

WISCONSIN EMPLOYMENT LAW

An Employer's Guide to Legal Proceedings

**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. In all cases, you will be billed for the costs we advance on your case, in addition to attorney fees.

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 reasons you may **not** use in your decision to terminate or otherwise change the terms or conditions of employment. They are set out on the following pages.

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. None of these bases may be used to make **any part** of your employment decisions. The only exception to this is a bona fide occupational qualification (BFOQ), the need for which is very rare and difficult to prove. An example of a BFOQ would be a job that requires an individual with no conviction record.

Employment discrimination takes many forms, including any prohibited action having an adverse effect on the terms or conditions of employment. An example would be refusing to consider a woman for a job entailing overnight travel on the assumption she would have child care problems. Another form of employment discrimination is allowing a sexually — or otherwise discriminatorily — intimidating or harassing environment to prevail. For instance, allowing offensive jokes or racist remarks 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 should not enter into employment contracts without legal advice.

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 when 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 its terms before meeting with an attorney. It may be wise to have an older handbook redrafted to ensure that it will not be construed as an employment contract.

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.

Violation of Public Policy

Courts may also intervene in your 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.

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

The courts may also intervene on the basis of public policy if the employee "whistle-blows" against a co-employee or the employer for violation of some law or other standard. For instance, an employee who is reprimanded or discharged for reporting criminal activities of a co-worker or an employer to the authorities may have a wrongful discharge claim.

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. As an example, age discrimination is not proven merely by showing that the employee happened to be over the age of 40 and was terminated. The employee must prove that the employer terminated him or her **because of** age.

What Is "Constructive Discharge?"

"Constructive discharge" means that an employee quits, claiming that no reasonable person could or should endure the working conditions that the employee was asked to endure. If appropriate, 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. Some examples which would provide for a constructive discharge include working in a sexually intimidating or harassing atmosphere, substantially reducing an employee's salary or hours, requesting an employee's resignation, or demanding that an employee perform work for which s/he is not trained.

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 & Medical Leave Act (WFMLA)

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 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.) All such employers **must** post a WFMLA poster in a conspicuous place. (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, 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 many employees do if they suspect they are being treated unfairly is to request a copy of their personnel file. You then have seven business days within which to provide a copy of the file and can charge no more than the actual copying charges. Certain documents need not be provided, however. You should **always** talk to your attorney before providing any personnel file. If you fail to honor the request, you will be subject to fines ranging from \$10 to \$100 per day for **each day** of continued violation.

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.

You will be notified of the complaint by the administrative agency and asked to respond to the complaint in writing. Drafting this document properly may make or break the case. It is important to work closely with your attorney and provide **all** information about the claim, whether it is positive or negative. The investigator for the administrative agency will contact those witnesses you have named who can provide information concerning the employee's claim. It is important that witnesses know you have given their names to the investigator 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 renders a written decision on 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 scheduled for hearing. At the hearing, we will present your case using witnesses and testimony to show why you believe no discrimination occurred. The employee 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 initially 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**.

Federal or State Court

If the case has been filed with an administrative agency, the employee has the right to move the case to state or federal court in most circumstances. The advantage to doing this is that it gives the employee a right to a jury trial and, in some cases, compensatory and punitive damages.

Claims involving breach of contract or violations of public policy are normally brought in state (circuit) court, in the county where the employer is located. Employment discrimination claims under the Civil Rights Act or other federal laws may be presented in either a federal or Wisconsin court, and may be heard by a jury. 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 defend.

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 or 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 employee to admit that s/he was verbally reprimanded on three occasions, 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 be asked to answer questions or 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 employee 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 court or jury. During this time, it is important to document statements that are made concerning the case or other information that is relevant to the case. If this is not done, 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

Witnesses who can support the employee's claims are extremely important to his/her 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 this may work to your advantage, you must understand that it is **unlawful to retaliate in any way** against an employee who testifies against an employer. Many employees will want to remain uninvolved. You should respect their wishes to the extent possible. However, if employees have information relevant to the case, they need to be encouraged to speak truthfully, without fear of reprisal.

Damages

What a successful employee can recover from an employment case varies with the type of claim made. In employment discrimination cases filed with an administrative agency, successful employees who have been terminated are entitled to back pay with interest, job reinstatement and attorney fees. If the employment discrimination was found to be a refusal to promote, you may be ordered to promote the employee, or to pay the additional salary the employee would have been earning if the promotion had been granted, together with back pay and attorney fees. There is no reciprocal provision regarding attorney fees. If an employee loses, there is no requirement that the employee pay the employer's attorney fees.

In claims made under the Civil Rights Act or other federal laws the employee is entitled, in many cases, to a jury trial and 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, damages for claims of breach of contract or for employment decisions made in violation of public policy, attempt to put the employee back in the position s/he would have been in if the breach of contract or violation of public policy hadn't occurred. For example, the employee might receive job reinstatement with back pay, or a sum of money to compensate him/her for the losses incurred because of the unlawful conduct. These kinds of claims, however, do not entitle an employee to attorney fees, as in employment discrimination claims.

Concluding Your Case

If settlement of all issues is not reached prior to trial, the decision will be made 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.

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.

If we can reach a settlement, we will obtain a release of all claims from the employee which will prevent further legal action based on his/her employment with you. It is important to be aware, however, that if an employee is reinstated, whether by settlement or court order, you may not retaliate in any way against the employee. To do so may expose you to a claim of punitive damages, in addition to other claims.

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

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