

# WISCONSIN



# 1848

## WISCONSIN QUICK AND EASY GUIDE TO LABOR & EMPLOYMENT LAW

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## At-Will Employment

Wisconsin has adopted the at-will employment doctrine, which allows both employers and employees to terminate an employment relationship with or without cause and notice. *Strozinsky v. School District of Brown Deer*, 237 Wis.2d 19, 38 (2000). Wisconsin courts recognize two exceptions to the at-will employment doctrine: unlawful purpose and public policy. *Id.* at 38-39.

With regard to the unlawful purpose exception, it is unlawful for an employer to discharge a qualified employee (or deny employment to a qualified individual) on the basis of an individual's "age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters." Wis. Stat. § 111.31.

With regard to the narrow public policy exception, an employee may not be terminated for a reason that violates a fundamental and well-established public policy. *Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 572-73 (1983). To succeed under this exception, an employee must: "(1) first identify a fundamental and well-defined public policy in their complaint sufficient to trigger the exception to the employment-at-will doctrine; and (2) then demonstrate that the discharge violated that fundamental and well-defined public policy." *Strozinsky v. School District of Brown Bear*, 237 Wis.2d at 40. If the employee-plaintiff successfully shows these two elements, "the burden shifts to the employer to show that the discharge actually was sparked by just cause." *Id.* at 41-42.

To be clear, the unlawful purpose exception is itself a public policy exception; employment decisions that violate express statutory terms are illegal and explicitly contravene public policy. However, Wisconsin courts "do not restrict public policy determinations 'to the literal language' of the provision or the circumstances it describes." *Id.* at 42. Constitutional, statutory, and administrative provisions may implicitly express public policy, and courts can assess the content of relevant provisions "to determine whether the spirit, if not the letter, speaks to a clear mandate of public interest." *Id.* at 43.

## Right-to-Work Laws

Wisconsin is a right-to-work state. Employees have the right to join or refrain from joining labor organizations, to bargain or refrain from bargaining "collectively through representatives of their own choosing," and to engage or refrain from engaging "in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection." Wis. Stat. § 111.04. An employer may not require an employee to refrain from joining, affiliating, or supporting – financially or otherwise – a union or other labor organization as a condition of employment. *Id.*

## Immigration Verification

Generally, Wisconsin places no additional employment verification procedures on employers beyond federal I-9 compliance. There is no requirement to use E-Verify unless a Wisconsin employer has a business presence or employees in states mandating E-Verify.

## Drug Testing

Wisconsin does not have any laws regulating drug and alcohol testing in the workplace. Employers may implement any drug testing and drug-free workplace policies at their own discretion, provided that the policy does not violate any other law such as anti-discrimination laws.

## Jury Duty Leave

An employer must allow an employee a leave of absence, without loss of time, for a period of court-mandated jury service. Wis. Stat. § 756.255. It is unlawful for an employer to terminate or otherwise discipline an employee because of jury service. *Id.* "For the purpose of determining seniority or pay advancement, the status of the employee shall be considered uninterrupted by the jury service." *Id.* If an employer "discharges or disciplines an employee in violation" of the law, the employer may be fined up to \$200 and "may be required to make full restitution to the aggrieved employee, including reinstatement and back pay." *Id.*

## Voting Leave

Wisconsin employers are required to provide employees with up to three consecutive hours of unpaid leave to vote while the polls are open, provided employees request the time off before election day. Wis. Stat. § 6.76. The employer may also designate the time of day for the absence. *Id.* “No penalty, other than a deduction for time lost, may be imposed upon an employee by their employer for taking time off to vote.” *Id.* This statute applies to all employers, including the state but does not impact the employee’s right to holidays.

## Family and Medical Leave

Under Wisconsin law, employers with 50 or more employees are required to permit covered employees to take the following amounts of leave time under the following conditions.

Up to six weeks of family leave in a 12-month period for:

- “The birth of an employee’s natural child, if the leave begins within 16 weeks of the child’s birth.” Wis. Stat. § 103.10(3)(b)(1) .
- Either the placement of a child with the employee for adoption or as a precondition to adoption (but not both) if the leave begins within 16 weeks of the child’s placement. Wis. Stat. § 103.10(3)(b)(2).

Up to two weeks’ leave in a calendar year to care for the employee’s child, spouse, domestic partner, or parent, if the child, spouse, domestic partner, or parent has a serious health condition (parent, means a natural parent, foster parent, adoptive parent, stepparent, or legal guardian of an employee, or of an employee’s spouse or domestic partner). Wis. Stat. § 103.10(3)(b)(3).

Up to two weeks of leave in a 12-month period to an employee with a serious health condition that makes them unable to perform the job. Wis. Stat. § 103.10(4).

