TOP TEN EMPLOYMENT ISSUES EVERY MUNICIPAL LAWYER SHOULD RECOGNIZE

League of Wisconsin Municipalities

Municipal Attorneys Institute

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I. FAILURE TO ADDRESS WORKPLACE PROBLEMS.

A. Human nature leads most people to avoid confrontation.

B. Small work force means there are no expectations or, worse, “the law doesn’t apply to us.”

C. Problematic employee conduct becomes the norm or “past practice.”

D. Employee complaints--avoidance means turnover.

E. Confronting the “problem employee” becomes personal and emotional.

F. Avoiding the tough issues can lead to legal issues.

II. WHAT IS LURKING IN YOUR HANDBOOKS, POLICIES, ORDINANCES OR CONTRACTS?

A. Many states, including Wisconsin, are "at will" employment states, meaning that the employee or the employer can terminate an employee’s employment at any time, for any *legal* reason, without advance notice. However, there are several important exceptions to "at will" employment.

1. Written employment contracts.

2. Enforceable verbal promises or contracts.

3. Employee handbook provisions.

   a. Probationary periods.
   b. Progressive discipline.
   c. "Permanent employment" status.
   d. Just cause standards for discipline or termination.

4. Union contracts.

5. Anti-discrimination and anti-retaliation laws.

B. The law requires that you have a grievance procedure for termination, discipline and workplace safety violations. The grievance procedure, in these cases, must provide the opportunity for an aggrieved employee to have his/her complaint decided by an independent hearing officer although the Council or the Board is the final decision-maker.

1. Does your grievance procedure cover only the statutory bases for grievances?

2. Who has the burden of proof?

3. Who can appeal an unfavorable decision?

4. What are the timelines?

5. Where does one find your grievance procedure?

C. Ideally, neither management nor employees should have to engage in scavenger hunts for the municipality's employment policies, regulations, work rules, employment law posters or forms.

III. DOCUMENTATION ISSUES.

A. Good documentation of employment matters is critical.

1. Good documentation leads to greater trust and confidence in your employment decisions.

2. Encourages decision makers to think through decisions and be consistent.

3. Creates institutional memory.

B. Good documentation is key in preventing and dealing with legal claims. As an example…

> Ms. Jones has worked for the Village office for 30 years. She has never quite managed to learn how to work with computers. She is sarcastic and belittling to the public and co-workers. She is absent at least weekly due to her "heart," but a doctor's note has never been seen. She is temperamental and autocratic.
>
> She was, however, married to the Village President for 25 years until they divorced.
>
> Ms. Jones is 57 years old, has a host of alleged health conditions and a personnel file that can easily be slid under most doors.
>
> You are the brand new Village Administrator and viewed by the Board, the office staff and, particularly, the Village President, as the person who can "get rid of" Ms. Jones.

C. How does good documentation help an employer?

1. Having written proof of your reasons goes a long way in proving that your reasons were not illegal.

2. Written proof reduces/eliminates the he said/she said factor.

3. Written proof eliminates or reduces the risk of "pretext" arguments.

D. How does poor or no documentation hurt the employer?

1. It undermines the employer's version of the situation (particularly regarding issues that are not objectively tracked, like "poor attitude").

2. Glowing performance evaluations, raises and even simple notes of thanks or "good work" can undermine the employer's case that the employee was underperforming or had other issues.

3. When accused of discrimination or retaliation, it is not enough that you did not violate the law; you must be able to prove that you did not violate the law.

4. It is a mistake to think a judge or jury will believe your version.

5. Basic assumption: If it isn't reduced to writing, it did not happen.

E. What events should be documented?

1. General rule: document every significant employment issue. If you are counseling an employee over a matter of any significance or taking any action (good or bad) because of a situation, you should document it.

2. Do not set the employee up to fail. (The foot-thick employment file that magically appears over the last six months prior to an employment action being taken despite nothing being placed in the personnel file for the previous 20 years).

3. Job expectations and objectives should be well documented.

   a. Job descriptions.

   b. Performance benchmarks.

   c. Attendance standards and record.

   d. Annual goals.

   e. Projects to be completed and deadlines.

4. Employee discipline should be documented.

   a. State what the expectation was.

   b. State how the employee failed to meet it (be specific).

   c. Review any previous counseling/warnings the employee has received on this or other issues.

d. Note the consequences of further problems ("Up to and including termination").

e. If applicable, documentation should demonstrate the municipality's efforts to support the employee in improving performance, such as training or extra supervision offered, etc.

F. Other keys to effective documentation.

1. Document events at the time they happen if possible ("contemporaneous documentation"). After-the-fact documentation is better than no documentation however.

Example of after-the-fact documentation: June 8, 2018. Ms. Jones, you have exhibited several inappropriate behaviors in department meetings over the last several months. On March 24, you called Steve Smith's idea of holding weekly rather than monthly staff meetings "idiotic". On April 16, you raised your voice and left a meeting abruptly when I stated that you would not receive an assistant. In yesterday's meeting, you laughed out loud at Gloria Green's complaint about the lack of equal work distribution and sarcastically told Gloria to "get a life." This behavior is unprofessional, causes stress between you and your peers, and will not be tolerated. We expect you to improve your interpersonal communications immediately and expect you to communicate with peers in a respectful manner. Further inappropriate behavior of this or other types will lead to further discipline including and up to termination.

I acknowledge receiving this document. _____

2. Record facts, not unsupported opinions or speculation.

Example:

Joan, even though you called in sick on Friday, Steve saw you out at a bar this weekend and thought you were drunk. We've been concerned about your habits and want you to ask yourself if you might have some issues to deal with. We just want to help if we can.

versus

Joan, because you called in sick on Friday, I specifically asked you to come into the office on Saturday if you were well enough to complete the monthly report. You did not come in, but an employee saw you out at a bar that night. It was inexcusable for you not to come in to complete your work if you were well enough to do so.

3. Be specific about job expectations--use examples.

Example:

You are not going to advance here because you are not well-organized.

versus

You have failed to timely complete three reports. This failure has resulted in the Board having incomplete information at three successive Board meetings: the TID report, the Main Street improvement project and the 2018 budgetary report.

4. Remember that most of what you document will be subject to discovery if there is a lawsuit.

5. Emails - They are evidence. People write things in e-mails they would not say to someone. E-mails are the single most damaging piece of evidence in employment cases. Watch those E-MAILS!

6. Draft documentation that will make sense to a third person years from now.

7. Think about whether you want the employee to have access to the documentation you are creating. Consult with your client regarding attorney-client privilege before creating documentation.

8. Ensure legal counsel review key documentation that might have serious legal consequences.

9. In most circumstances, DO NOT document issues until you have heard the employee's side of things. Your HR process will lose credibility if you jump the gun without all the facts.

