Employment Law Update

2022 Wisconsin Law Update

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Agenda

- COVID-19
- Statutory Changes
- Federal and State Court Cases
- LIRC Cases

COVID-19: OSHA ETS

- On November 5, 2021, the Occupational Safety and Health Administration ("OSHA") introduced an Emergency Temporary Standard ("ETS") for private employers of 100 or more.
  - Wisconsin does not have an OSHA-approved state plan; i.e., Wisconsin falls under federal OSHA jurisdiction.
  - OSHA-covered employers in Wisconsin must comply with the ETS (and other COVID-related directives from OSHA).
- Under the ETS, employers are required to establish, implement, and enforce one of two policies:
  - (1) A policy mandating that each employee must become fully vaccinated; or
  - (2) A policy mandating that each employee must either choose to become fully vaccinated or provide proof of weekly testing and wear a face covering.
- On January 13, the U.S. Supreme Court essentially struck down the OSHA ETS
  - The Court determined that OSHA did not have the power to promulgate the broad standard.
  - On January 25, OSHA announced that it will withdraw the ETS.

COVID-19: Testing

- Wis. Stat. § 103.37(2m) states:
  - "No employer may require any employee or applicant for employment to pay the cost of a medical examination required by the employer as a condition of employment."
- Does a medical exam include COVID testing?
- Is it a requirement as a condition of employment?

COVID-19: Vaccines

- Wisconsin has not yet enacted any statewide restrictions on mandatory COVID-19 vaccination.
- Some vaccine-related legislation is currently making its way through the Wisconsin legislature:
  - Assembly Bill 25, and companion Senate Bill 5 address vaccination requirement prohibitions.
  - Assembly Bill 309 would amend the Wisconsin Fair Employment Act and other anti-discrimination statutes to make “vaccination status” a protected class and an unlawful basis for discrimination.
- Wisconsin has not enacted any guidance on how to handle religious or medical exemptions from vaccination requirements, though employers have recently been inundated with such requests.

COVID-19: Mask Mandates

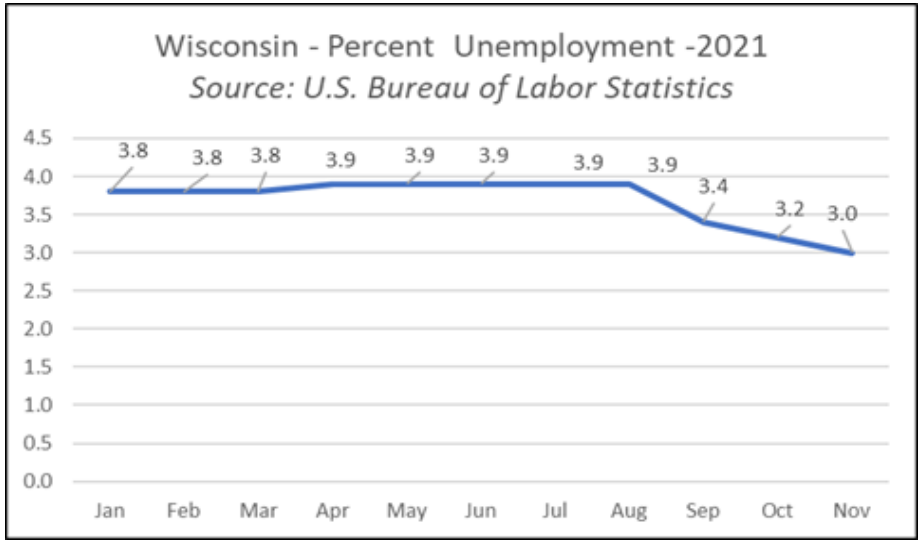
- In March 2021, the Wisconsin Supreme Court struck down Governor Evers' statewide mask mandate.
- Only applies to statewide mandates.
- Allows local mandates
  - Milwaukee and Madison have mask mandates currently in effect.

