

# Country Guide

## USA – Wisconsin

Prepared by

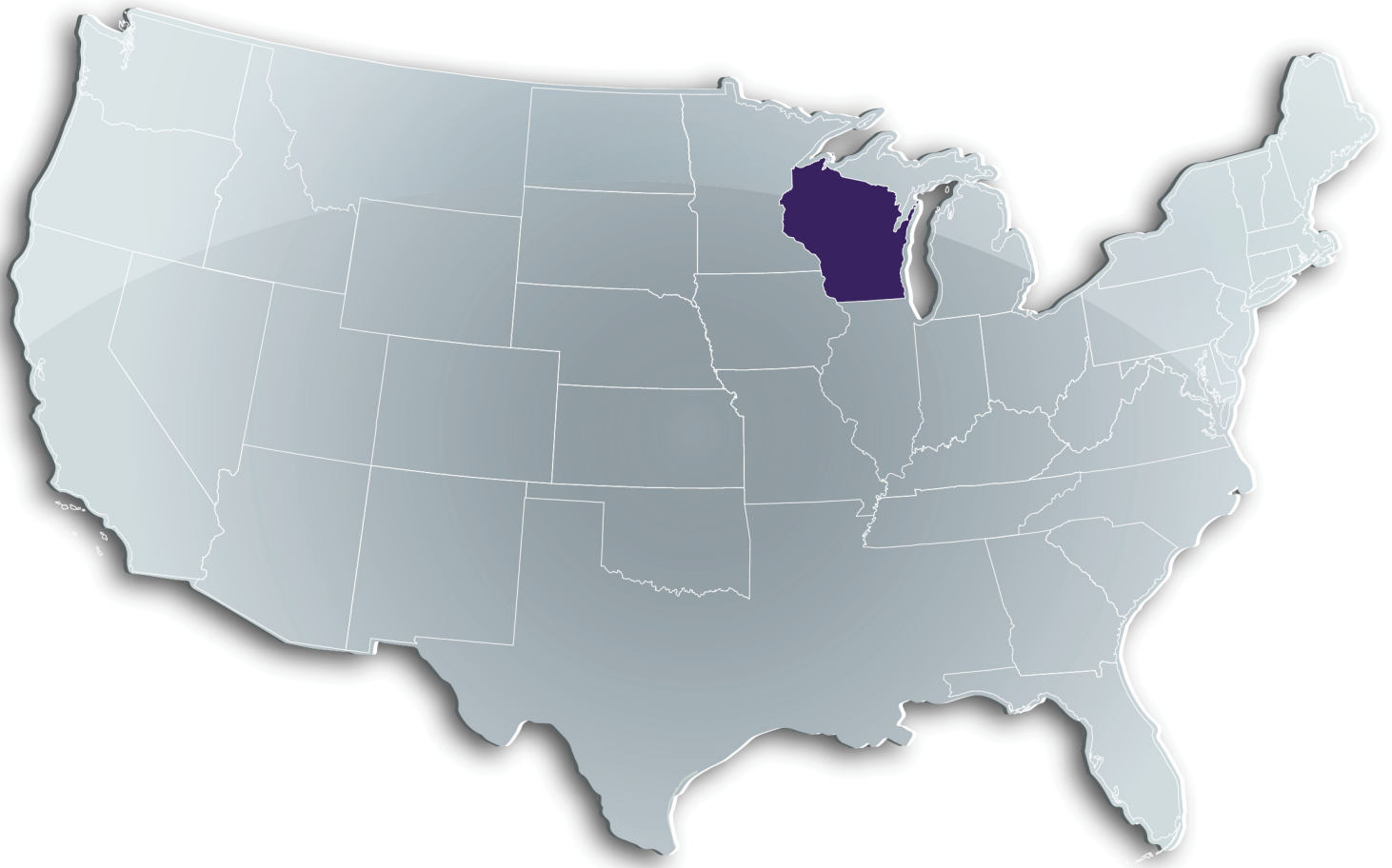
Michael Best & Friedrich LLP



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# DOING BUSINESS IN WISCONSIN



A LEGAL GUIDE PREPARED BY:



**Michael  
Best**

Because of the complexity of the issues discussed, and the frequent changes in laws, regulations, and procedures, this guide should not be construed as legal advice or used as a substitute for the services of an attorney. The information in this guide was current as of its publication date, however a lawyer should be consulted on any specific matter to ensure the information has been interpreted and applied correctly to the matter and that the law has not changed since publication.

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# Chapter 1 - Geography

## Geography

Wisconsin is a northern Midwest state that shares borders with Minnesota, Iowa, Illinois and Michigan. It also shares borders with Lake Michigan, Lake Superior and the Mississippi River, and is home to many other prominent bodies of water, such as the Wisconsin River and Lake Winnebago. Wisconsin has a temperate climate, with hot, humid summers and very cold winters accompanied by frequent snowfall. Overall, Wisconsin has a relatively flat landscape, making it ideal for farmland. The state is divided into 5 major regions: Eastern ridges and lowlands, Western upland, Northern highland, Lake Superior lowland, and the Central Plain.

- Sources:
  - [http://www.netstate.com/states/geography/wi\\_geography.htm](http://www.netstate.com/states/geography/wi_geography.htm)
  - <http://www.wisconline.com/wisconsin/geoprovinces/index.html>

## Cultural/Ethnic Background

Wisconsin was first occupied by a variety of Native American Indian tribes, which is reflected by the names of many of the state's cities and landmarks. A Frenchman, Jean Nicolet, was the first explorer to reach Wisconsin, and he opened the area to the Great Lakes as well as French Canadian fur traders. The first waves of European settlers to Wisconsin began in the 1800s, with people coming from almost every nation, but predominantly Germany, Poland, Italy, Ireland and Norway. In more recent years, the state has experienced an influx of Hmong and Central American immigrants. Wisconsin's diverse regional landscape today reflects its multicultural background, and there are many festivals held throughout the state to celebrate its various heritages. Wisconsin is well-known as "America's Dairyland," a reference to the state's prominent cheese and dairy industry. Wisconsin is also ranked as a national leader in production of cranberries, ginseng, snap peas, organic corn, oats, beans and organic hay acreage and beer production and consumption. Due to technological advances in Wisconsin's food production and food science, the Milwaukee area has one of the largest concentrations of food science professionals in the United States. As a result, Wisconsin is a national leader in food safety science.

- Sources:
  - <https://www.census.gov/quickfacts/WI>
  - <http://inwisconsin.com/key-industries/food-and-beverage>

## Investment Climate

Wisconsin's investment climate is fairly strong. In 2017, the unemployment rate averaged 3.3 percent. The high level of research and development occurring in the state, bolstered by its flagship university, has made the state attractive to venture capital investments. Further, the state has a historically strong manufacturing and agricultural sectors, as well as abundant natural resources and a strong transportation infrastructure. These factors have resulted in

technology and manufacturing multi-national companies choosing to invest in Wisconsin. For example, in 2017, Foxconn announced that it would locate its North American manufacturing hub in Wisconsin.

Wisconsin also has an attractive investment climate for early stage companies. For example, there is a 25 percent state tax credit for investments made in “Qualified New Business Ventures” (essentially early-stage technology companies headquartered in Wisconsin).