10. Have employees sign and date all documentation to acknowledge receipt.

IV. HARASSMENT

A. Harassment basics--federal law.

1. Under Title VII of the Civil Rights Act of 1964, harassment is:

a. unwelcome verbal or physical conduct or other acts;

b. engaged in because of the recipient's protected class status when:

i. submission to the conduct is a condition of employment or benefits ("quid pro quo"), or

ii. the conduct unreasonably interferes with the recipient's work or can reasonably be seen to create a hostile, intimidating, or offensive environment ("hostile environment").

c. Harassment can include:

i. Verbal or physical abuse

ii. Epithets, name-calling, slurs

iii. Threats

iv. Vulgar, obscene or derogatory language

v. Mimicry

vi. Lewd or offensive gestures or pranks

vii. Offensive jokes

viii. Offensive, threatening or hostile e-mails

2. Sexual harassment is a special category of harassment that can include the above as well as:

a. Sexual advances

b. Requests for sexual favors

c. Unwelcome physical contact, e.g., touching, rubbing or brushing against another

d. Display of offensive or graphic pictures, cartoons, jokes, photos

e. Unwelcome social invitations

f. Sexually charged e-mails

3. Harassment, sexual or otherwise, is not:

a. Welcome conduct, such as banter and jokes among friends who participate equally or truly consensual relationships.

b. Isolated incidents of harassment (in the hostile environment context).

c. Conduct that is not based on sex or other protected class status.

d. Expecting and demanding that employees do their job.

e. Actually supervising employees.

f. Writing evaluations of employees or taking disciplinary action against employees based on misconduct.

5. Two landmark U.S. Supreme Court cases in 1998 clarified an employer's liability for sexual harassment. *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998); *Farragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

   a. Employers are strictly liable for harassment by a supervisor or manager over a subordinate that results in a tangible employment action. Tangible employment action means a significant change in employment status, such as hiring, firing, failing to promote, reassigning to less desirable position, or a change to benefits. The focus is generally on economic harm.

   b. Absent a tangible employment action, an employer can avoid liability by showing:

      i. It exercised reasonable care to prevent and promptly correct any harassing behavior; and

      ii. The plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.

         (a) "Reasonable care to prevent and promptly correct harassment" involves:

            (i) Effective anti-harassment policy;

            (ii) Regular, periodic training;

            (iii) Effective enforcement of the policy--not just a piece of paper!

         (b) Correcting the harassment properly involves:

            (i) Effective investigation of complaints;

            (ii) Effective responses to findings that harassment occurred;

            (iii) Consistent enforcement across the organization.

B. Wisconsin harassment law.

1. There is emerging a significant difference between Title VII and the Wisconsin Fair Employment Act and how the latter is interpreted by the Wisconsin Equal Rights Division.

2. Wis. Stat. § 111.36(1)(b) provides, in relevant part:

a. Employment discrimination because of sex includes but is not limited to, any of the following actions by any employer:

i. Engaging in sexual harassment;

(a) "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or *unwelcome verbal or physical conduct of a sexual nature.*

(b) *Unwelcome verbal or physical conduct of a sexual nature* includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment.

ii. Implicitly or explicitly making or permitting acquiescence in or submission to sexual harassment a term or condition of employment;

iii. Making or permitting acquiescence in, submission to or rejection of sexual harassment the basis or any part of the basis for any employment decision affecting an employee, other than an employment decision that is disciplinary action against an employee for engaging in sexual harassment in violation of this paragraph; or

iv. Permitting sexual harassment to have the purpose or effect of substantially interfering with an employee's work performance or of creating an intimidating, hostile or offensive work environment. Under this paragraph, substantial interference with an employee's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct

is such that a reasonable person under the same circumstances as the employee would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment.

3. WFEA recognizes three ways in which an employer may be liable for sexual harassment.

   a. The first is where the harassment is perpetrated by an owner or an agent of the employer who is in a position of responsibility such that it is appropriate to apply the rule of *respondeat superior* and treat the actions of the agent as being the actions of the employer.

      i. In determining whether an employee's co-workers are supervisors for purposes of imputing liability for alleged discriminatory acts, the courts will look to the following criteria (*Crear v LIRC.*, 114 Wis. 2d 537,541-42 (Wis. App. 1983)):

         (a) The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees;

         (b) The authority to direct and assign the work force;

         (c) The number of employees supervised and the number of other persons exercising greater, similar or lesser authority over the same employees;

         (d) The level of pay, including an evaluation of whether the supervisor is paid for his or her skill or for his or her supervision of employees;

         (e) Whether the supervisor is primarily supervising an activity or is primarily supervising employees;

         (f) Whether the supervisor is a working supervisor or whether he or she spends a substantial majority of his or her time supervising employees; and

         (g) The amount of independent judgment and discretion exercised in the supervision of employees.

      ii. The *Farragher* and *Ellerth* affirmative defenses do not apply to sexual harassment caused by an owner or a supervisor. *Sanderson v. Handi Gadgets Corp.* (LIRC, 3/21/2005).

b. The second is where there has been quid pro quo sexual harassment;

c. The third is by permitting sexual harassment to create a hostile work environment. The third category applies to the actions of co-workers who are not considered to be agents of the employer.

At this time we believe the *Farragher* and *Ellerth* affirmative defenses apply to sexual harassment caused by co-workers.

C. What should employers do in regard to harassment issues?

1. Promote a respectful work culture for all in your work place.

2. Have an anti-harassment policy that covers all protected classifications.

3. Ensure your staff understands your anti-harassment policy and their right to complain about any harassing conduct.

4. TRAIN your supervisors about harassment and what their heightened obligations are in regard to reporting and addressing this conduct.

5. Ensure that no retaliatory conduct is allowed.

V. DISABILITY LAWS AND ACCOMMODATION REQUIREMENTS.

A. The Americans with Disabilities Act and the Wisconsin Fair Employment Act prohibit discrimination on the basis of disability.

B. What do disability laws require?

1. Employers may not discriminate against otherwise qualified applicants or current employees who have physical or psychological disabilities in any aspect of the employment relationship, including the application procedure, hiring, advancement, discharge, compensation, training, or any other term, condition or privilege of employment. This includes the provision of health insurance and other benefits.

2. Employers must provide reasonable accommodations for applicants and employees, both in the hiring process and with regard to all other aspects of employment.

C. ADA's Definition of Disability

1. A physical or mental impairment that substantially limits one or more of the major life activities of an individual;

2. A record of having such an impairment; or

3. Being regarded as having such an impairment.

4. The ADA was amended effective January 1, 2009 by the Americans With Disabilities Amendments Act ("ADAAA"). The ADAAA was intended to reinstate a broad scope of protection under the ADA.

D. ADA Reasonable Accommodation Requirements

1. A reasonable accommodation is a change in work environment or the way in which things are customarily done that allows a disabled employee the opportunity to successfully perform his/her position and to enjoy equal employment opportunities.

2. An accommodation is reasonable if it is effective and does not cause undue hardship or a direct threat to the employee or others.