COVID-19: Other COVID Response

- 2021 Assembly Bill 1 related to state government actions to address the COVID-19 pandemic.
  - The bill contained COVID-related employment provisions, including a prohibition against vaccination as condition of employment, as well as various unemployment insurance provisions.
- On February 5, 2021, Governor Evers vetoed the bill, stating:
  - "I am vetoing AB 1 in its entirety because I object to the provisions in this bill that will make it more challenging to mitigate the impact of COVID-19 in Wisconsin. Instead, AB 1 takes away existing tools available to public health officials and employers."
- On January 10, 2022, representatives introduced Amendment 1 to Assembly Bill 675, which would require Wisconsin employers to allow proof of a previous COVID infection as an alternative to vaccination and testing.
  - On January 25, 2022, Assembly Bill 675 passed the Assembly and was sent to the Senate.

COVID-19: Other COVID Response

- In 2021, Wisconsin experienced lower unemployment rates:
  - November 2021 Wisconsin unemployment rate tied an all-time low, from November 2018.
  - Compare the Wisconsin unemployment rate to the national average for November 2021, which is 3.0% : 4.2%.



Wisconsin % Unemployment - Source: U.S. Bureau of Labor Statistics

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2020	3.3	3.3	3.2	14.8	10.4	8.6	7.2	6.1	5.2	4.8	4.4	4.0
2021	3.8	3.8	3.8	3.9	3.9	3.9	3.9	3.9	3.4	3.2	3.0	

Statutory Changes: Enacted Employment Legislation

- During the 2020-2021 legislative session, approximately 118 Wisconsin bills were enacted, four of which deal with employment issues:
  - 2021 Wisconsin Act 4 – among other provisions, the act provides immunity for entities from civil liability for a COVID-19-related injury or death, except in the case of reckless or wanton conduct or intentional misconduct.
  - The immunity is retroactive to claims accruing on or after March 1, 2020, but does not apply to an action filed before February 27, 2021.

Statutory Changes: Enacted Employment Legislation cont.

- 2021 Wisconsin Act 26 - allows an employer to require a tipped employee who customarily receives gratuities to use an electronic signature (i.e., any unique electronic identifier) to acknowledge the counting of tips in the employer's payroll records. This act is effective April 25, 2021.
- 2021 Wisconsin Act 29 – specifies the circumstances in which post-traumatic stress disorder ("PTSD") is covered for a police officer or full-time member of a fire department, among other revisions to the worker's compensation law.

Statutory Changes: Enacted Employment Legislation cont.

- 2021 Wisconsin Act 59 – Essentially requires Schedule D for contributions to the unemployment insurance program to remain in effect, regardless of the balance of the unemployment reserve fund, through the end of calendar year 2023.
  - State law specifies that Schedule D (i.e., containing the lowest rates for employers) is in effect for any calendar year whenever, as of the preceding June 30, the fund has a cash balance of at least $1,200,000,000. Schedule D was in effect in calendar year 2021.

Statutory Changes: Remote Work Considerations

- With the explosion of remote work opportunities, Wisconsin employers – many for the first time – are being forced to confront compliance with other state employment laws.
- Important remote work compliance considerations:
  - Telecommuting agreements
  - State personal income tax
  - State corporate tax
  - Registration to conduct business in the state
  - Paid sick leave and vacation leave
  - State unemployment insurance
  - Workers' compensation coverage
  - Wage garnishments
  - New hire reporting
  - Business expense reimbursement
  - Wage deductions
  - Restrictive Covenants

Statutory Changes: Marijuana Possession

- Marijuana is currently legal in 36 states for medical reasons, and recreationally available in 18 states. Only four states still maintain the full prohibition of cannabis products; an additional three states have decriminalized but not legalized it; and seven states (including Wisconsin) keep marijuana banned but have legalized some cannabis products such as CBD oil.
- On November 16, 2021, a group of Wisconsin lawmakers unveiled a bipartisan bill (i.e., 2021 Assembly Bill 812) to decriminalize marijuana possession - which was introduced to the State Assembly on January 6, 2022.
- The bipartisan bill would assign a civil forfeiture (i.e., similar to a speeding ticket) for possession of less than half an ounce of marijuana and would maintain current penalties for possession of anything between a half an ounce and an ounce of marijuana. Additionally, the bill would remove penalty enhancers (e.g., repeat offense, felony bump) for possession of an ounce or less of marijuana.
- The legislation also provides liability protections for employers who choose not to drug test most workers.

