

## Wisconsin

### Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

#### Topics

##### **I. Discrimination**

No new laws or regulations enacted in 2015 or 2016.

##### **II. Pre-Employment Inquiry Guidelines**

No new laws or regulations enacted in 2015 or 2016.

##### **III. Family and Medical Leave**

###### **Protected Leave for Bone Marrow or Organ Donation**

Wisconsin has enacted a law allowing employees a leave of absence for bone marrow or organ donation.

###### **Coverage and Eligibility**

Employers of 50 or more employees must provide up to 6 weeks of leave in a 12-month period to serve as bone marrow or organ donors. Eligible employees are those who have worked for the employer for more than 52 consecutive weeks and for at least 1,000 hours during the preceding 52-week period. Leave may be taken only for the period necessary for the employee to undergo the bone marrow or organ donation procedure and to recover from the procedure.

###### **Notification and Certification**

If an employee intends to take advantage of the leave, he or she must:

1. Make a reasonable effort to schedule the bone marrow or organ donation procedure so that it does not unduly disrupt the employer's operations, subject to the approval of the health care provider of the bone marrow or organ recipient, and
2. Give the employer advance notice of the bone marrow or organ donation in a reasonable and practicable manner.

The employee must provide written verification to the employer that the employee is serving as a bone marrow or organ donor. The employer may require the employee to provide written certification from the bone marrow or organ recipient's health care provider to support the employee's request for leave. The employer may require certification of any of the following:

- That the recipient has a serious health condition that necessitates a bone marrow or organ transplant,
- That the employee is eligible and has agreed to serve as a bone marrow or organ donor for the recipient, and/or

The amount of time expected to be necessary for the employee to recover from the bone marrow or organ donation procedure.

### **Compensation and Benefits During Leave**

Leave is unpaid, but the employee may substitute, for portions of the leave, any paid or unpaid leave of any other type provided by the employer. During the leave period, the employer shall maintain group health insurance coverage under the conditions that applied immediately before the leave began. If the employee continues making any contribution required for participation in the employer's group health insurance plan, the employer shall continue making group health insurance premium contributions as if the employee had not taken leave. The employer may require the employee to have in escrow with the employer an amount equal to the entire premium or similar expense for eight weeks of the employee's group health insurance coverage.

No employer may, because an employee took bone marrow or organ donation leave, reduce or deny an employment benefit that the employee accrued before his or her leave began.

### **Reinstatement**

Upon an employee's return, s/he is entitled to reinstatement as follows:

1. If the position that the employee held immediately prior to the leave began is vacant when the employee returns, the employee must be placed in that position; or
2. If the position that the employee held immediately prior to the leave began is not vacant when the employee returns, in a position with equivalent compensation, benefits, working shift, hours of employment, and other terms and conditions of employment.

An employee returning from bone marrow or organ donation leave is not entitled to a right, employment benefit, or employment position to which the employee would not have been entitled had he or she not taken bone marrow or organ donation leave, or to the accrual of any seniority or employment benefit during a period of bone marrow or organ donation leave.

### **Modification of Terms and Conditions**

The statute does not prohibit an employer from providing employees with rights to bone marrow or organ donation leave that are more generous to the employees than the rights provided under the statute. In addition, the statute does not prohibit an employer and an employee who is serving as a bone marrow or organ donor from mutually agreeing to alternative employment for the employee while the employee recovers from the bone marrow or organ donation procedure. No period of alternative employment with the same employer reduces the employee's right to bone marrow or organ donation leave.

### **Required Posting**

Each covered employer (employers of 50 or more employees) shall post, in one or more conspicuous places where notices to employees are customarily posted, a notice setting forth employees' bone marrow and organ donation leave rights. Employers of 25 or more employees shall post, in one or more conspicuous places where notices to employees are customarily posted, a notice describing that employer's policy with respect to leave for bone marrow and organ donation leave. The Wisconsin Department of Workforce Development will create and publish a poster.

Wis. Stat. § 103.11, Wis. Stat. § 111.322, Wis. Stat. § 632.897, and Wis. Stat. § 893.965 (Effective Date 07/01/2016).

**IV. Wage and Hour Laws**

No new laws or regulations enacted in 2015 or 2016.

**V. Drug Testing**

No new laws or regulations enacted in 2015 or 2016.

**VI. Noncompete and Other Employment Agreements**

No new laws or regulations enacted in 2015 or 2016.

**VII. Workplace Safety**

No new laws or regulations enacted in 2015 or 2016.

**VIII. Workers' Compensation**

No new laws or regulations enacted in 2015 or 2016.