- Sources:
  - <http://inwisconsin.com/select-wisconsin/state-strengths/business-climate-rankings/>
  - <http://wisconsintechnologycouncil.com/wp-content/uploads/2015/09/2011-Wisconsin-Edge.pdf>
  - <https://siteselection.com/issues/2017/sep/upper-midwest-bagging-the-big-one-how-wisconsin-landed-foxconn.cfm>
  - <http://www.jsonline.com/story/money/2017/05/18/wisconsins-unemployment-rate-drops-17-year-low/330992001/>
  - [http://host.madison.com/wsj/business/tom-still-foxconn-decided-to-make-wisconsin-its-american-home/article\\_afdd5697-c245-56d6-b47b-94f504c77f0e.html](http://host.madison.com/wsj/business/tom-still-foxconn-decided-to-make-wisconsin-its-american-home/article_afdd5697-c245-56d6-b47b-94f504c77f0e.html)
  - <http://inwisconsin.com/entrepreneurs/assistance/qualified-new-business-venture/>

## Chapter 2 – Business Entities

### Corporations

Contact information for Wisconsin's Corporation Commission and Department of Commerce:

State of Wisconsin Department of Financial Institutions  
201 W Washington Avenue, Suite 500  
Madison, WI 53703  
Telephone: (608) 261-9555  
[www.wdfi.org](http://www.wdfi.org)

Wisconsin Department of Economic Development  
201 W. Washington Avenue  
Madison, WI 53703  
Telephone: (855) 469-4249  
[www.inwisconsin.com](http://www.inwisconsin.com)

Articles of Incorporation. Prepare and file Articles of Incorporation with the Wisconsin Department of Financial Institutions. Articles of Incorporation can be filed in hard copy or online and filing fee is \$100. The Articles shall include the following information:

- Statement that the Corporation is incorporated under Chapter 180;
- Corporate name;
- Number of authorized shares of the Corporation and if more than one class of shares is authorized, all of the following:
  - The distinguishing designation of each class;
  - The number of shares of each class that the corporation is authorized to issue, except that an investment company may declare that each class has an indefinite number of authorized shares;
  - Before the issuance of shares of a class, a description of the preferences, limitations and relative rights of that class.
    - If one or more series of shares are created within a class of shares, all of the following before the issuance of shares of a series:
      - The distinguishing designation of each series within a class.
      - The number of shares of each series that the corporation is authorized to issue, except that an investment company may declare that each series has an indefinite number of authorized shares.
      - The preferences, limitations and relative rights of that series.
    - The street address of the corporation's initial registered office and the name of its initial registered agent at that office.
    - The name and address of each incorporator.

- The registered agent may be an individual who resides in Wisconsin or a business entity authorized to do business in Wisconsin and must have a physical street address in Wisconsin.

#### Laws governing corporations in Wisconsin

- General. Corporations doing business in Wisconsin may be organized either under the laws of Wisconsin or organized under the laws of another state or country and qualified to do business in Wisconsin as a "foreign corporation." The Wisconsin Business Corporation Law is based on the Revised Model Business Corporation Act and is set forth in Chapter 180 of the Wisconsin Statutes. Articles of Incorporation organizing a Wisconsin corporation must be filed with the Wisconsin Department of Financial Institutions. See Item #2 for a description of the process of filing Articles of Incorporation.
- Management and Other Matters
  - Management. The board of directors is responsible for the direction of the management of the business and affairs of the corporation. Day-to-day operations are managed by the corporation's officers, subject to the supervision of the board of directors. Directors are elected on an annual basis by the shareholders, unless their terms are staggered. If a director's term expires without a successor being elected, the director will continue to serve until a successor is elected or such director dies or resigns. Officers are generally elected on an annual basis by the board of directors, but may be removed by the board of directors at any time, with or without cause. Certain matters must be approved by a vote of the shareholders, such as certain mergers and share exchanges, substantive amendments of the articles of incorporation, the sale of all or substantially all of the assets of the corporation other than in the regular course of business and dissolution of the corporation.
  - Meetings of Directors and Shareholders. Directors of a corporation may act either by meeting or by unanimous written consent. Meetings by electronic means are permitted under certain circumstances. Similarly, shareholders may either hold formal meetings or in lieu thereof may act by unanimous written consent. Further, if the articles of incorporation so provide, shareholders may act by the written consent of only the number of votes necessary to take such action had a meeting been held.
  - Directors. A Wisconsin corporation must have at least one director who must be a natural person, though not necessarily a Wisconsin resident.
  - Officers. There are no requirements in Wisconsin that a corporation has specific officers, but most corporations have at least a President and a Secretary. A person may hold more than one office.
  - Share Ownership and Consideration. There is generally no limitation on who may own shares in a Wisconsin corporation. In general, shares can be issued for cash, promissory notes, services performed, contracts for services to be performed and other tangible and intangible property (with some limitations).
  - Shareholder Limited Liability. Shareholders, in their capacities as such, are generally not liable for the acts or debts of the corporation, subject to certain exceptions.



- Filing Requirements. A Wisconsin corporation must file with the Wisconsin Department of Financial Institutions an annual report containing certain information about the corporation. If an annual report is not filed when due, a penalty is imposed and, if the failure continues for more than one year, the corporation may be involuntarily dissolved by the Wisconsin Department of Financial Institutions.
- Filing Requirements for Foreign Corporations. Corporations doing business in Wisconsin and not incorporated under the laws of Wisconsin must file an annual report containing information similar to the report described above in order to remain licensed as a foreign corporation. Failure to file the necessary forms can result in the corporation losing its qualified status in Wisconsin.
- Statutory Close Corporation. The Wisconsin Business Corporation Law also authorizes statutory close corporations. A corporation is a statutory close corporation if its articles of incorporation so provide. An existing corporation, with 50 or fewer shareholders at the time of its election, may elect to amend its articles of incorporation to provide that it become a statutory close corporation. A statutory close corporation is subject to all of the various statutory provisions of the Wisconsin Business Corporation Law that apply to statutory close corporations, including providing for share transfer restrictions, a right of first refusal in favor of the corporation for certain stock transfers, the ability to elect not to have a board of directors or bylaws and authorization of shareholder agreements to regulate the management of the business of the corporation.
- Service Corporations. The Wisconsin Business Corporation Law also authorizes service corporations. Only natural persons licensed, certified or registered under Wisconsin Statutes may organize and own shares in a service corporation. The organizers and shareholders of the service corporation must all hold the same license, certification or registration. In the case of health care professionals who may hold different licenses, all shareholders and organizers of a service corporation must be licensed health care professionals. In general, a shareholder, director, officer or employee of a service corporation is not personally liable for the debts or other contractual obligations of the service corporation, nor for the omissions, negligence, wrongful acts, misconduct and malpractice of any person who is not under his or her actual supervision and control in the specific activity concerned, but is liable for his or her own omissions, negligence, wrongful acts, misconduct and malpractice and those of any person acting under his or her actual supervision and control in the specific activity concerned.

#### Incorporation

- The corporate existence begins when the articles of incorporation become effective. After incorporation, if initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers and carrying on any other business brought before the meeting.
- After incorporation, if initial directors are not named in the articles of incorporation, the incorporator or incorporators shall hold an organizational meeting, at the call of a

majority of the incorporators, to elect directors and complete the organization of the corporation.

- Action required or permitted by this chapter by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator.
- An organizational meeting may be held in or outside this state.

#### Corporate mergers, or change exchanges

- Certain extraordinary transactions involving corporations, including mergers, share exchanges, sales of all or substantially all assets out of the ordinary course of business and voluntary dissolution, require, in addition to Board of Director approval, approval of the corporation's shareholders. In addition, shareholders who object to such transactions and who do not vote in favor of them may, under certain circumstances, elect to dissent from the transaction and, by following detailed procedures set forth in the Wisconsin Business Corporation Law, demand to be paid the fair value of their shares.

## Partnerships

Wisconsin's statutes governing general partnerships are included in Chapter 178 of the Wisconsin Statutes. A general partnership is an association of two or more persons or entities to carry on as co-owners of a business for profit. A general partnership is formed by the oral or written agreement of the partners to form the partnership. No filing is required with the state or any local jurisdiction to form a general partnership. In addition, common law general partnerships may be formed by the conduct of parties acting as partners.

- The Uniform Partnership Act, as adopted by Wisconsin at Chapter 178 of the Wisconsin Statutes, provides a framework for the government of Wisconsin general partnerships. A great deal of latitude is provided as to what provisions may be included in the partnership agreement, which sets forth the terms and provisions governing the partnership.
- Each partner of a general partnership is jointly and severally liable for all partnership debts and liabilities. Further, each partner is an agent of the partnership and each partner's actions pertaining to the business of the partnership generally bind and obligate all of the partners. The death, dissolution or withdrawal of a partner results in the statutory dissolution of a general partnership.