Statutory Changes: Medical Marijuana

- Wisconsin is currently one of 14 states which have not legalized medical marijuana.
- On Jan. 26, a group of Republican Wisconsin lawmakers announced their plans to introduce a bill to legalize medical marijuana in the state.
- The bill (LRB-0250/1), which appears to have bicameral and bipartisan support, would allow medical providers to chose to be certified to recommend the use of marijuana to their patients.
- Included products: liquids, pills, tinctures, topicals.
  - Not smokable products.
- Purchase locations: dispensaries in each county limited by the population of that county.
  - The proposal does not allow planting, growing, cultivating, or harvesting for personal, family, or household use.
- Qualifying medical conditions: Crohn's Disease, Cancer, Seizure Disorders, PTSD, Glaucoma, HIV/AIDS, Multiple Sclerosis, ALS.
- The bill would also establish a regulatory commission, licensing requirements for producers, processors, transporters, dispensaries, and laboratories, and taxes.

Wisconsin Case Law Update

- Cree, Inc. v. Labor & Indus. Review Comm'n, 2021 WI App 4, 394 Wis. 2d 642, 953 N.W.2d 883.
  - Conviction record discrimination exception
- White v. United Airlines, 987 F.3d 616 (7th Cir. 2021).
  - Paid leave under USERRA
- EEOC v. Wal-Mart Stores East LP, Case No. 17-cv-70 (E.D. Wis. 2021).
  - Jury awarded $125 million in punitive damages in an ADA case
- Graef v. Cont'l Indem. Co., 2021 WI 45, 397 Wis. 2d 75, 959 N.W.2d 628.
  - Negligence suit against a Worker's Compensation carrier
- Reilly v. Century Fence Co., 527 F. Sup. 3d 1003 (W.D. Wis. 2021).
  - Wisconsin prevailing wage and overtime
- Demkovich v. St. Andrew Parish, 3 F.4th (7th Cir. 2021).
  - Hostile work environment claims for religious employers
- Cota v. Oconomowoc Area School District (LIRC July 30, 2021).
  - Arrest record discrimination
- Marty v. S.C. Johnson & Son (LIRC March 31, 2021); Marty v. Joy Global Surface Mining (LIRC April 20, 2021).
  - Statute of limitations for discrimination cases against applicants

Cree, Inc. v. LIRC

- Covered in last year's presentation
- Update: Wisconsin Supreme Court heard oral arguments on October 15, 2021.
  - Still waiting on a decision, so stay tuned.
- Refresher: In Wisconsin, employers cannot refuse to hire a prospective employee on the basis of conviction record unless the offense "substantially relates" to the circumstances of the particular job.
- Facts:
  - Palmer was convicted of strangulation/suffocation, sexual assault, battery, and criminal damage to property relating to a domestic incident with his live-in girlfriend.
  - Palmer was applying for a job with Cree, Inc., a lighting manufacturer in Racine, WI, in which he would have interacted with female coworkers and customers, often unsupervised, and often while traveling for work.
    - About half of Cree's 1,000 employees were women.
    - Position involved traveling to trade shows, meeting with customers unsupervised.
  - While in the office, Palmer would be working with lots of employees in a large, open-air office with lots of nooks and crannies out of sight of security cameras and other people.
  - Cree, Inc. determined it was unsafe to hire Palmer due to his conviction record, and Palmer brought a case against them with the ERD.

Cree, Inc. v. LIRC cont.