**IX. Miscellaneous**

**A. Franchisor Not an Employer of Franchisee's Employees**

The new law amends Wisconsin's workers' compensation, minimum wage, unemployment insurance, wage payment, and fair employment practices statutes to provide that, for purposes of those statutes, a franchisor is not considered to be (1) an employer of a franchisee or (2) an employer of a franchisee's employee unless:

- the franchisor has agreed in writing to assume that role, or
- the state agency or agencies charged with enforcement of the statutes finds that the franchisor has exercised a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.

Wis. Stat. § 102.04, Wis. Stat. § 104.015, Wis. Stat. § 108.065, Wis. Stat. § 109.015, and Wis. Stat. § 111 (Effective Date 03/03/2016).

**B. Amendments to Day of Rest Requirement**

Wisconsin's "one day of rest in seven" statute requires factory and mercantile employers, with certain exceptions, to provide their employees with at least 24 consecutive hours of rest for every seven consecutive days worked. Employers that needed to schedule work beyond the "one day of rest in seven" requirement were required to obtain a temporary waiver from the Wisconsin Department of Workforce Development (DWD). The waiver subsequently expired automatically after six months.

Under the amended law, a DWD-issued waiver is no longer required so long as an employee provides a statement "in writing that he or she voluntarily chooses to work without at least 24 consecutive hours of rest in 7 consecutive days." For those employees covered by a

collective bargaining agreement with contrary provisions, the amendment does not become effective until the agreement expires or is extended, modified, or renewed, whichever occurs first.

An employee's verbal consent to work beyond the "one day of rest in seven" requirement does not satisfy the statute's requirements. Employers must get an employee's consent in writing and it must be voluntarily issued without threat of discipline or reprisal for refusing to agree. However, the amendment does not clarify when employers must obtain an employee's written consent and once obtained, how long the written consent remains effective.

Wis. Stat. § 103.85(2)(g) (Effective date 07/14/2015).

### **C. Right to Work**

Wisconsin is now a "Right to Work" state. The legislation significantly modifies state law by, among other things, prohibiting employers and labor organizations from requiring employees to join, remain a member of, or financially support a labor organization as a condition of employment. Violation of the law will be a Class A misdemeanor.

The law will not impact an existing collective bargaining agreement (CBA) unless it is renewed, modified, or extended after the law's effective date. In other words, the "union security," "union shop," or similar provisions in current union contracts will still be valid and enforceable until the contract is renewed, modified, or extended.

In addition, in negotiations for a first union contract or negotiations to renew, modify, or extend an existing contract, employers and unions cannot require, as a condition of obtaining or continuing employment, that any individual:

- Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization;
- Become or remain a member of a labor organization;
- Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization; or
- Pay to any third party an amount that is in place of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of, or employees represented by, a labor organization.

This means, among other things, that employers and unions are prohibited from agreeing on or maintaining "union security," "union shop," or other similar provisions that require employees to become union members and/or pay union dues or fees as a condition of employment. To the extent permitted by federal law, such provisions would be deemed void.

#### **Dues Check-Off Clauses**

The new law will not impact the right of employers and labor organizations to negotiate dues check-off and other similar provisions. However, an employer cannot deduct dues or assessments from an employee's earnings unless the employee has voluntarily signed and provided to the employer an order (i.e., authorization) that such deductions be made. To the extent permitted by federal law, the order must be terminable by the employee's giving the employer at least thirty 30 days' written notice of the termination.

## **Open Issues**

Employers and unions will likely arm-wrestle over what certain provisions of the law actually mean. For example, does an existing “union security” clause really need to be removed or modified in order to comply with the law? What does “provide anything of value” mean when it comes to the prohibition on requiring employees to support a labor organization as a condition of employment? How will a ban on required payments to “third parties” (which is likely aimed at worker centers and other union front organizations) be applied? How will “federal law” impact an employee’s right to revoke his or her dues check-off authorization? Only time will tell how these questions will be answered.

## **Practically Speaking**

The law does not negate an employer’s obligation to continue to recognize and bargain with an existing union under the National Labor Relations Act (NLRA). Nor will it be a license for employers to encourage employees to decertify existing unions. In addition, it does not change a union’s duty of fair representation to employees who choose not to be members of and/or pay dues to the union. Those employees remain part of their bargaining unit and covered by the applicable union contract.

Wis. Stat. § 947.20, Wis. Stat. § 111.02, Wis. Stat. § 111.04, Wis. Stat. § 111.06, Wis. Stat. § 111.39, and Wis. Stat. § 175.05 (Effective Date 03/11/2015). Wis. Stat. § 111.01 has been repealed.