3. Specific categories of accommodations that might be required:

   a. Making existing facilities accessible

   b. Job restructuring/reallocation of certain job functions

   c. Temporary and possibly permanent part-time or modified work schedules

   d. Acquiring or modifying equipment

   e. Changing tests, training materials, or policies

   f. Providing qualified readers or interpreters

   g. Reassignment to a vacant position

   h. Temporary "forbearance" of attendance and performance issues

   i. Work at home requests

   j. Extended, unpaid leave of absence (even beyond FMLA entitlements)

4. Accommodations that will generally not be required:

   a. Longer-term lowering of job standards (performance/attendance)

   b. Bumping another employee out of a job

   c. Repeatedly excusing prohibited behavior on the job

   d. Hiring additional employees to assist or perform part of the job

e. Transferring a light duty job reserved for worker's comp injuries into a regular job

f. Creating a new position

g. Indefinite leaves of absence

h. Tolerating ongoing, chronic and excessive unplanned absences.

5. The employer may choose among reasonable accommodations as long as the chosen accommodation is effective.

E. Distinctions between ADA and Wisconsin law on reasonable accommodation.

1. Under the ADA, the concept of "essential functions" of a job is critical to determine whether an accommodation is "reasonable." Courts interpreting the ADA have consistently held that a proposed accommodation is not reasonable (and thus an employer is not required to implement it) if the accommodation does not enable the disabled employee to perform the "essential functions" of the job.

a. Thus, employers are not required to remove or significantly alter essential job functions to reasonably accommodate employees. If an employee cannot perform essential functions, even with an accommodation, then the employee is not qualified for the job and can be terminated. However, employers may have to restructure jobs to remove marginal tasks.

b. Employers are not required to create new positions to reasonably accommodate.

c. Employers are not required to hire another employee to perform the work of a disabled employee.

2. Wisconsin law does not recognize the concept of "essential functions." Reasonable accommodations are not limited to those that permit an employee to perform essential job functions. Thus, there may be cases where "essential functions" must be removed or restructured to reasonably accommodate an employee.

a. The "reasonableness" of an accommodation goes to whether it allows the employee to "adequately" perform his or her job responsibilities -- not whether the accommodation allows the employee to perform some, most or all of the duties.

b. An employer who has refused a reasonable accommodation must prove either that even with the accommodation, the employee would not be able to perform his or her job responsibilities adequately OR

the reasonable accommodation would impose an undue hardship on the employer.

c. The employer can show undue hardship by showing that providing the accommodation will create significant difficulty or expense. Hardship is judged on a case-by-case basis. Lowered morale amongst co-workers is not undue hardship.

F. Requests for Accommodation

1. There are no formal requirements for disability accommodation requests.

2. Requests can be verbal or in writing.

3. An employee need not mention disability laws or use term "reasonable accommodation" in making a request. There is NO MAGIC language required.

4. Generally, employers should not proactively ask whether an employee has a disability or whether an accommodation is needed. When an employee is struggling in some aspect of job performance, the employer should focus on the job performance and leave it to the employee to raise any health issues. However, if the employee has a known disability which is suspected of causing workplace issues, the employer may want to initiate the "interactive process." Approaching these issues correctly requires an individualized of each situation.

5. A request for accommodation triggers the Interactive Process: a discussion and exchange of information to establish the need for accommodation and to identify appropriate reasonable accommodation(s). Employers should document their efforts to engage in the interactive process.

G. Employers Must Be Open To Considering Modifying Employee Work Schedules As A Reasonable Accommodation.

1. Employers may have to allow "ramp up" periods where an employee works limited hours or performs limited tasks for a period of time.

2. In most cases, an employer is not required to offer an ongoing part-time schedule as an accommodation if it does not in fact have part-time jobs. The ADA does not require employers to create jobs. However, if the employer does extend part time status to non-disabled employees, it will be difficult to demonstrate why such an accommodation is not reasonable or would cause undue hardship.

H. Employers May Not Penalize Employees For Lower Production Or Other Issues Caused By A Leave Of Absence.

An employee cannot be penalized for below-average production numbers if the reason for those poor numbers is because the employee has missed work time due to an FMLA or disability leave. This does not mean that an employee who fails to make a certain production quota would be entitled to a bonus conferred on the basis of achieving that quota.

I. Exceptions

1. Direct Threat

a. A defense to an allegation of discrimination under the ADA includes that an individual poses a direct threat to the health or safety of the individual or others in the workplace. 29 CFR § 1630(15). If an employee poses such a direct threat, the employee is not considered a "qualified individual with disability" under the ADA.

b. The determination that an employee poses a direct threat must be premised upon:

i. A reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence; and

ii. An expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86, (2002) (citing 29 C.F.R. § 1630.2(r).

c. In deciding whether a direct threat exists, an employer should consider:

i. the duration of the risk;

ii. the nature and severity of the potential harm;

iii. how likely it is that the potential harm will occur; and

iv. how imminent the potential harm is.

2. Undue Hardship

a. An employer can show undue hardship by showing that providing the accommodation will create significant difficulty or expense.

b. A determination of undue hardship should be based on several factors, including:

i. the nature and cost of the accommodation needed;

ii. the overall financial resources of the facility making the reasonable accommodation;

iii. the number of persons employed at this facility;

iv. the effect on expenses and resources of the facility;

v. the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);

vi. the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and

vii. the impact of the accommodation on the operation of the facility

c. Hardship is judged on a case-by-case basis.

d. Lowered morale amongst co-workers is not undue hardship.

VI. WAGE AND HOUR MATTERS

A. Who Is Covered?

1. Employees who are covered by the Act fall into two categories: non-exempt and exempt. Non-exempt employees are subject to all of the FLSA requirements. Exempt employees are exempt from the minimum wage and overtime provisions, but are still subject to the other FLSA requirements.

2. State and local governments must comply fully with the FLSA, including the minimum wage, overtime and record keeping requirements.

B. Non-Covered Individuals.

An individual is deemed to be a non-covered individual for the purposes of the FLSA if the individual falls into a particular category.

1. Public officials. Such non-covered individuals include elected officials and their personal staffs, policy making appointees, and legal advisors to

such elected officials.

2. Bona fide volunteers. A bona fide volunteer

a. performs hours of service for a public agency for civic, charitable or humanitarian reasons, without promise, expectation, or receipt of compensation for service rendered;

b. offers his or her services freely and without pressure or coercion, direct or implied, from an employer; and

c. does not perform the same type of services for the public agency as an employee as those for which they propose to volunteer. Bona fide volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof for their service without losing their status as volunteers.

d. Payments to Volunteers. Bona fide volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof for their service without losing their status as volunteers.

i. An example of expenses that may be provided to a volunteer include a uniform allowance provided to a volunteer firefighter or a reimbursement for reasonable cleaning expenses or for wear and tear on personal clothing worn while performing hours of volunteer service. Expenses may also include reimbursement for the approximate out-of-pocket expenses incurred incidental to providing volunteer services, for example, payment for the cost of meals and transportation expenses.

ii. Reasonable benefits may involve inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, worker's compensation) or pension plans or "length of service" awards, commonly or traditionally provided to volunteers of state and local governmental agencies.

iii. A nominal fee must not be a substitute for compensation and must not be tied to productivity. The following factors will be among those examined in determining whether a given amount is nominal:

(a) The distance traveled and the time and effort expended by the volunteer;

(b) Whether the volunteer has agreed to be available around the clock or only during certain specified periods; and

(c) Whether the volunteer provides services as needed or throughout the year.

iv. An individual who volunteers to provide periodic services on a year round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.

v. Volunteers may also be reimbursed for tuition, transportation, and meal costs involved in their attending classes intended to teach them to perform efficiently the services they provide or will provide as volunteers. In addition, the volunteer may be provided books, supplies, or other materials essential to their volunteer training or reimbursement for the cost thereof.