Under the federal Family and Medical Leave Act, however, an employee may take up to 12 weeks of leave for the aforementioned reasons. 29 U.S.C. § 2612 (FMLA). The federal and state leave laws run concurrently.

Family and medical leave under the FMLA and Wisconsin law is unpaid. Employees are not entitled to receive pay while taking family leave. Wis. Stat. § 103.10; 29 U.S.C. § 2612. However, employers are permitted to maintain more generous policies than the law requires. Wis. Stat. § 103.10(2)(a).

## Other Leave

### Vacation Leave

In Wisconsin, employers are not required to provide employees with vacation benefits, either paid or unpaid. If an employer chooses to provide such benefits, it must comply with the terms of its established policy or employment contract. Wis. Stat. §109.01(3).

### Military Leave

Wisconsin’s military leave law applies to any permanent classified state employee (as defined in Wis. Stat. § 230.08) who enlists or is ordered: “into active service in the armed forces of the United States or who is requested to work for the federal government during a national emergency or a limited national emergency.” Wis. Stat. § 230.32. Said employee “shall be restored to the same or similar position in the classified service and his or her employment shall be deemed not to have been interrupted by such leave except for the receipt of pay or other compensation and accumulation of sick leave and vacation for the period of such absence, unless the employee qualifies to receive pay and benefits under Wis. Stat. § 230.315, and the employee shall be given all other benefits of seniority, status, pay, pay advancement, performance awards and pension rights under...as though the state employment was continuous, if:

- The employee presents sufficient evidence of satisfactory service;
- The employee “is still qualified to perform the duties of such position”;

- The employee's period of service did not exceed "[four] years unless involuntarily retained for a longer period" and the employee applies for restoration within 180 days after relief from service; and
- Circumstances have not changed such that restoration of the employee to his or her position is impossible or impracticable.

Wis. Stat. § 230.32.

### **Bone Marrow and Organ Donation Leave**

"An employee may take bone marrow and organ donation leave...for the purpose of serving as a bone marrow or organ donor if the employee provides his or her employer with written verification that the employee is to serve as a bone marrow or organ donor. No more than six weeks of leave in a 12-month period may be taken under this subsection, and leave may be taken under this subsection only for the period necessary for the employee to undergo the bone marrow or organ donation procedure and to recover from the procedure." Wis. Stat. § 103.11. Upon the employee's return from donation leave, his or her employer must reinstate the employee in the same position if it is vacant, or if not vacant, "in an equivalent employment position having equivalent compensation, benefits, working shift, hours of employment, and other terms and conditions of employment." *Id.*

### **Smoking Laws**

Wisconsin law prohibits the smoking of tobacco products at a place of employment, including break rooms, cafeterias, elevators, employee lounges, restrooms, conference rooms, meeting rooms, and private offices. Wis. Stat. §101.123. Employers are required to display non-smoking signs and no-smoking posters throughout the workplace. *Id.* An employer cannot be accused of employment discrimination due to an adverse action they take against an employee on the basis of the employee's use or nonuse of tobacco (or other lawful product) if said employee's use or nonuse impairs his or her ability to satisfy their employment obligations, creates a conflict of interest, or undermines the employee's qualifications. Wis. Stat. §111.35.

### **Break Time to Express Milk**

Wisconsin has not enacted laws at the state level regarding providing break time to express milk in the workplace. However, the Fair Labor Standards Act (FLSA) provides breastfeeding individuals with some workplace protections. 29 U.S.C. § 218d. Under the FLSA, breastfeeding employees are entitled to reasonable break time and a private space (other than a bathroom) to pump at work for one year after their child's birth. *Id.*

### **Meal Breaks**

Wisconsin does not require employers to provide breaks, including lunch breaks, for workers 18 years of age or older. However, employers must provide suitable spaces for employees to eat lunch if "reasonably necessary" for the employees' "protection of the life, health, safety, and welfare." Wis. Stat. § 101.211.

Wisconsin employers are required to provide employees under the age of 18 at least a 30-minute duty-free meal period when working a shift greater than six hours in duration. Wis. Stat. § 103.68.

### **Minimum Wage, Overtime, and Wage Recordkeeping**

Wisconsin's minimum wage is \$7.25 per hour. Wis. Stat § 104.035. Employers must still comply with federal wage laws and regulations.

Wisconsin employers are permitted to pay tipped employees \$2.33 per hour, and opportunity employees (trainees) may be paid \$2.13 per hour, as long as the employee's tips bring the total hourly wage up to the state minimum wage of \$7.25 per hour. *Id.*

Generally, if an employee works more than 40 hours in a week, the employee must be compensated at a rate of one and one-half times their regular rate of pay. Wis. Stat. § 103.025; Wis. Admin. Code DWD § 274.03.