**Registered Limited Liability Partnerships.** Wisconsin's statutes governing registered limited liability partnerships are included in Wis. Stats. §§ 178.40 to 178.53 of Chapter 178 of the Wisconsin Statutes. A registered limited liability partnership governed by the laws of Wisconsin must file a registration statement in required form with the Wisconsin Department of Financial Institutions. The name of the limited liability partnership must include the words "Registered Limited Liability Partners" or "Limited Liability Partnership" or the abbreviation "L.L.P." or "LLP" as the last words or letters of its name.

- Wisconsin Statutes provide that a partner in a registered limited liability partnership is generally not personally liable for any debt, obligation or liability of the partnership,

whether in tort, contract or otherwise, except that a partner is liable for the omissions, negligence, wrongful acts, misconduct or malpractice of such partner and of any person acting under such partner's actual supervision and control in the specific activity concerned. A partner may also be liable for debts, obligations and liabilities of the partnership resulting from the partner's acts or conduct other than as a partner.

- Limited Partnerships. A limited partnership is a partnership formed by two or more persons or entities, at least one of which is a general partner and at least one of which is a limited partner. The Uniform Limited Partnership Act, as adopted by Wisconsin at Chapter 179 of the Wisconsin Statutes, provides the statutory framework governing Wisconsin limited partnerships. A certificate of limited partnership (setting forth various required information) must be filed with the Wisconsin Department of Financial Institutions in order for a limited partnership to be formed. Only the general partners are required to execute the certificate of limited partnership.
- Limited partners generally have limited liability and are not liable for the debts and liabilities of the limited partnership beyond the amount that they have contributed or have agreed to contribute to the limited partnership, except that a limited partner may be liable to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner. As in the case of a general partnership, the general partners of a limited partnership are jointly and severally liable for all of the debts and liabilities of the limited partnership.
- The general partners manage and control the business of the limited partnership. Because a limited partner who participates in the control of the business of a limited partnership risks becoming generally liable for the debts and liabilities of the limited partnership, limited partners typically are prohibited by the limited partnership agreement from participating in management. However, § 179.23(2), Wis. Stats., provides a list of various actions by limited partners that will not constitute participating in control of the business. For instance, limited partners can have approval rights over various matters, such as a sale of substantially all of the assets of a limited partnership, and may be employees of the limited partnership or officers, directors or shareholders of a corporation which is a general partner of the limited partnership.
- The death, dissolution or withdrawal of a limited partner does not dissolve the limited partnership and the death, dissolution or withdrawal of a general partner may, but does not necessarily, cause the dissolution of a limited partnership.

Limited Liability Companies. Wisconsin's statutes governing limited liability companies (LLCs) are included at Chapter 183 of the Wisconsin Statutes. An LLC is a noncorporate entity that is composed of one or more members. Members have limited liability for the LLC's debts and liabilities similar to that enjoyed by shareholders of a corporation. Under the federal "check the box" regulations (which have been adopted in Wisconsin), one-member LLCs are disregarded for income tax purposes, and treated as either a division or a sole proprietorship of the member, unless an election is made to be taxed as a corporation. LLCs with two or more members are taxed as partnerships, unless an election is made to be taxed as a corporation.

To form an LLC, articles of organization must be filed with the Wisconsin Department of Financial Institutions.

An operating agreement is typically entered into among the members, which covers matters similar to those covered in a partnership agreement. Management may be by the members directly, by one or more managers (who may, but need not, be members) or by such other structure as is agreed upon by the members.

Generally, each member of an LLC is an agent of the LLC, except in a manager managed LLC where the managers, but not the members in their capacities as such, are agents of the LLC.

## Sole Proprietorship

A sole proprietorship is an individual engaging in business for himself or herself. Unlike other forms of business organizations, there is no requirement for formal record keeping and no ongoing forms that have to be filed with the Wisconsin Department of Financial Institutions. Also, there are no specific statutes or other laws governing the organization and operations of the sole proprietorship and there is no formal system of management. An owner of a sole proprietorship has unlimited liability for the debts and liabilities of the sole proprietorship (subject to applicable bankruptcy laws). A sole proprietor also is generally liable for any actions committed by employees of the business in the course of their employment.

## Joint Ventures

The term “joint venture” generally is used generically to indicate the existence of a relationship between parties who join together for a common purpose and who may structure their relationship in any number of ways. There is no specific entity designated for a joint venture in Wisconsin, nor is there a Wisconsin statute that is designated to specifically govern joint ventures. In many cases, business partners will form an LLC to operate the joint venture business.

## Nonstock Corporations

Wisconsin’s statutes governing nonstock corporations are included at Chapter 181 of the Wisconsin Statutes (Wisconsin Nonstock Corporation Law). Many of the provisions of the Wisconsin Nonstock Corporation Law are similar to the provisions of Chapter 180 Wisconsin Statutes governing for-profit business corporations. Chapter 181 permits organization of nonstock corporations for any lawful activity. Under Wisconsin law, a nonstock corporation has no shareholders and may or may not have members. Voting rights of members of nonstock corporations may be defined or limited in the organizational documents of the corporation. Directors and officers are provided limited liability protection by § 181.0855 and volunteers are provided limited liability protection by § 181.0670.

- Cooperatives. Chapter 185 of the Wisconsin Statutes permits the organization of cooperatives for lawful purposes except banking and insurance. All cooperatives subject to Chapter 185 are also subject to all statutes relating to the organization of the specific type and purpose of corporation involved. Cooperatives organized under Chapter 185 may have one or more classes of members and may have capital stock, although capital stock is not required.

## Alternative Methods of Doing Business

- **Sales Representatives.** A resident or nonresident business may do business in Wisconsin through one or more sales representatives. The presence of a sales representative in Wisconsin raises two important issues. First, whether the activities of the sales representative are sufficient to require the entity which employs the representative to register with the Wisconsin Department of Financial Institutions to do business in Wisconsin and, second, whether the representative's activities are sufficient to subject the entity that employs the representative to Wisconsin income tax or sales tax. Counsel should be consulted prior to commencing operations in Wisconsin to determine whether any such registration is required. Termination of sales representatives is generally governed by the terms of the contract between the parties. In the absence of a written contract, common law and statutes may apply.
- **Branch Offices.** Opening a branch office in Wisconsin generally will require qualification as a foreign corporation in Wisconsin. Further, the opening of a branch office would subject the foreign corporation to Wisconsin income tax laws as well as the obligation for collecting sales or use tax on taxable sales, if appropriate.
- **Distributors.** The main issue that arises in connection with the presence of a distributor in the state of Wisconsin is whether the foreign entity whose products are being distributed will be required to register to do business or to pay or collect tax. The question is generally one of the natures of the relationship with the distributor: if the relationship is that of principal and agent, the acts of the agent will be deemed to be the acts of the foreign principal; if the relationship is one of independent contract, the foreign entity will not be treated as acting through the distributor. The facts and circumstances of each particular case will be determinative in making such a decision.
- **The Wisconsin Fair Dealership Law (Chapter 135, Wis. Stats.)** governs Wisconsin dealerships. Entities granting dealerships in most cases have significantly greater economic and negotiating power than the persons to whom or entities to which the dealerships are granted. Accordingly, the Wisconsin Fair Dealership Law gives dealers in Wisconsin a number of rights with respect to the entity granting the dealership in an effort to balance the economic and negotiating leverage.
- **Licensing.** A relationship between a grantor and a grantee of a license in Wisconsin is ordinarily a relationship between independent contractors. The licensor is generally not considered to be transacting business in Wisconsin just because of the presence in Wisconsin of a license absent other factors (such as the distributor issues raised above). There are no particular statutes in Wisconsin that specifically govern a licensing relationship.