(a) Whether the furnishing of expenses, benefits, or fees would result in an individual losing their status as volunteers under the Fair Labor Standards can only be determined by examining the total amounts of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation.

(b) Although not codified in the regulations, a series of opinion letters establishes a general rule (20% test) to determine whether a fee paid to a volunteer would be considered nominal. In the first important letter (FLSA 2005-51), the Department reviewed whether a $3,675 stipend to a varsity track coach was considered a nominal fee. The letter indicated that "In determining whether the $3,675 stipend at issue is a permissible nominal fee, the Department looks at the economic realities of the situation and must compare the volunteer stipend to what it would otherwise cost to compensate someone to perform those services. If the stipend is no more than 20 percent of what the district would otherwise pay to hire a coach or advisor for the same services, it would appear to be a permissible nominal fee." *See also* FLSA 2008-15, 2008-16, 2006-28.

vi. Factors that may be considered in determining whether a

person is a volunteer or employee include whether there is some form of merit pay (bonuses for certain activities), whether the fee or stipend is based on productivity (for example, number of fire responses), whether the 20% threshold is exceeded, whether there is a contract with the volunteer and what language may appear in an employee handbook or policy.

3. Independent Contractors. The focal point in deciding whether an individual is an independent contractor is whether the individual is economically dependent on the business to which he or she renders services or is, as a matter of economic fact, in business for himself/herself. In applying this test, the courts generally focus on five factors: (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work. *Doty v. Elias,* 733 F. 2d 720 (10th Cir. 1984). On July 15, 2015, the Department of Labor issued a far-reaching Administrator's Interpretation expressing the DOL's belief that most workers classified as independent contractors are employees under the FLSA's broad definitions. In June 2017, Labor Secretary Alexander Acosta announced the withdrawal of this Administrator's Interpretation (AI) on independent contractors. While the AI was not binding law, it did represent a significant shift in wage and hour law advocated by the prior administration and served as the Wage and Hour Administration's justification for taking certain enforcement actions.

4. Interns. Many internships are unpaid, which raises a substantial legal question about failing to treat "interns" as employees. *See* Wage & Hour Div., Fact Sheet #71, Internship Programs Under the Fair Labor Standards Act. The DOL stated that courts have used the "primary beneficiary test" to determine whether an intern or student is, in fact, an employee under the FLSA and that this test allows courts to examine the "economic reality" of the intern and employer relationship to determine which party is the "primary beneficiary" of the relationship. Courts have identified the following seven factors as part of the test:

   a. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

   b. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

c. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

d. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

e. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

f. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

g. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The DOL has indicated that FLSA exempts certain people who volunteer to perform services for a state or local government. It states that "[u]npaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible."

C. FLSA Exemptions. In order to be exempt from the Act's minimum wage and overtime requirements, an employer must be able to show that the employee meets the job duties associated with a specific exemption. These exemptions are identified by different categories, including bona fide executive, administrative and professional employees. The FLSA regulations define the requirements for each of these exemptions. In general, each of these employee exemptions includes three basic requirements: (1) a salary basis requirement; (2) a salary level requirement; and (3) a primary duty requirement. Each of these requirements is described below.

1. Salary Basis Requirement. The salary basis requirement for exempt employees states that an employee must be paid on a salary, rather than an hourly, basis. In other words, each pay period, the employee must regularly receive a predetermined amount constituting all or part of his or her compensation, without regard to the quality or quantity of the work performed. An employer must pay the employee's salary for any week he or she performs work without regard to the number of days worked. Administrative and professional employees may also be paid on a fee basis. An employee is paid on a fee basis when he or she is paid an agreed

amount for a single job regardless of the time required for its completion.

An employer violates the salary basis requirement and jeopardizes an employee's exempt status if it makes certain deductions from salary that are not permitted under the regulations. Deductions are permissible only under some circumstances. In particular, an employer may deduct from an employee's salary (1) for absences for one or more full days for personal reasons, other than sickness or disability; (2) for one or more full days when an exempt employee is absent because of sickness or disability and the deduction is made pursuant to a bona fide plan, policy, or practice of paying wage-replacement benefits; (3) when an exempt employee is absent from work for less than one week for jury duty, as a witness, or for military duty, the daily compensation received may be offset from the employee's salary; (4) for a violation of a major safety rule, the employer may make partial-day deduction from salary; (5) for one or more full days as discipline for violation of workplace conduct rules; (6) for full days in the initial or last week of employment; and (7) for reduced or intermittent leave under FMLA, the employer may make partial day deductions. 29 C.F.R. § 541.602(b)(1)-(7).

Isolated or inadvertent deductions will not jeopardize the exempt status if the employer repays the employee. The employer will lose an overtime exemption for making an improper deduction only if the employer has an actual practice of improper deductions. An employer will not be deemed to have an actual practice of improper deductions if the employer has a clearly communicated policy that prohibits improper deductions; reimburses employees for improper deductions; and makes a good faith commitment to comply in the future. If an employer fails or refuses to reimburse an employee after making an improper deduction, or continues the practice, the exemption is lost during the time period the deductions were made for employees in the same job classification working for the same managers responsible for the improper deduction. 29 C.F.R. § 541.603.

2. Salary Level Requirement. The salary level requirement states that an employee must earn a minimum weekly salary. Under the rules, the minimum salary requirement is generally $455 per week ($23,660 per year).

When evaluating the exempt status of an employee, an employer should always look first at the salary level, because, if an employee's weekly salary falls below the minimum salary level, the employer can end its analysis and conclude that the employee will not be exempt. At the same time, an initial examination of salary level first can indicate whether the employee is highly compensated (the salary exceeds $100,000 per year). In such cases, the employee is then only required to perform one of the exempt duties or responsibilities of an executive, administrative or professional employee. These duties are explained in more detail below.