- LIRC held that Cree did not meet its burden of establishing that the particular job Palmer was applying for was "substantially related" to his convictions; therefore, Cree had discriminated against Palmer.
- District court reversed
- Court of Appeals affirmed LIRC (reversing the district court)
- Cree appealed to the Wisconsin Supreme Court
  - Issue before the court: Whether LIRC erred in applying the substantial relationship test under the WFEA for the domestic violence convictions based on its treatment of other convictions involving violence.
  - Arguments centered around how much latitude employers should have to judge whether a past conviction for domestic violence was "substantially related" to a particular job, whether employers should analyze the circumstances underlying the conviction (as opposed to simply considering the elements of the crime) when applying the substantial relationship test, and the public policy ramifications of treating such convictions different than other convictions for violent acts.

White v. United Airlines

- 7th Circuit case out of Illinois
- May require Wisconsin employers to provide paid leave to employees on military leave under USERRA.
- Under USERRA, employers must furnish the same "rights and benefits" to employees on military leave as they do for employees on comparable non-military leave.
  - Factors for determining whether non-military leave is comparable to military leave:
    - The duration of the leave
    - The purpose of the leave
    - The controllability of the leave (i.e., whether the employee has a say as to when it takes place or how long it lasts)
- Facts:
  - A group of pilots accused their employer, United Airlines, of violating USERRA when it did not grant them paid leave and profit-sharing credit while they were out on short-term military leave.
  - On the other hand, the employer provided paid leave for jury duty and paid sick leave.

White v. United Airlines cont.

- The Northern District of Illinois held that the "rights and benefits" under USERRA did not include paid leave and dismissed the case.
  - The 7th Circuit reversed on February 3, 2021.
  - Holdings:
    - The rights and benefits under USERRA included paid leave.
    - It could not be said that an employee's absence due to military reserve duty was any less "controllable" than an employee's absence attributable to jury duty or illness.
  - Impact:
    - If employers pay for sick leave or jury duty leave, they may need to pay for military duty leave if they are considered "comparable."

EEOC v. Wal-Mart Stores East LP

- Eastern District of Wisconsin jury verdict from July 15, 2021
- A jury sided with the plaintiff, deciding she was discriminated against because of her disability under the ADA, and awarded punitive damages of $125 million.
- Facts:
  - 16-year employee of Wal-Mart with Down Syndrome brought EEOC claim after her employment was terminated.
  - She was terminated due to her spotty attendance, following a series of warnings. Her attendance issues only started after Wal-Mart changed her schedule pursuant to their business needs and her claimed availability.
  - She attributed her significant attendance problems to her disability of Down Syndrome.
- Court denied summary judgement and allowed the case to proceed to trial.
  - The judge rejected Wal-Mart's arguments that they could not accommodate the employee by allowing her to maintain her previous schedule and/or by flexing their attendance requirements.
  - The judge also noted that the employer should have considered engaging in efforts to assist the employee in adjusting to the change.
  - The employee was able to perform the essential functions of her job because she had been doing so for approximately 16 years.

EEOC v. Wal-Mart Stores East LP cont.

- The judge also allowed the issue of punitive damages to be considered at trial.
  - Standard for punitive damages: The plaintiff must show that the employer engaged in intentional discrimination with malice or with reckless indifference to the federally protected rights of an aggrieved individual.
  - The judge allowed the following facts at trial to serve as evidence that Wal-Mart's failure to comply with the ADA was malicious or in reckless indifference:
    - Wal-Mart supervisors underwent ADA training.
    - Wal-Mart had an entire department responsible for addressing reasonable accommodations.
- July 15, 2021 jury verdict, after a 4-day trial:
  - $150,000 in compensatory damages
  - $125,000,000 in punitive damages
    - The court granted Wal-Mart's motion to reduce the total award to the statutory maximum of $300,000.
- Impact:
  - Employers may be required to alter clear and routinely-enforced policies, such as attendance, if doing so would constitute a reasonable accommodation for a disability.