**Franchising.** The relationship between the grantor and the grantee of a franchise is customarily a relationship between independent contractors and therefore subject to the issues surrounding independent contractors outlined above. However, Wisconsin franchise laws in many cases require registration of the offer of a franchise within Wisconsin (subject to certain exceptions). Circumstances surrounding registration and other regulatory requirements for franchising are extensive and need to be thoroughly considered.

## Chapter 3 – Trade Regulations

### Federal Antitrust Law

The antitrust laws of the United States are primarily reflected in five federal statutes: the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, and the Hart-Scott-Rodino Act.

- The Sherman Antitrust Act of 1890. The Sherman Act is divided into two primary sections. Section 1 prohibits contracts, combinations, and conspiracies made in restraint of trade. Section 2 prohibits unilateral and combined conduct that monopolizes or attempts to monopolize trade. Under the Sherman Act, some restraints are "per se" unreasonable (such as price-fixing agreements between competitors) and others are subject to analysis under a "rule of reason" (such as some restrictions placed on a distributor by a manufacturer). Restraints subject to the "per se" rule are never permitted, while those governed by the "rule of reason" test will be evaluated on a case-by-case basis.
- The Clayton Act of 1914. The Clayton Act prohibits certain specific anticompetitive activities. For example, the Act prohibits some corporate mergers, exclusive dealing contracts, and agreements under which one product is sold subject to the requirement that the purchaser also buy another product from the seller (known as a "tying" arrangement).
- The Robinson-Patman Act of 1936. The Robinson-Patman Act prohibits a seller from discriminating (or inducing others to discriminate) among competing purchasers in the price charged for commodities "of like grade and quality." While the Act focuses on price discrimination, it also addresses other concerns such as discriminatory advertising allowances.
- The Federal Trade Commission Act. The FTC Act declares unlawful "unfair methods of competition" and "unfair or deceptive acts or practices."
- The Hart-Scott-Rodino Antitrust Improvements Act of 1976. The Hart-Scott-Rodino Act requires that, under certain circumstances, a company proposing to merge with or acquire another company must give prior notice of the proposed acquisition to the Federal Trade Commission and the Justice Department. Failure to report may result in very substantial fines.

**Enforcement:** Private individuals and corporations may bring lawsuits under the Sherman Act, the Clayton Act and the Robinson-Patman Act. Remedies may include injunctive relief, treble damages and attorney fees. The government may enforce the Sherman Act through criminal prosecutions and civil suits. In addition, the government may enforce the Clayton Act and the Robinson-Patman Act through the FTC or the Justice Department. Only the government can enforce the Federal Trade Commission Act and the Hart-Scott-Rodino Act.

## Regulation of International Trade and Investment

Foreign investment in the U.S. and other international commercial activities involving U.S. entities are subject to a number of U.S. statutes and related regulations. The following discussion outlines some of the more important aspects of these laws which might be relevant to someone investing in or trading with entities located in the U.S.

- **Restrictions on Foreign Investment**

Under a statutory provision commonly referred to as the Exon-Florio Amendment (Section 721 of Title VII of the Defense Production Act of 1950, as added by Section 5021 of the Omnibus Trade and Competitiveness Act of 1988), the President has broad authority to investigate and prohibit any merger, acquisition or takeover by or with foreign persons which could result in foreign control of persons engaged in interstate commerce if the President determines that such merger, acquisition or takeover constitutes a threat to the national security of the U.S. Congress has indicated that the term "national security" is to be interpreted broadly and that the application of the Exon-Florio Amendment should not be limited to any particular industry.

The statute sets out a timetable for investigations of transactions which can take up to 90 days to complete. The President or his designee has 30 days from the date of receipt of written notification of a proposed (or completed) transaction to decide whether to undertake a full-scale investigation of the transaction. The President has delegated the authority to make investigations pursuant to the Exon-Florio Amendment to the Committee on Foreign Investment in the U.S. ("CFIUS"), an interagency committee made up of representatives of various executive branch agencies. Notifications of transactions are not mandatory and may be made by one or more parties to a transaction or by any CFIUS member agency.

If at the end of the initial 30-day period after notification of a transaction, CFIUS decides that a full-scale investigation is warranted, it then has an additional 45 days to complete an investigation and make a recommendation to the President with respect to the transaction. The President then has 15 days in which to decide whether there is credible evidence that leads the President to believe that the foreign interest exercising control might take action to impair the national security. If the President makes such a determination, Exon-Florio empowers the President to take any action which the President deems appropriate to suspend or prohibit the transaction, including requiring divestment by the foreign entity if the transaction has already been consummated.

U.S. law also places certain restrictions on acquisitions of businesses which require a facility security clearance in order to perform contracts involving classified information. Under Department of Defense regulations, foreign ownership may cause the Department to revoke a security clearance unless certain steps are taken to reduce the risk that a foreign owner will obtain access to classified information (DOD5220.22-R). Assuming that a foreign owner will be in a position to "effectively control or have a dominant influence over the business management of the U.S. firm," the Department of Defense may require, as a condition to continuation of the security clearance, that the foreign owner establish a voting trust agreement, a proxy agreement or a "special security

agreement" approved by the Department of Defense and designed to preclude the disclosure of classified information to the foreign owner or other foreign interests.

- Reporting Requirements for Foreign Direct Investment

All foreign investments in a U.S. business enterprise which result in a foreign person owning a 10% or more voting interest (or the equivalent) in that enterprise are required to be reported to the Bureau of Economic Analysis, a part of the U.S. Department of Commerce. Pursuant to the International Investment and Trade in Services Survey Act (22 U.S.C. 3101-3108) and the regulations promulgated thereunder (15 C.F.R. 806), such reports must be made within 45 days after the investment transaction. Depending on the site of the entity involved, quarterly, annual and quinquennial reports may be required thereafter.

- The International Investment and Trade in Services Survey Act

The International Investment and Trade in Services Act ("IISA" or the "Act"), passed in 1976, authorizes the President to collect information and conduct surveys concerning the nature and amount of international investment in the U.S. The IISA's primary function is to provide the federal government with the information necessary to formulate an informed national policy on foreign investments in the U.S. It is not intended to regulate or dissuade foreign investment but is merely a tool used to obtain the data necessary to analyze the impact of such investments on U.S. interests.

Under the IISA, international investments are divided into two classifications – direct investments and portfolio investments. Congress has delegated its authority to collect information on both types of international investments to the President. In turn, the President has delegated the power to collect data on direct investments to the Bureau of Economic Analysis ("BEA"), a part of the Department of Commerce, and on portfolio investments to the Department of the Treasury.

- A "foreign person" is any person who resides outside of the U.S. or is subject to the jurisdiction of a country other than the U.S. A "direct investment" is defined as the ownership or control, directly or indirectly, by one person of 10% or more of the voting interests in any incorporated U.S. business enterprise or an equivalent interest in an unincorporated business enterprise. Because the IISA further defines "business enterprise" to include any ownership in real estate, any foreign investor's direct or indirect ownership of U.S. real estate constitutes a "direct investment" and falls within the requirement that reports be filed with the BEA.
- Unless an exemption applies, a report on Form BE-13 must be filed with the BEA within 45 days of the date on which a direct investment is made. The form collects certain financial and operating data about the investment, the identity of the acquiring entity and certain information about the ultimate beneficial owner. In addition, a Form BE-14 must be filed by any U.S. person assisting in a transaction which is reportable under Form BE-13. The purpose is, obviously, to ensure that those required to file a Form BE-13 do so.
- The Agricultural Foreign Investment Disclosure Act of 1978



The Agricultural Foreign Investment Disclosure Act ("AFIDA" or the "Act") of 1978 requires all foreign individuals, corporations and other entities to report holdings, acquisitions and dispositions of U.S. agricultural land occurring on or after February 1, 1979. The Act contains no restrictions on foreign investment in U.S. agricultural land and is aimed only at gathering reliable data from reports filed with the Secretary of Agriculture to determine the nature and magnitude of this foreign investment. Unlike the reports filed under the International Investment Security Act of 1976, reports filed under AFIDA are not confidential but are available for public inspection.