3. Primary Duty Requirement. The primary duty requirement states that an employee's primary duty must be the performance of exempt work. In other words, although an exempt employee may perform some nonexempt duties, the primary duty of the employee must be exempt in nature. The primary duty analysis requires a detailed analysis of the specific duties required for each exemption in comparison to the duties actually performed by the employee. In its analysis, an employer should also consider (1) the amount of time spent performing exempt work, (2) the employee's relative freedom from supervision, (3) the relative importance of the exempt duties as compared with other types of duties, and (4) the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

   Some nonexempt work may be considered exempt work in this analysis. In particular, work that is directly and closely related to the performance of exempt work is also considered exempt work. Tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work are considered exempt work. This work may include physical tasks and menial tasks that arise out of exempt duties or routine work without which the employee's exempt work cannot be performed properly, such as using the computer to create documents or presentations.

4. With some exceptions, each category of exempt employees discussed below includes the three requirements discussed above. Each exemption also contains specific job duties that define the nature of the work required to meet that exemption.

   a. Executive Employee. These employees generally include employees who engage in the management of an agency or department, which generally involves oversight of employees and control over the work involved. Such duties may include selecting and training employees, directing the work of employees, handling employee complaints and grievances, disciplining employees, planning their work, and planning and controlling the budget. Under the FLSA regulations, an executive employee is an employee:

      i. Who is compensated on a salary basis at a rate of not less than

$455 per week, exclusive of board, lodging or other facilities;

ii. Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

iii. Who customarily and regularly directs the work of two or more other employees; and

iv. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

An employer must be able to show that each employee meets every requirement of the exemption. It is the actual duties performed by the employee, not the duties necessarily contained within a job description. When applying these tests, an employer should keep in mind that the tests do not rely on job titles. There are no absolute exemptions based on job title or classification; however, employees who may qualify as exempt executives in an academic setting include the supervisor of buildings and grounds, transportation director, and food service program director.

b. Administrative Employee. Employees qualifying for this exemption are generally those employees who engage in running or servicing the agency or a department. Administrative duties include work in such areas as finance, accounting, budgeting, procurement, safety and health, personnel management, human resources, labor relations, computer network, and similar activities. Under the FLSA regulations, an administrative employee is an employee:

i. Who is compensated on a salary or fee basis at a rate of not less than $455 per week, exclusive of board, lodging or other facilities; and

ii. Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

iii. Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Employees who may qualify as exempt administrative employees in a municipal setting include the human resource manager or finance director. An employee's exercise of discretion and independent judgment under the third factor involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities

have been considered. This exercise of discretion and independent judgment must be more than the application of procedures or specific standards described in manuals or other sources. The FLSA regulations include a long list of factors to consider in determining whether an employee exercises discretion.

c. Professional Employee. Professional employees are generally employees who are engaged in work that is predominantly intellectual in character. The work must also include the consistent exercise of discretion and judgment rather than the performance of routine mental or physical work. Under the FLSA regulations, a professional employee is an employee:

i. Compensated on a salary or fee basis at a rate of not less than $455 per week, exclusive of board, lodging, or other facilities, and

ii. Whose primary duty is the performance of work:

(a) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(b) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. (Emphasis added).

d. Computer Employee. Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals. Under the FLSA regulations, the employer must compensate the computer employee on a salary or fee basis at a rate of not less than $455 per week or on an hourly basis at a rate not less than $27.63 an hour. The computer employee must also have a primary duty consisting of any of the following or a combination of the following: (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or (3) the design, documentation, testing, creation or modification or computer programs related to machine operating systems.

D. FLSA Non-Exempt Employees.

1. Work. All "work" must be compensated and counted against the 40 hour workweek to determine when employees must be paid overtime. Employment is defined to include all hours that an employee is suffered or permitted to work for the employer. 29 U.S.C. § 203(g). Work not requested but suffered or permitted is work time. 29 C.F.R. § 785.11. If the employer knows or has reason to believe that the employee is continuing to work, the time is working time. "[I]t is the duty of management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so." 29 C.F.R. § 785.13.

2. Smartphone Usage. Although smartphones and other personal electronic devices offer employers and employees many advantages in the workplace, use of these devices can have significant legal implications. One such legal issue is whether employers must pay nonexempt employees overtime under the FLSA for time spent checking smartphones after work hours. In one case, a group of Chicago Police officers alleged that they were required to work overtime on their smartphones without compensation. However, the Court of Appeals held that the officers were not entitled to additional pay because the City did not have knowledge of the overtime. *Allen v. City of Chicago*, 865 F.3d 936 (7th Cir. 2017). The DOL has also sought public input on the issue of mobile device use by non-exempt employees outside their working hours.

3. Compensable Time.

   a. Breaks / Lunch Period. Breaks of twenty (20) minutes or less are compensable. 29 C.F.R. § 785.18. Meal periods of less than thirty minutes or where the employee is not free to leave his or her station are compensable. 29 C.F.R. § 785.19.

   b. On-Call Time. On-call time where liberty is restricted is compensable. On-call time where the employee leaves a telephone number and is not restricted is noncompensable. 29 C.F.R. § 785.17.

   c. Traveling. Traveling between work sites or traveling out of town during working hours or engaged in travel as part of the employer's principal activity is compensable. 29 C.F.R. § 785.38, .39.

   d. Training / Seminars. The compensability of employee time spent

in training programs, lectures, labor-management committee meetings and safety meetings is addressed in the federal regulations. Attendance at such training need not be counted as work time if the following four criteria are met: (1) attendance occurs outside the employee's regular working hours; (2) attendance is voluntary; (3) the employee does not perform any productive work while attending; and (4) the program, lecture or meeting is not directly related to the employee's job. See 29 C.F.R. § 785.27.

e. Overnight Trips. The federal law states that, where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided (1) adequate sleeping facilities are furnished by the employer and (2) the employee can usually enjoy an uninterrupted night's sleep. See 29 C.F.R. § 785.22.

4. Overtime. The FLSA requires overtime pay for all covered, non-exempt employees for any hours worked in excess of 40 hours per workweek. The FLSA requires that all covered non-exempt employees be paid at a rate not less than one and one half times the non-exempt employees' regular rate of pay for each hour worked in excess of the maximum hours applicable in any given workweek. The FLSA defines workweek for the purpose of non-exempt employee overtime calculation as a fixed period of 168 hours or seven consecutive 24-hour periods.

5. Compensatory Time. Public employers may also offer compensatory time rather than overtime. Compensatory time, if offered, requires the employer to provide time off at a rate not less than one and a half hours off for each hour worked over 40 in a week. The employer must allow the employee to use the compensatory time at any time which does not create a substantial disruption to the employer's operations. Employers may cap the amount of compensatory time that may be accrued (and may not allow accrual of more than 240 hours in a year except for police and fire employees) and can require that compensatory time be used by a specific date.

6. Regular Rate of Pay. Examples of compensation that must be included in the employee's regular rate of pay includes wages, on-call pay, nondiscretionary bonuses, and shift differentials. See FLSA 2018-9. Items that are not included in the regular rate of pay include discretionary bonuses and severance pay. An employer and his employee, however, may not agree on a regular rate for overtime compensation purposes which is fictitious or artificial in nature, that is, which is different from the employee's actual or bona fide hourly rate for bona fide

compensation. *Walling v. Helmerich*, 323 U.S. 37 (1944); see also 29 C.F.R. § 778.500.