Graef v. Continental Indemnity Company

- Wisconsin Supreme Court
- Limited the tort claims an employee may bring against a worker's compensation carrier.
  - The Wisconsin Worker's Compensation Act precludes tort claims against employers and worker's compensation insurance carriers so long as:
    - Employers and worker's compensation insurance carriers meet their duty to pay for a subsequent injury that "naturally flows" from a covered workplace injury.
    - This includes injuries caused or worsened by the treatment, or lack of treatment, of the original work-related injury.
- Facts:
  - The employee was gored by a bull in a livestock yard at his workplace.
  - As a result, he developed depression.
  - The insurance carrier failed to approve payment for a refill of his subsequently prescribed antidepressant medications.
  - As a result, the employee attempted suicide, and suffered a self-inflicted gunshot injury.
  - The employee filed a tort claim for negligence in circuit court against the worker's compensation insurance carrier.

Graef v. Continental Indemnity Company cont.

- Holdings:
  - Wisconsin's Worker's Compensation Act precluded the negligence claim against the insurance company because the statute provided the employee's exclusive remedy.
  - The insurance carrier did not have to concede that the employee would succeed in bringing his worker's compensation claim in order for the court to dismiss the tort claim.
- Impact:
  - Even though this case was brought against an insurance carrier, it may apply to negligence claims brought by employees against employers based on injuries flowing naturally from a prior workplace injury.

Reilly v. Century Fence

- Western District of Wisconsin
- Facts:
  - Plaintiffs were current and former employees of a company which provided pavement marking services to private and governmental clients.
  - Sued under the Federal Fair Labor Standards Act (FLSA) and comparable Wisconsin wage and hour laws.
- A number of issues including:
  - (1) whether the company must include compensation designated as “cash fringe” in calculating employees’ overtime rates.
    - The employer designated a portion of paychecks of hourly employees as “cash fringe,” which is money paid to employees in lieu of fringe benefits.
    - Example: An employee typically makes $20/hour, and cash fringe was $400 per week.
      - Thus, the issue was if the employee worked more than 40 hours, should the overtime hours be calculated based upon the $20/hour wage, or the $30/hour wage.
  - Holding: Yes. Under the FLSA and state law, employers must include cash fringe in the overtime calculation
    - In the example, overtime must be $45/hour.
    - The court further denied the Company’s motion that it had paid overtime as required under the Davis-Bacon Act based on the facts presented.

Reilly v. Century Fence cont.

- 2) Whether the company must pay for overtime on prevailing wage projects at prevailing wage overtime rates even if the employee did not work more than 40 hours per week on prevailing wage projects under Wisconsin Law.
  - During a given week, employees worked on some projects that were governed by WI prevailing wage laws, and some that were not.
  - Example: Employee worked 30 hours on non-prevailing wage projects and 20 hours on prevailing wage projects.
- Holding: Yes. Under Wisconsin law, employees are entitled to receive overtime pay on all hours worked over 40 in a week at the prevailing wage overtime rate, even if they worked less than 40 hours total on that project.
  - In the example, the employee would receive 10 hours of overtime pay at the prevailing wage overtime rate, even though they only worked 20 hours on the prevailing wage project.
- (3) Whether the company can credit "premium compensation" paid for work in excess of 8 hours per day against overtime owed for hours in excess of 40 hours per week.
  - The employer chose to pay premium compensation at overtime rate for any work employees complete over 8 hours per day even though the law does not require this. But, then the employer took credit for this premium pay if the employee worked more than 40 hours per week.
  - Example: Employee worked 10 hours/day Monday – Thursday, so under the employer's policy qualified for premium pay for a total of 8 hours. If the employee worked 10 hours on Friday, the employer would only pay 2 hours of overtime because they already paid her 8 hours, and under the law, only owed a total of 10 hours.
  - The holding on this issue references that the Company violated prevailing wage law in calculating the pay rate for hours worked in excess of 40 on prevailing wage projects.
- Holding: No. Even though the employer was not required to pay premium compensation, since it did so it was still required to pay overtime for all hours worked in excess of 40.
  - In the example, employees were owed an additional 10 hours of overtime over the 8 already paid.