- For the purposes of the Act, a "foreign person" is (i) any individual who is not a citizen or national of the U.S. and who is not lawfully admitted to the U.S.; (ii) a corporation or other legal entity organized under the laws of a foreign country; and (iii) a corporation or other legal entity organized in the U.S. in which a foreign entity, either directly or indirectly, holds 5% or more of an interest. The definition of "agricultural land" is any land in the U.S. which is used for agricultural, forestry or timber production. AFIDA requires a foreign person to submit a report on Form ASCS-153 to the Secretary of Agriculture any time he holds, acquires, or transfers any interest, other than a security interest, in agricultural land. The report requires rather detailed information concerning such matters as the identity and country of organization of the owning entity, the nature of the interest held, the details of a purchase or transfer and the agricultural purposes for which the foreign person intends to use the land. In addition, the Secretary of Agriculture may require the identification of each foreign person holding more than a 5% interest in the ownership entity.

- **Export Controls**

In general, U.S. export controls are more stringent and restrict a wider array of items than the export controls of most other countries. (See the Export Administration Act of 1979, as amended, 50 U.S.C. App. 2401-2420 and the regulations promulgated thereunder, 15 C.F.R. 730-799.) Except for exports to U.S. territories and possessions, and in most cases, Canada, all exports from the U.S. are subject to an export "license." An export license is an authorization which allows the export of particular goods or technical information. Two basic types of licenses exist, general licenses and individual validated licenses.

There are many types of general licenses. These are authorizations which are generally available and for which it is not necessary to submit a formal application. They cover all exports which are not subject to a validated license requirement. Most exports can be made under one of these general classifications.

In contrast, individual validated licenses are required for those items for which the U.S. specifically controls the export for reasons of national security, foreign policy or short supply. If the export of a specific product to a specific destination is subject to an individual validated license requirement, it is necessary to apply for and obtain such a license from the Office of Export Administration, an office within the U.S. Department of Commerce, prior to the export. Certain commodities cannot be exported to any country without an individual validated license, while certain other commodities may require a validated license only for shipment to specified countries.

- For purposes of the U.S. export control regulations, an export of technical information occurs when the information is disclosed to a foreign national even if such disclosure occurs in the U.S. Thus, if disclosure of information is subject to a validated license requirement, the disclosure may not be made to a foreign national without first obtaining the necessary validated license, whether or not the disclosure is to occur outside the U.S.
- Foreign Trade Zones

Foreign trade zones are areas in or adjacent to ports of entry which are treated as outside the customs territory of the U.S. In order to expedite and encourage trade, goods admitted into a foreign trade zone are generally not subject to the customs laws of the U.S. until the goods are ready to be imported into the U.S. or exported. These foreign trade zones are isolated, enclosed and policed areas which contain facilities for the handling, storing, manufacturing, exhibiting and reshipment of merchandise. Foreign trade zones are created pursuant to the Foreign Trade Zones Act (19 U.S.C. 81a-u) and are operated as public utilities under the supervision of the Foreign Trade Zones Board. Under the Foreign Trade Zones Act, the Board is authorized to grant to public or private corporations the privilege of establishing a zone. Regulations covering the establishment and operation of foreign trade zones are issued by the Foreign Trade Zones Board, while U.S. Customs Service regulations cover the customs requirements applicable to the entry of goods into and the removal of goods from these zones.
- Anti-dumping Law

The U.S. anti-dumping law (19 U.S.C. 1671-1677) provides that if a foreign manufacturer sells goods in the U.S. at less than fair value and such sales cause or threaten material injury to a U.S. industry, or materially retard the establishment of a U.S. industry, an additional duty in an amount equal to the "dumping margin" is to be imposed upon the imports of that product from the foreign country where such goods originated. Under the statute, sales are deemed to be made at less than fair value if they are sold at a price which is less than their "foreign market value" (which generally is equivalent to the amount charged for the goods in the home market). The dumping margin is equal to the amount by which the foreign market value exceeds the U.S. price.
- The Secretary of Commerce is charged with determining whether merchandise is being sold at less than fair value in the U.S. The International Trade Commission makes the determination of whether such sales cause or threaten material injury to a U.S. industry.

## State of Wisconsin Antitrust Laws

Most of Wisconsin's antitrust laws are found in Chapter 133 of the Wisconsin Statutes, titled "Trusts and Monopolies." The legislature has expressed its intent that the chapter "be interpreted in a manner which gives the most liberal construction to achieve the aim of competition." Many of Wisconsin's antitrust laws are based upon federal antitrust statutes, and Wisconsin courts follow federal cases arising under analogous federal statutes. In addition, Wisconsin has several focused antitrust and trade regulation statutes unique to this state.

- Enforcement of Wisconsin Antitrust Laws. Private parties, the State of Wisconsin (through the Attorney General), or District Attorneys may bring actions for violations of Chapter 133. Within the Attorney General's Office, there are designated Assistant Attorneys General responsible for antitrust matters within the Consumer Protection and Antitrust Unit. The Antitrust staff works in conjunction with the Federal Trade Commission and the U.S. Department of Justice.
- Under Chapter 133, plaintiffs may recover treble damages, the costs of a suit, and reasonable attorneys' fees. Injunctions to prevent or restrain violations of Chapter 133 are authorized by Wis. Stat. § 133.16. The State may seek fines, civil forfeitures, or imprisonment for violations of certain sections of Chapter 133. An important feature of Wisconsin antitrust law is the ability of indirect purchasers to pursue antitrust claims, which is contrary to the federal Illinois Brick doctrine as established by the U.S. Supreme Court. The statute of limitations for Wisconsin antitrust claims under Chapter 133 is six years, which time period commences upon the discovery of facts constituting the cause of action.
- Wisconsin local governmental units, and any official or employee of a local governmental unit who acted in an official capacity, are exempt from damages, costs, or attorneys' fees in actions brought under Chapter 133.
- Wisconsin's "Little Sherman Act" (Agreements in Restraint of Trade and Monopolization). Section 133.03 of Wisconsin's antitrust statutes is based upon Sections 1 and 2 of the federal Sherman Antitrust Act (hereinafter "Sherman Act"), one of the key antitrust statutes at the federal level. Wis. Stat. § 133.03(1) broadly prohibits (as does Section 1 of the Sherman Act) agreements or conspiracies which restrain trade. Wis. Stat. § 133.03(1) states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal."
- As with claims brought under Section 1 of the Sherman Act, Wis. Stat. § 133.03(1) claims will be evaluated under either the Rule of Reason or the Per Se rule, depending upon the type of restraint involved. The Rule of Reason allows the weighing of pertinent facts to determine the actual competitive effect of the challenged restraint, while the Per Se rule is applied to types of restraints previously deemed to be clearly anti-competitive without further inquiry. The extensive case law under Section 1 of the Sherman Act, which reflects economic and legal determinations that particular types of agreements have the potential of pro-competitive effects, or are almost always anti-competitive, guides Wisconsin courts in deciding which rule of antitrust analysis will apply to a particular agreement.
- Wis. Stat. § 133.03(2) prohibits monopolization, attempts to monopolize, and conspiracies to monopolize. Additionally, Wis. Stat. § 133.03(2) is based on Section 2 of the Sherman Act.
- Price Discrimination. Wisconsin's basic price discrimination statute is found in Wis. Stat. § 133.04. Although similar to the federal Robinson-Patman Act in some respects, Wis. Stat. § 133.04 does not include many of the defenses found in the federal statute. Compared to the complex Robinson-Patman Act, Wis. Stat. § 133.04(1) is remarkably brief, stating that "[n]o person may discriminate, either directly or indirectly, in price

between different purchasers of commodities of like grade and quality, for the purpose or intent of injuring or destroying competition in any level of competition or any person engaged therein.” Although the general rule is that Wisconsin courts apply federal antitrust principles to Wisconsin antitrust claims, there is no definitive guidance on whether all of the statutory defenses available under the Robinson-Patman Act are likewise available to Wisconsin defendants.