A recent federal district court case in Wisconsin concluded that certain payments to employees needed to be considered within the regular rate of pay. See *Gilberson v. City of Sheboygan*, Case No. 2015-cv-139 (E.D. Wis. Feb. 5, 2016) (concluding that certain lump sum bonus payments and payments made through certain types of health reimbursement accounts must be included in the FLSA overtime rate). Also, last year, the federal Court of Appeals for the Ninth Circuit concluded that cash in lieu payments should be included in the regular rate. *Flores v. City of San Gabriel*, 2016 WL 3090782 (June 2, 2016).

VII. THE HIRING PROCESS

A. Background Checks

1. A background check is another tool to obtain information that will assist in determining which qualified applicant is better suited for the position.

2. The information sought in a background check should be relevant to specific job-related considerations and priorities.

3. Verification of Application Information

a. Studies estimate that 30-50% of resumes and applications contain misrepresentations.

b. A 2016 survey from CareerBuilder.com found that over 60% of employers use social networking sites to screen job candidates.

i. The survey of more than 2,186 hiring managers revealed that 60% of employers used social networking sites to research candidates and 49% of employers rejected applicants based on what was uncovered on social networking sites.

ii. Of those 49%:

(a) 46% cited provocative or inappropriate photographs or information;

(b) 43% cited content about drinking or using drugs;

(c) 31% cited bad-mouthing of previous employers, co-workers or clients;

(d) 29% cited poor communication skills; and

(e) 33% cited discriminatory comments.

4. Liability Avoidance

a. Negligent Hiring

b. Automobile Insurance Coverage/Premiums

B. Types of Background Checks

1. Criminal Background

a. The Department of Justice Division of Law Enforcement Services provides criminal background checks.

b. Wisconsin Court System Circuit Court Access

2. Employment History

3. Driving Record

4. Licensure

C. Legal Restrictions.

1. Arrest and Conviction Record

a. Wisconsin law permits employers to conduct criminal background checks, but prohibits employers from discrimination on the basis of arrest or conviction record.

b. The fact that an applicant has been arrested, without more, may not be the basis for making an adverse employment decision.

i. "Arrest record" is defined as "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 pursuant to any law enforcement or military authority." Wis. Stat. § 111.32(1).

ii. Under the *Onalaska* rule, an employment decision is not based on "arrest record" if an employer makes that decision on the basis of its own internal investigation and concludes

that the employee in fact engaged in the conduct in question, which conduct the employer finds unsatisfactory. C*ity of Onalaska v. LIRC,* 120 Wis. 2d 363, 367, 354 N.W.2d 223 (Ct. App. 1984).

c. A pending criminal charge may generally serve as the basis for not hiring an applicant, but only if the nature of the charge or conviction is "substantially related" to the position in question.

i. "Criminal" means conduct prohibited by state law and punishable by fine or imprisonment. Wis. Stat. § 939.12.

ii. Conduct punishable only by forfeiture is not a crime. *State v. Roggensack,* 15 Wis. 2d 625, 630, 113 N.W. 2d 389, 392 (1962); Wis. Stat. § 939.12.

d. A conviction may generally serve as the basis for not hiring an applicant, but only if the nature of the charge or conviction is "substantially related" to the position in question.

A "conviction record" includes, but is not limited to, "information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has been less than honorably discharged or has been placed on probation, fined, imprisoned, placed on extended supervision or paroled pursuant to any law enforcement or military authority." Wis. Stat. § 111.32(3).

e. The "substantial relationship" test requires the employer to assess on a case-by-case basis whether the conviction is substantially related to the position.

i. The "substantial relationship" test seeks to strike a balance between society's interest in rehabilitating those who have been convicted of a crime and its interest in protecting citizens. *Robertson v. Family Dollar Stores* (LIRC, 10/14/05).

ii. The inquiry is not whether it is "likely" that the convicted person will re-offend, but whether there is an unreasonable risk" of this occurring. *Matousek v. Sears Roebuck & Co.,* (LIRC, 02/28/07) (decision on remand from *Sears Roebuck & Co. v. LIRC,* Milw. Co. Cir. Ct., 09/29/06).

iii. The mere possibility that a person could re-offend at a particular job does not create a substantial relationship.

Robertson v. Family Dollar Stores (LIRC, 10/14/05).

iv. The substantial relationship defense does not require the employer to demonstrate that it concluded at the time of the employment decision that the circumstances of the offense were substantially related to the circumstances of the job. It is an objective legal test which is meant to be applied after the fact by a reviewing tribunal. *Zeiler v. State of Wisconsin-Dept. of Corrections* (LIRC, 09/16/04).

v. The amount of time which has elapsed since the conviction is not relevant. *Jackson v. Klemm Tank Lines* (LIRC, 02/19/10). In Madison, an employer cannot consider a conviction older than three years. MGO §39.03(8)(i)3.b.

vi. Issues to be considered in applying the "substantial relationship" test are:

(a) Do the circumstances of the charge or conviction suggest a propensity to commit a similar offense?

(b) Does the job provide a particular and significant opportunity for similar criminal behavior?

(c) The circumstances that foster criminal activity: the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the individual as revealed by the conviction.

f. Employers can ask applicants whether they are subject to a pending charge or have been convicted.

i. The application question should be phrased in terms of a conviction for a felony, misdemeanor or other offense.

ii. The application question must also contain a statement that the disclosure of a conviction will not necessarily disqualify the applicant from consideration for employment.

2. Federal Equal Employment Opportunities Commission (“EEOC”)

a. The EEOC has recently issued an extensive guidance regarding employer use of criminal background checks and concluded that an employer’s use of an individual’s criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964.

b. An employer can violate Title VII with respect to protected classes in one of two ways: disparate treatment or disparate impact.

i. "A violation may occur when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability)."

ii. "An employer's neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability)."

