comments with your attorney and/or legal assistant assigned to your case. Your complete and informed involvement is vital to the satisfactory resolution of your case.

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