- The provisions of § 133.04 as they relate to the business of insurance are superseded by Chapters 611, 613 and 628 of the Wisconsin Statutes.
- Wisconsin has a specific statute outside of Chapter 133 which prohibits price discrimination in the prescription drug industry. Wis. Stat. § 100.31(2) provides that “[e]very seller shall offer drugs from the list of therapeutically equivalent drugs published by the federal food and drug administration to every purchaser in this state, with all rights and privileges offered or accorded by the seller to the most favored purchaser, including purchase prices for similar volume purchases, rebates, free merchandise, samples and similar trade concessions. Nothing in this subsection prohibits the giving of a discount for volume purchases.”
- Another Wisconsin statute outside of Chapter 133, Wis. Stat. § 100.201, specifically prohibits discrimination in the purchase of milk from producers. Wis. Stat. § 100.201(2)(b) states that no wholesaler shall “[d]iscriminate in price, directly or indirectly, between different purchasers of selected dairy products of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.”
- Interlocking Directorates. Wis. Stat. § 133.06 prohibits a corporation with its principal place of business in Wisconsin from having a director in common with another corporation, if the two corporations compete and if either corporation has capital, surplus, and undivided profits aggregating more than \$100,000. This section is based on Section 8 of the federal Clayton Antitrust Act. Wis. Stat. § 133.06 does not apply to the insurance business.
- Illegal Contracts Void. Antitrust plaintiffs in Wisconsin have another cause of action in Wis. Stat. § 133.14. This section of Chapter 133 provides that all contracts or agreements made by any person while involved in a conspiracy prohibited by Wis. Stat. § 133.03 (prohibiting unlawful contracts and conspiracies related to the restraint of trade or commerce), and which are connected with such a violation, shall be void. Additionally, any payments made pursuant to such a contract may be recovered. In essence, this section provides an alternative method of recovery for a Wisconsin Little Sherman Act claim.
- Other Significant Trade Regulation Statutes
  - Secret Rebates Prohibited. Wis. Stat. § 133.05(1) prohibits “secret payment or allowance of rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise, or the secret extension to certain purchasers of special services or privileges not extended to all purchasers purchasing upon like terms and

conditions,” when such payments, allowances, or extensions injure or tend to injure a competitor, or destroy or tend to destroy competition. Competitive injury is a required element under this section; however, intent to injure is not. This section does not apply to the insurance business.

- Below-Cost Pricing. Wis. Stat. § 100.30, titled the “Unfair Sales Act” and also commonly referred to as the “Minimum Markup Law,” prohibits certain below-cost sales. The statute defines “cost” in numerous circumstances, and contains a presumption of competitive harm for sales below cost. There are also several exceptions to the general prohibition against below-cost sales. The Unfair Sales Act only applies to the sale of goods, consequently excluding services.
- Conspiracy to Injure Another in His or Her Reputation, Trade, Business, or Profession. Wis. Stat. § 134.01 provides a private cause of action in Wisconsin which is often used by plaintiffs to allege general business torts. The statute provides that “[a]ny 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his or her will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment or by fine not exceeding \$500.” Wisconsin courts have interpreted this section to have four elements that a plaintiff must prove to prevail in a civil action for damages: (1) the defendants acted together; (2) with a common purpose to injure the plaintiff’s business; (3) maliciously; and (4) which resulted in financial injury to the plaintiff.
- General Trade Regulation. Wis. Stat. § 100.20, which is modeled after the Federal Trade Commission Act, provides both a public and private cause of action for injury caused by unfair methods of competition and unfair trade practices. While this section of Chapter 100 provides for general trade regulation, this section also describes specific limitations for certain goods and services.

## Regulation of Franchises in Wisconsin

The State of Wisconsin takes a largely hands off approach to the regulation of franchises. Unlike other states, Wisconsin does not engage in any regulatory oversight of the fairness or contents of a franchise disclosure document. Wisconsin is decidedly a registration only state.

The Wisconsin Department of Financial Institutions, Division of Securities is the “regulator” of franchises in the State of Wisconsin. However, this institution does nothing other than collect the required franchisor registration paperwork. Pursuant to Wisconsin law (“Wisconsin Statutes Ch. 553), a franchisor is required to register with the Division of Securities only prior to any sales being made in Wisconsin. Accordingly, a franchisor does not have to register if he is simply offering franchises to the general public. The triggering event is once a franchisee is committed to purchasing a franchise. A franchisor must register before the sale/agreement is final.

Chapter 553 defines a franchise as a written or oral contract between two or more persons by which:

- (1) a franchisee is granted “the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or a system prescribed or suggested in substantial part by a franchisor”; and
- (2) “the operation of the franchisee’s business is substantially associated with the franchisor’s business and trademark, service mark, trade name, logo type, advertising or other commercial symbol designated to franchisor”, and (3) the franchisee is required to pay directly or indirectly a franchise fee. If the business arrangement satisfies this three prong test and a sale has become imminent, the franchisor will need to register with the Division of Securities. Pursuant to Wis. Stat. §553.26, a franchisor’s registration is required to include the name of the franchisor, the name or names under which the franchisor intends to do business and the franchisor’s principle business address. The registration also needs to include a copy of the offering circular, a consent to service of process in the State of Wisconsin, and a registration fee.

While Wisconsin’s franchise law is decidedly non-intrusive and properly characterized as a registration only system, all potential franchisors should be aware of and should consider the Wisconsin Fair Dealership Law. See Wis. Stats. Ch. 135. The Wisconsin Fair Dealership Law is extremely broad in its scope and applies to relationships which are normally excluded from dealership laws in other jurisdictions. Under the Wisconsin law, dealership is defined as:

- “A contract or agreement either express or implied whether oral or written between two or more persons by which a person is granted the right to sell or distribute goods or services, or use a trade name, trademark, service mark, logo type, advertising or other commercial symbol, in which there is a community of interest in the business of offering, selling or distributing goods or services at wholesale, retail, by lease, agreement or otherwise.”
- On its face, the dealership law is broad and, as applied by Wisconsin’s courts, it is even broader. Based on its text, the typical franchise relationship will most likely be covered by the Wisconsin Fair Dealership Law.
- Pursuant to the Wisconsin Fair Dealership Law, the rights of a grantor to terminate his business relationship with its dealer are significantly constrained. Wis. Stat. § 135.03 prevents a grantor from “terminating, canceling, failing to renew or substantially changing the competitive circumstances” of a dealership “without good cause.” While business justifications can support the for cause requirement under the right circumstances, it is imperative that anyone offering a franchise in the State of Wisconsin draft the ultimate agreement entered into by the franchisee to contain a definition of good cause and an explanation of when termination or nonrenewal is applicable. Further, the grantor is required to provide the dealer at least 90 days written notice of the termination, cancellation, nonrenewal or substantial change in competitive circumstances. The notice is required to state the reasons for the change and by law the dealer has 60 in which to cure any deficiencies. If the deficiency is rectified, the notice of termination is void.
- Under this statute, it is possible that a grantor may be unable to terminate his relationship with a dealer. The Wisconsin Fair Dealership Law expressly allows a dealer to seek an injunction to prevent the termination of the dealership.

- While many portions of the Wisconsin Fair Dealership Law apply regardless of the terms of the written agreement between the grantor and the dealer, there are several areas where careful drafting can lessen the impact of the Fair Dealership Law. Any person considering selling franchises in the State of Wisconsin should work carefully with their Wisconsin counsel to utilize proper contracting techniques to lessen the impact of, or in certain circumstances, entirely avoid, the Wisconsin Fair Dealership Law.

## Consumer Protection Statutes

Wisconsin has enacted numerous and quite specific consumer protection laws which are scattered throughout Wisconsin statutes. However, the two most important consumer protection statutes are Wis. Stat. § 100.18 (“Section 100.18”) and Wis. Stat. § 100.20 (“Section 100.20”). These two statutes provide the backbone of Wisconsin’s consumer protection scheme. Section 100.18 was first enacted in 1913 and has been gradually expanded by the Wisconsin Legislature.