3. Fair Credit Reporting Act Considerations ("FCRA")

a. If an employer conducts its own background check, there is no legal requirement that the employer notify individuals of the fact that it may review and take action based upon an individual's background profile.

b. If an employer hires an outside entity to perform a background investigation and that entity regularly conducts background checks such a search may qualify as a consumer report or an investigative consumer report that triggers FCRA.

c. FCRA requirements include:

i. A clear and conspicuous disclosure to the applicant *before* requesting the credit report, in a document consisting *solely* of that disclosure, that:

(a) A consumer report may be obtained for employment purposes;

(b) That the consumer has authorized in writing the procurement of the report by the employer; and,

(c) That before an adverse action is taken, the applicant or employee will be provided with a copy of the report, the address and phone of the credit bureau, and a copy of "A Summary of Consumers Rights" under the FCRA.

ii. Before obtaining a credit report from a credit reporting agency, the employer must certify to the credit reporting

agency that:

(a) The consumer has been informed that a credit report may be obtained for employment purposes;

(b) The consumer has authorized the procurement of a credit report;

(c) The consumer has been informed about the procedures to be taken in case an adverse action is to be taken based in whole or in part on the credit report; and,

(d) The information being obtained will not be used in violation of any federal or state equal opportunity law or regulation.

iii. Before taking an "adverse action", the employer must issue a statement advising the applicant that an adverse action may be taken based in whole or in part on the credit report obtained, and enclosing a copy of that report, a copy of a prescribed Summary of Rights issued by the Federal Trade Commission.

iv. When the adverse action is taken, the employer must issue a notice which must include:

(a) The name and address and telephone number of the agency/individual used;

(b) A statement that the agency/individual was not responsible for taking the adverse action and therefore, cannot explain it; and,

(c) A notice that the applicant or employee may dispute the accuracy or completeness of any information furnished by the agency/individual, and that the applicant or employee has the right to an additional free credit report if requested within 60 days of receipt of the Adverse Action Notice.

4. State and Federal Discrimination Statutes

   a. State and federal statutes make it a discriminatory, prohibited act to refuse to hire an applicant because of the applicant's protected class status.

   b. When faced with a charge of discrimination in hiring, one of an employer's best defenses is that it was not aware of the applicant's protected class status. Background checks often reveal personal information that discloses protected class status. When conducting background checks, an employer may also learn of such information. In these instances, an employer can no longer contend that it had no knowledge of protected class information.

   c. Protected classifications applicable to employers include:

      i. Age
      ii. Race
      iii. Creed/Religion
      iv. Color
      v. Disability
      vi. Sex (including pregnancy)
      vii. National origin
      viii. Ancestry
      ix. Pregnancy
      x. Genetic history
      xi. Sexual orientation
      xii. Arrest or conviction record
      xiii. Marital status
      xiv. Use or non-use of lawful products while off-duty, off- premises

5. Driver's Privacy Protection Act of 1994

   The Driver's Privacy Protection Act of 1994, governs the privacy and disclosure of personal information gathered by state Departments of Motor Vehicles and prohibits the disclosure of personal information contained in those records without the express consent of the person to whom such information applies. This statute applies to Departments of Motor Vehicles as well as other "authorized recipient[s] of personal information", and imposes record-keeping requirements on those "authorized recipients".

6. Privacy Laws

   a. Right to Privacy

      i. Wisconsin recognizes an individual's right to privacy. Wis. Stat. § 995.50. An invasion of privacy includes, "(i)ntrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or

in a manner which is actionable for trespass." Wis. Stat. § 995.50(2)(a).

ii. Employers who access applicant information stored on social media sites should proceed with caution. Generally, if an applicant uses social media and the applicant's profile is open to the public, then the applicant will not have a claim for invasion of privacy. However, under no circumstances should an employer ever access an applicant's information on a social media site through false pretenses.

b. Employer Requiring Access to Passwords – Wis. Stat. § 995.55

i. On April 8, 2014, Wisconsin passed a law that places restrictions on employer's ability to access personal social media accounts of candidates and employees.

ii. The general aim of the law is to protect individual privacy rights in personal social media accounts such as Facebook, Twitter, and blogs. The law prohibits employers from:

(a) Requesting or requiring an employee or applicant, as a condition of employment, to disclose access information (e.g., passwords, usernames), to a personal social media account or to otherwise grant access to or allow observation of the account.

(b) Terminating or otherwise discriminating against an employee because the employee:

(1) Refused to provide the employer access to a personal social media account; or

(2) Opposed the employer's potential violation of the law, or filed a complaint or testified or assisted in an action against employer for such violation.

(c) Refused to hire an applicant because the applicant refused to provide access to a personal social media account.

iii. The law retains certain important rights for employers:

(a) Employers may require access information in order to gain access to an electronic communications device (such as a computer or cell phone) supplied by or paid for by the employer.

(b) Employers may require access to an account or service provided by the employer, obtained by the employee due to the employee's employment or which is used for the employer's business. Employers may discipline or discharge an employee for transferring the employer's confidential or financial information to the employee's personal social media account without the employer's authorization.

(c) Employers may require an employee to grant access to or allow observation of the employee's personal account if there is a reasonable belief that the employee has transferred confidential or financial information without authorization to the employee's personal Internet account or has engaged in another work-related violation or misconduct, if there is a reasonable belief that activity on the employee's personal Internet account relates to that misconduct or violation. Employers are not permitted to require the disclosure of access information to the account in such cases.

(d) Employers may comply with a duty to screen applicants for employment prior to hiring and may comply with a duty to retain employee communications that is established under state or federal law, rules or regulations.

c. References

i. Employers frequently only provide an employee's position and dates of service.

ii. Wisconsin has created a statutory safe haven for employers in giving negative references about a former employer. Wis. Stat. § 895.487.

"An employer who, on the request of an employee or a prospective employer of the employee, provides a reference to that prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from all civil liability that may result from providing that reference. The presumption of good faith under this subsection may be rebutted only upon a showing by clear and convincing evidence that the employer knowingly provided false information in the reference, that the employer made the reference maliciously or that the employer made the reference in violation of § 111.322 [i.e., the reference was discriminatory]."

iii. Defamation law likewise carries protections for those giving

negative references. An employer has a conditional privilege which includes the provision of letters of reference from former employers to prospective employers:

"For instance, in *Hett v. Ploetz*, 20 Wis.2d 55, 59-62, 121 N.W.2d 270 (1963), a defamatory letter of reference from an ex-employer to a prospective employer was held to be entitled to a conditional privilege. We stated that the prospective employer has an interest in receiving information concerning the character and qualifications of the former employee, and the ex-employer has an interest in giving such information in good faith to insure that he may receive an honest evaluation when he hires new employees." *Zinda v. Louisiana Pacific Corp*., 149 Wis. 2d 913 (1989).

D. Interviews

1. There are limitations on what an employer can ask of someone giving a reference for an applicant.

2. Questions should be job-related and should be asked consistently of all candidates and all references. An employer cannot ask third parties what the employer could not ask the applicant directly.

3. Prohibited questions include:

   a. Questions directly or indirectly related to protected status

   b. Year of graduation from high school

   c. Languages spoken (unless specifically job-related)

   d. Place of birth

   e. To what organizations or clubs did the applicant belong?

   f. Mrs., Miss, Ms.

   g. Spouse's name, occupation

   h. Children? Ages?

   i. What church does the applicant attend?

   j. With whom does the applicant live?

   k. Has the applicant ever been arrested?

l. Does the applicant own a car? (but not: Does the applicant have reliable transportation?)

m. Questions of a medical nature:

i. What current or past medical problems limited the applicant's to do the job?

ii. Did the applicant ever suffer a work-related injury or file a worker's compensation claim?

iii. How many days was the applicant sick last year? (but not: How many days was the applicant absent?)

iv. What medications did the applicant take?

v. Was the applicant ever treated for drug abuse?