Demkovich v. St. Andrew Parish

- 7th Circuit case from July 9, 2021
- The ministerial exception applies to bar hostile work environment claims based on minister-to-minister harassment for religious employers.
  - Ministerial exception: Protects religious organizations from employment discrimination suits brought by its "ministers."
  - Minister is broadly defined.
  - Ensures that under the First Amendment, the government stays out of decisions made by religious organizations relating to employment.
- Issue: Since hostile work environment claims do not generally involve ultimate employment decisions (failure to hire, termination), are religious employers still protected from such suits?
- Facts: Organist and music director at a Catholic church alleged he was harassed by his supervisor, a minister, because of his sexual orientation and disabilities.
- District Court in Illinois did not dismiss the harassment claim against the church based on the ADA.
- The 7th Circuit reversed and held that the ministerial exception applied to bar hostile work environment claims between ministers.
- Impact:
  - There is a circuit split on this issue already: The 7th Circuit joined the 10th Circuit in this holding, while the 9th Circuit did not categorically include all claims of discrimination under the protection of the ministerial exception.
  - Only applies to suits brought by ministers against their religious organization employers.

Cota v. Oconomowoc Area School District

- LIRC case from July 30, 2021
- Involves application of the Onalaska defense.
  - Generally, employers may not discharge/fail to hire based on arrest record.
    - Arrest record includes, but is not limited to, "information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense." Wis. Stat. sec. 111.32.1.
  - *Onalaska* defense: Employers may discharge/fail to hire if motivated by the underlying conduct itself, not the fact that the employee was arrested. *City of Onalaska v. LIRC,* 120 Wis. 2d 363, 354 N.W.2d 223 (Ct. App. 1984).
- Facts:
  - The School District conducted an internal investigation into missing funds and was not able to ascertain whether the complainants had stolen the money or not, but believed it was likely. The complainants were disciplined for a related infraction. The district referred the matter to the police for an investigation.
  - The police department charged the complainants with municipal theft. The district suspended the complainants pending the outcome of the court proceedings.
  - The prosecutor informed the district of the arrest, that he believed he could convict the complainants, and that he anticipated a plea agreement.
  - The next day, the district terminated the complainants, stating it had learned they were, in fact, guilty of theft.

Cota v. Oconomowoc Area School District cont.

- An ALJ determined there was no discrimination.
- Here, LIRC reversed. Holding:
  - The *Onalaska* defense did not apply because the district relied upon information from the prosecutor in its termination decision.
    - The court determined that the district did not terminate the complainants until after it came to believe that the complainants were going to accept the plea agreement and would pay restitution.
  - Even though the district believed the complainants were guilty of theft after their own internal investigation, they did not act upon that belief until confirmation from the prosecutor.
- This decision was appealed to the Circuit Court.
  - Oconomowoc Area School District v. Gregory L. Cota et al.
  - Last update: 11/30/21, motion hearing.
- Impact:
  - Employers must be careful in relying upon any information other than that discovered during their own internal investigations in taking action against employees when criminal conduct is involved.

Marty v. S.C. Johnson & Son; Marty v. Joy Global Surface Mining

- LIRC cases filed by the same complainant for the same reason, from March and April 2021, respectively.
- When an applicant did not hear back from a potential employer, and believes he was not hired for discriminatory reasons, the statute of limitations begins a few months after submitting the application.
  - Complaints of discrimination must be filed no more than 300 days after the alleged discrimination occurred. Wis. Stat. sec. 111.39(1).
  - The statute of limitations period begins to run when the complainant "knew or reasonably should have known of the wrong that was committed against him."
- Facts:
  - Complainant applied for jobs with each company 14 times in total between 2010 and 2019. He only heard back regarding two of the applications.
  - Filed the complaints in 2020 – more than 300 days after each application– alleging discrimination based upon marital status (single).
  - Complainant alleged he was not made aware of the application decisions, so the statute of limitations period never started.

Marty v. S.C. Johnson & Son; Marty v. Joy Global Surface Mining cont.

- Holding: A reasonable person would conclude that he had not been hired for a position within a few months of submitting an application and receiving no response.
  - Therefore, the statute of limitations had run out, and the complaint was barred.
- Impact:
  - Though many applicants complain about employers “ghosting” them, LIRC has endorsed the practice, stating it is reasonable for an applicant to conclude they will not be hired after not hearing back for a few months.

THANK YOU!