- Section 100.18 is also liberally construed by Wisconsin courts. Section 100.18 bars “untrue, deceptive or misleading” statements made in the course of selling goods or services. Those statements can be made in any form or forum. Section 100.18 is not limited to formal advertisements and even encompasses oral communications. By its terms the statute applies only to statements made to the “public”; however, Wisconsin courts have construed the public to include a single person in the context of a one-on-one sales pitch. See *State v. Automatic Merchants of America, Inc.*, 64 Wis. 2d 659, 663, 221 N.W.2d 683 (1974). However, courts have concluded that a communication is not made to the public if the communication is made in the context of an already existing business relationship.

Section 100.18 can be enforced by the State of Wisconsin through the Department of Agriculture Trade Consumer Protection (“DATCP”), the Department of Justice or by an individual who suffers “pecuniary loss” due to the untrue, deceptive or misleading statement. DATCP has the authority to file a lawsuit seeking to enjoin a violation of this section. A private party can file a lawsuit seeking to recover their actual damages, costs and reasonable attorney’s fees. If a private suit is brought after DATCP has already sought and obtained an injunction, the private litigant is entitled to recover twice their actual damages plus their costs and their reasonable attorney’s fees.

While the text of the statute would suggest that its original purpose was to police false advertising, the courts have construed the statute very broadly and it is now a common tool in business to business disputes.

- The second pillar of Wisconsin’s consumer protection statutes is Section 100.20. Section 100.20 reaches beyond misleading or false statements and regulates a whole host of “unfair trade practices.” DATCP has been much more active creating regulations under Section 100.20 and has enacted rules related to landlord/tenant relations, direct marketing, home improvement, motor vehicle repair, work recruitment schemes, and weights and measures. These regulations spawn a substantial body of litigation within each and every one of the areas regulated. Under Section 100.20, DATCP can impose civil forfeitures up to \$10,000 for violations and can seek restitution in civil enforcement

actions. Anyone seeking to do business in Wisconsin should familiarize themselves with the trade regulations applicable to their industry.

In addition to its regulatory authority, DATCP has been empowered to issue what are called special orders under Section 100.20. A special order is directed at a specific individual or business that functions essentially as an injunction preventing that individual or business from continuing to engage in a specific activity. A violation of a special order subjects the target of the order to civil or criminal enforcement. Under Section 100.20, a private party is authorized to bring a lawsuit only if the target of that lawsuit has violated a specific regulation or a special order. If such a violation can be proved, the private litigant is entitled to recover double damages.



## Chapter 4 – Taxation

### Federal Taxation

#### Federal Income Taxation

Federal income taxes are not affected by where a business chooses to locate in the U.S. There are various methods of controlling the amount of the U.S. income tax-payable, and many of these apply to domestic corporations as well as foreign owned corporations or foreign individuals.

**Personal Income Tax.** Individuals are subject to U.S. income tax on their worldwide income if they are U.S. citizens or resident aliens. Resident alien status is determined under a set of complex rules. Any individual who is not a U.S. citizen, and who does not wish to be taxed as such, and who plans to spend a substantial amount of time in the U.S., should pay careful attention to these rules. Currently, the highest marginal U.S. individual income tax rate is 39.6% for ordinary income and 28% for capital gains. A nonresident alien generally is subject to tax on dividends from U.S. corporations, as discussed below.

### State of Wisconsin Taxation

#### Personal Income Tax

Wisconsin has a progressive personal income tax, with rates ranging from 3.9% to 7.65%. The Wisconsin income computation for a particular year is based on federal adjusted gross income, computed under the Internal Revenue Code (I.R.C.) in effect as of a specified date, with numerous exceptions and modifications. For the tax year beginning after December 31, 2016, the Wisconsin income computation generally is based on the I.R.C. as in effect on December 31, 2016, with numerous exceptions and modifications.

Wisconsin law provides a 30% deduction for long-term capital gains. Wisconsin law does not provide itemized deductions, but does allow a tax credit equal to five percent of certain items that are used in computing federal itemized deductions. Wisconsin also allows certain other tax credits; one of these is for income taxes paid to other states.

Wisconsin net operating losses (as defined) of individuals may be carried back 2 years and forward for up to 20 years. As noted in B.1., below, Wisconsin net business losses (as defined) of a C corporation may be carried forward for up to 20 years, but may not be carried back.

With respect to shareholders in S corporations that are engaged in business in Wisconsin, see Section C, below.

#### C Corporation Income and Franchise Tax

- Rate; Income Computation; Combined Reporting.
- There is a single rate of 7.9% on the Wisconsin net income, whether ordinary income or capital gain, of all C corporations. The Wisconsin corporate net income or loss computation for a particular year is based on federal adjusted gross income, computed under the I.R.C. in effect as of a specified date, with numerous modifications. For the tax

year beginning after December 31, 2016, Wisconsin corporate net income generally is based on the I.R.C. as in effect on December 31, 2016, with numerous exceptions and modifications. Examples of the modifications to the I.R.C. which are frequently overlooked by taxpayers include the following:

- Wisconsin does not allow certain bonus depreciation and expensing allowed under the I.R.C.;
- state and local net income taxes, and certain other types of state taxes, are not deductible (or creditable);
- the federal dividends received deduction provisions are replaced by considerably different Wisconsin rules;
- I.R.C. § 381, relating to the carryover of tax attributes in certain corporate acquisitions, is modified for Wisconsin purposes;
- Wisconsin does not adopt the I.R.C. provisions relating to DISCs, which are treated as regular C corporations;
- the federal income exclusion relating to interest on state and local bonds does not apply;
- the I.R.C. provisions relating to net operating losses are replaced by a Wisconsin rule that (among other things) does not allow carrybacks but generally provides for a 20 year carryforward.

Effective for taxable years beginning on or after January 1, 2009, Wisconsin adopted mandatory unitary combined reporting for corporations, with Wisconsin joining approximately 20 other states (including neighbors Illinois, Minnesota, and Michigan) that have adopted some type of a mandatory combined reporting tax system. Previously, every corporation computed its income, and filed tax returns, on a separate company basis. The Department has adopted lengthy administrative regulations on the subject, which are set forth at Wis. Admin. Code §§ Tax 2.60–.67. The primary statutory provision relating to combined reporting is Wis. Stat. § 71.255. The following address some of the more common questions that have arisen concerning the new provisions:

- **Corporations Subject to Combined Reporting**

A corporation must file a combined report if (1) it is a member of a commonly controlled group, i.e., it is sufficiently connected through ownership (generally, a greater-than-50% ownership test, taking into account certain “attribution” rules) to one more other corporations; (2) it is engaged in a “unitary” business with one or more other corporations in its commonly controlled group; and (3) the corporation has unitary business income that is subject to combination under Wisconsin’s “water’s edge” rules.

S corporations, certain other “flow-through” entities, and tax-exempt corporations generally are not includible in a combined return. However, income or loss of a pass-through entity (e.g., a partnership or LLC treated as a partnership for income tax purposes) is included in a combined return to the extent income passes through to a member corporation. Foreign insurers are exempt from Wisconsin income and franchise taxation and therefore are not includible in a combined report. For domestic insurers, however, the matter is more complicated. See Wis. Dep’t of Revenue, “A.

Who Must Use Combined Reporting?” question A8, <http://www.revenue.wi.gov/faqs/ise/combrpta.html>.

- “Finnigan” versus “Joyce.” The Department of Revenue takes the position that every member of a combined group has nexus where any member of a combined group has nexus; i.e., that Wisconsin has adopted the “Finnigan” approach to sales factor sourcing.
- Operating Losses. Wisconsin net business losses (“NOLs”) generated by a combined group after the January 1, 2009 effective date may be used by the member that generated them, or shared with the group, in a specified manner. In 2011, the Legislature adopted a provision that allows limited sharing of pre-effective date (January 1, 2009) business loss carryforwards, beginning with taxable years beginning after December 31, 2011.
- Credits. With one important exception, tax credits and credit carryforwards may be used to offset the tax liability only of the corporation that generated the credit. The exception is that any member of a group with certain unused “research credits” may, after using the credit to offset its own liability for the taxable year, use that credit or carryforward to offset the tax liability of all other members of the combined group on a proportionate basis, to the extent the tax liability is attributable to the unitary business.
- “Controlled Group Election.” A combined group may elect to include every “commonly controlled” corporation (as defined) in its combined group, regardless of whether the corporations are engaged in the same unitary business. Once made, the election is irrevocable and effective for 10 years.