VIII. EMPLOYEE BENEFITS

A. Need for Benefit Plans

1. Positions, particularly skilled positions, are becoming harder to fill (wastewater treatment plant workers, electric utility workers, finance officials)

2. Employees are looking for benefit packages that provide current compensation and future security

3. Since Act 10 was enacted in 2011, more and more municipalities are negotiating individual benefit packages with their employees to address worker shortages and the needs of employees on an employee by employee basis

B. Types of Benefits

1. Insurance benefits (health, dental, long and short term disability, cafeteria plans)

2. Retirement/post-retirement benefits (WRS, §457 plans, payouts of unused sick leave or other paid time off)

3. Vacation and other paid time off policies

4. Education and training benefits

C. Legal Red Flags

1. Do non-discrimination rules apply to the plan?

2. What tax consequences might arise if you provide some types of benefits?

   a. Cash in lieu of insurance?

   b. Payment of premiums for an employee's individual health insurance plan?

   c. HSA contributions in the absence of a high deductible insurance plan?

   d. Sick leave banks?

   e. Credit reimbursement?

   f. Mileage/meal reimbursement?

   g. Accountable vs. non-accountable plans?

   h. Failing to meet reporting obligations?

3. Who is the plan administrator?

IX. NON-MANAGING MANAGERS AND NON-SUPERVISING SUPERVISORS

A. Characteristics of poor managers and supervisors:

1. They choose favorites employees and establish different sets of rules for those favorites.

2. They fail to communicate and document nothing.

3. They ignore problem employees. They lack the courage to deal with a difficult situation despite knowing that it is the right thing to do.

4. They speak loudly and rudely to staff. They are bullies and operate to intimidate others. Conversely, they expect employees to be able to read their minds and offer little or no direction.

5. They are poster children for the "Peter Principle." They are not qualified, having neither the skills nor experience to perform the job adequately.

6. Will not let go of problems or mistakes. The bad boss returns to discuss negative events continually and searches for faults in employees.

7. They fail to adhere to legal requirements pertaining to disability accommodations, FMLA, compensatory time requests, wage and hour laws and non-discrimination laws.

8. Instead of facilitating people doing their jobs, they perform the work, leaving their work undone.

B. Legal Issues

1. Claims of discrimination, harassment.

2. Evaluation challenges and challenges to disciplinary actions.

3. Claims of other legal violations.

4. Under the doctrine of *respondeat superior,* their violations become your violations.

5. Incompetent or marginally competent employees remain in the workforce.

6. Other management employees, or the governing body of the municipality, end up taking on the responsibilities of the ineffective manager or supervisor.

X. THE GOVERNING BODY AND ITS MEMBERS

A. Functions of the Governing Body

1. Often determined by the governing body itself through the creation of ordinances, policies, handbooks and contracts.

2. With respect to employment matters, how those matters will be handled largely depends on the size of the municipality

a. Employment in a village with one or two employees is likely to be handled directly by the governing body or a personnel committee.

b. Employment in larger municipalities is likely going to be delegated to an administrator, department heads or managers/supervisors.

B. Functions of Mayors and Village Presidents

1. A mayor is the head of the police and fire departments and is the chief executive officer of the city. Except in cities with a city administrator, department heads report directly to the mayor. In cities with a city administrator, the mayor provides direction to the administrator, who then provides direction to department heads.

2. A village president is a trustee and presides at village board meetings but is not considered the chief executive officer of the village. A village administrator reports to the village board.

3. Ordinances and policies may grant additional authority to both mayors and village presidents.

C. Management Concerns

1. Individual alders or board members taking it upon themselves to supervise employee work or to direct the day to day work of employees. This can range from following employees around, demanding that work tasks be performed in a certain way or in a certain order or independently filing complaints, evaluations or other documents and demanding that the documents be placed in the employee's file.

2. Individual alders or board members demanding to see the personnel files of individual employees.

3. Individual alders or board members deciding to attend staff meetings and then participating in (read, controlling) those meetings.

D. Breaches of Confidentiality.

1. Sources of Confidentiality

a. Wisconsin Open Meetings Law – §19.85, Stats.

> "The Legislature, in conferring on governmental bodies the power to hold closed meetings for certain carefully defined purposes, clearly intended that no one should have the right to report a closed meeting under circumstances that might mean that its private and secret nature could be violated." 66 Op. Att'y Gen. 318, 325.

b. Wisconsin Open Records Law - §19.36, Stats.

c. Employment Records and information (Wisconsin Privacy Statute – §995.50(2)(a))

d. Medical Records - Americans with Disabilities Act (ADA), Health Information Privacy and Protection Act (HIPPA), Wisconsin health insurance privacy laws

2. Implications of Breaching Privacy or Confidentiality

a. Disclosure of confidentiality could result in prosecution under Wis. Stat. § 946.12 for misconduct in office.

i. Class I felony – fine up to $10,000 or 3.5 years or both.

ii. The municipality does not have to defend an alder or a board member from criminal charges.

b. An alder or board member who knowingly acts outside of his or her duty by disclosing protected information could be engaging in a criminal act, which is not protected by the First Amendment.

c. "Qualified immunity" is lost if an official "knew or reasonably should have known" that an action within the scope of his or her official responsibility would violate someone's constitutional or statutory rights or if he or she acted with malicious intent to cause a deprivation of constitutional or statutory rights or other injury. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

i. Without qualified immunity, an alder or board member could be individually liable for civil suits.

ii. Additionally, an individual acting outside the scope of his or her authority might not be covered by the district's insurance policy.

d. Statutory Immunity – §893.80(4), Stats.

i. "No suit may be brought against any… political corporation, governmental subdivision, or any agency …or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."

ii. This immunity is lost if an employee or public official engages in acts which are "malicious, willful and intentional acts." *Scott v. Savers Prop & Casualty Co.,* 2003 WI 60, p 16.

e. Privacy Statute - §995.50(2)(a), Stats.

A violation could result in a civil action for compensatory damages and attorneys fee.

E. Breach of Fiduciary Responsibilities.

1. Alders and board members must act in the best interests of the municipality and never for their own personal interests.

2. As trustee of the public, a public officer owes an undivided duty to the public he/she serves, and is not permitted to place himself/herself in a position which will subject him/her to conflicting duties or expose him/her to the temptation of action in any manner other than in the best interests of the public. 58 Wis. Op. Att'y. Gen. 247 (1969).

F. No Authority as Individuals.

A New Jersey School Ethics Commission decision provides an illustration of how board members can violate ethics rules when they act as individuals outside the scope of the collective authority of the board. *In the Matter of Julia Hankerson, Woodbine Board of Education, Cape May County,* Decision No. C36-02.

The board member directed district employees to perform errands on the board member's behalf such as copying and faxing.

The board member interviewed, nominated, and recommended the hiring of job applicants.

These actions exceeded her authority as a board member, violated state laws, including the state ethics code, and caused her to be removed from her board position by the Ethics Commission.