“Each employer shall keep a record of the names and addresses of all student learners and employees, the hours of employment and wages of each, and such other records pertaining to ability as the department requires, except that an employer is not required to keep a record of the hours of employment of an employee who is exempt under rules promulgated by the department from the requirement under Wis. Stat. § 103.02 that an employee be paid overtime compensation, as defined in Wis. Stat. 103.025(1)(c), and who is not compensated on an hourly rate basis.” Wis. Stat. § 104.09.

### **Final Payments**

Wisconsin law requires an employer to issue a final paycheck no later than the employer’s next regularly scheduled payroll date when an employee quits or is terminated. Wis. Stat. § 109.03(2). This law does not apply to sales agents employed on a commission basis. *Id.*

### **Unemployment Insurance**

Unemployment insurance provides temporary weekly income benefits to eligible individuals who have lost their jobs. The benefits are intended to partially offset the loss of wages while an unemployed worker searches for suitable work or until an employer can recall the employee to work. Nothing is deducted from an employee’s wages to pay for their coverage; employers pay for the benefits through mandatory contributions to the Unemployment Reserve Fund. Wis. Stat. § 108.16. Unemployment benefits are administered by the Department of Workforce Development. Additional information regarding the benefits may be accessed at <https://dwd.wisconsin.gov/uiben/handbook/>.

### **Workers’ Compensation**

The Wisconsin Workers’ Compensation Act, Wis. Stat. § 102, *et seq.* applies to all employers in Wisconsin with three or more employees. Employees who suffer injuries and/or occupational diseases arising out of and in the course of their employment may be eligible to receive several types of benefits under the Act. Under the Act, a workplace injury must be reported to the employer “within 30 days after the occurrence of the injury or within 30 days after the employee knew or ought to have known the nature of his or her disability and its relation to the employment;” failing to promptly report an injury may result in a denial of benefits if the employer lacked knowledge of the injury. Wis. Stat. § 102.12.

The Act is administered by the Wisconsin’s Department of Workforce Development and additional information regarding the Act may be accessed at <https://dwd.wisconsin.gov/wc/>.

### **Child Labor**

Generally, 14 years of age is the minimum age for employment under Wisconsin state law, and a minor may not be employed during school hours (subject to certain exceptions). Minors under the age of 14 may only be employed as follows and to the extent permitted under federal law:

- Farming (minimum age of 12);
- Street trades (e.g., delivering newspapers, selling products door-to-door, or on the street) (minimum age of 12);
- Fundraising sales for non-profit organizations and schools (no minimum age) (see Wis. Admin. Code DWD § 270.10(2)(c);
- Under direct supervision of the minor’s parent or guardian in connection with the parent’s or guardian’s business, trade, or profession if the minor would otherwise be permitted to work in the same job at age 14;
- Caddies on golf courses (minimum age of 12; caddies aged 12-13 must use non-motorized caddy carts);
- Domestic work in and around the home of the employer if not in connection with or part of a trade, business, or profession of the employer (minimum age of 12);
- Work in connection with the minor’s parent/guardian’s trade, business, or profession (minimum age of 12 if the minor could be employed at age 14);
- Sideline officials at high school football games (minimum age of 12);

- Ball monitors at high school football games or practices (minimum age of 11);
- Officials for athletic events sponsored by private, non-profit organizations in which the minor would be eligible to participate or in which the participants are the same age or younger than the minor (minimum age of 12);
- School lunch programs for the school that the minor attends (minimum age of 12); and
- Public exhibitions (e.g., performance arts or modeling) (no minimum age) (Wis. Stat. § 103.78).

Wis. Admin. Code DWD § 270.10

A minor below the age of 16 must possess a valid work permit before beginning employment (except for employment in farming and youth apprenticeship programs). Wis. Stat. § 103.70. There are restrictions dealing with minors for places of work, as well as restrictions on the hours of the day a minor may work. e.g., Wis. Stat. § 103.65.

The relevant guidance related to Wisconsin's Child Labor laws may be found at: [dwd.wisconsin.gov/er/laborstandards/workpermit/minoremployment.htm](http://dwd.wisconsin.gov/er/laborstandards/workpermit/minoremployment.htm).

### **Gun Laws**

An employer may prohibit an employee from carrying a concealed weapon during the course of their employment. Wis. Stat. § 175.60(15m). However, an employer may not restrict the possession of concealed weapons in employees' privately owned vehicles whether or not the vehicle is parked on the employer's property or is used in the course of employment. *Id.*

### **Equal Pay**

Wisconsin prohibits employers from discriminating against employees in "compensation paid for equal or substantially similar work" on the basis of sex if sex "is not a bona fide occupational qualification." Wis. Stat. §111.36. "[S]ex is a bona fide occupational qualification if all of the members of one sex are physically incapable of performing the essential duties required by a job, or if the essence of the employer's business operation would be undermined if employees were not hired exclusively from one sex." *Id.*