## Allocation & Apportionment

Corporations that are engaged in business solely in Wisconsin are taxed on all of their income, unless otherwise exempt. Corporations engaged in business in Wisconsin and at least one other state are subject to detailed apportionment and allocation rules. Apportionable income is broadly defined, and includes such typical items as income from sale of inventory, income from services, and interest from accounts receivable. With certain exceptions, apportionable income is multiplied by a single-factor (sales) formula, which determines the percentage of such income that is taxable by Wisconsin. Nonapportionable income, which is allocated to the “situs” of the property, is defined, rather unhelpfully, as income, gain, or loss from the sale or rental of, or royalties from, nonbusiness real property or nonbusiness tangible personal property. Special apportionment rules apply to taxpayers in certain industries, including interstate telecommunications companies, sports clubs, public utilities, financial institutions, motor carriers and air carriers. Wis. Admin. Code § Tax 2.46 – 2.505.

One issue that frequently arises is the treatment of income and gain from investment-type assets. Wisconsin’s statutes say that interest and dividends are includible in apportionable income “if the payer is unitary with the taxpayer or, if not unitary, if the investment activities producing this income are an integral part of a unitary business and the payer and taxpayer are neither affiliates nor related as parent and subsidiary.” A similar statutory standard applies with respect to gain or loss from the sale of intangible assets. Wis. Stat. § 71.25(5)(a)9. These statutes are the subject of frequent litigation.

Another issue that frequently arises is the treatment of income or gain from such one-time events as the sale of substantially all the assets of a business. Prior to July 1, 1991, a

Department of Revenue administrative rule adopted the UDITPA definition of “business income.” Based on that definition, some Wisconsin tribunals held, as have many courts across the U.S., that income from one-time events was not business income. The Department repealed that rule, however, effective July 1, 1991, and the statutes now provide that “apportionable income” includes gain or loss from the “sale of real property or tangible personal property used in the production of business income.” Despite the statute, it is unclear whether a corporation could successfully argue that isolated type transactions (such an asset sale of an entire business in a taxable transaction) do not create apportionable income or loss.

The statutes contain a long list of gross receipts that are and are not considered “sales” for apportionment factor purposes. Certain types of gross receipts that may be considered “apportionable” are nevertheless excluded by statute from the sales factor computation; examples are certain interest, dividends and capital gains. Wis. Stat. § 71.25(9)(e) & (f). This is, in effect, a type of “throw-out” rule, the constitutionality of which can be questioned under certain circumstances.

With respect to sales factor sourcing, sales of tangible personal property generally are sourced on a destination-type basis. For taxable years beginning on or after January 1, 2009, sales into states where the seller is not subject to that state’s taxing jurisdiction are “thrown back” 100% to Wisconsin. Previously, 50% of these sales were thrown back. The impact of the 100% throwback statute is tempered somewhat, however, by combined reporting rules that (at least in the Department’s view) treat every member of a combined group as being subject to tax in the states where any member of the group is subject to a net income tax. In addition, Wisconsin has a broad statutory nexus provision that, while casting a wide net in terms of determining nexus with Wisconsin, also applies for purposes of applying the throwback rules. Wis. Stat. § 71.22(1r).

Effective for taxable years beginning on or after January 1, 2005, gross receipts from services are sourced based on a “benefit of the service” type standard, and receipts from software are sourced based on a standard that looks to where the purchaser or licensee uses the software. Effective for taxable years beginning on or after January 1, 2009, gross receipts from the sale and licensing of intangibles (e.g., royalties) are sourced based on where the purchaser or licensee uses the intangible. Wis. Stat. § 71.25(9) (df) – (dj) and Wis. Admin. Code § Tax 2.39(6). Prior to the adoption of these standards, a “cost of performance” standard, similar to that in effect in many states across the country, applied. For an example of the application of the cost of performance standard in Wisconsin, see *Sketchers USA, Inc. II v. Department of Revenue*, Wis. Tax Rep. (CCH) ¶ 401-978 (Tax App. Comm’n. 2015) (concluding that Sketchers’ cost of performance with respect to certain royalty income was outside the State of Wisconsin).

With respect to combined reporting groups, each member of the group is required to compute a fraction called the “modified sales factor.” The numerator of the fraction is the individual member’s Wisconsin sales (for most corporations), receipts (for financial organizations), or premiums (for insurance companies), determined under the generally applicable apportionment rules discussed above. The denominator of the fraction is the combined sales, receipts, and premiums of all the members of the combined group. In the Department’s combined reporting forms, each member of the group computes its own sales factor numerator, and this is divided by the group denominator, resulting in a Wisconsin apportionment fraction for that member. The

fraction is multiplied by the group's combined unitary income to determine that member's share of the combined unitary income. After certain potential adjustments, the Wisconsin tax of that member is determined. The amounts of tax of all the individual members are totaled and reported on the combined return. See Wisconsin Form 6. Corporations in specialized industries that use a multifactor formula must convert their multifactor apportionment to single-factor data in a specified manner.

#### Economic Substance Doctrine; Add-Back Statutes; § 482 Type Authority

The Department of Revenue has frequently asserted various statutory and common law grounds to adjust or disallow the Wisconsin income tax effects of transactions between related parties. These assertions will decline as a result of the adoption of combined reporting, although audits and disputes remain with respect to pre-combined reporting years, and the provisions remain in force and have potentially broad application in other contexts.

One provision, very similar to I.R.C. § 482, authorizes the Department to "distribute, apportion or allocate gross income, deductions, credits or allowances" between or among commonly controlled entities. The Department is aggressive in asserting the application of this statute, particularly in cases involving imputation of interest on intercompany receivable balances and intercompany transfer pricing.

Effective for taxable years beginning on or after January 1, 2008, Wisconsin adopted "add-back" statutes that require certain taxpayers to add back into income the amount of interest and rent paid to related parties, as defined. The Legislature subsequently expanded these provisions for taxable years beginning on or after January 1, 2009, to cover certain "management fees" and "intangible expenses."

The Wisconsin Legislature has adopted a statutory "economic substance" test, which, under certain circumstances, authorizes the Department to determine the amount of a taxpayer's taxable income or tax so as to reflect what would have been the taxpayer's taxable income or tax "if not for the transaction or transactions without economic substance causing the reduction in taxable income or tax." Wis. Stat. §§ 71.10(1m), 71.30(2m) and 71.80(1m). The Department also takes the position that the Wisconsin Tax Appeals Commission and courts have created a "common-law" economic substance doctrine to disallow transactions that the Department believes are tax-motivated or lack economic substance. An example is *Hormel Foods Corp. v. Department of Revenue*, Wis. Tax Rep. (CCH) ¶ 401-302, at 37,144 (Tax App. Comm'n Mar. 29, 2010) (appeal to Dane County Circuit Court dismissed June 20, 2011), in which the Wisconsin Tax Appeals Commission for the first time squarely examined the scope of these doctrines in Wisconsin. In *Hormel*, a taxpayer transferred certain intellectual property, as well as a significant research-and-development operation, to an affiliate, and then licensed back the intellectual property at a fair-market-value rate, claiming Wisconsin deductions for the royalties. The Tax Appeals Commission concluded that the Department properly disallowed the deductions, saying that "the underlying transactions lacked economic substance and a valid business purpose and were entered into primarily for the purpose of tax avoidance."

#### Wisconsin Income Tax Treatment of Common Corporate Transactions

- The Wisconsin net income tax treatment of a transaction generally follows the federal income tax treatment. This means, for example, that a transaction that qualifies for tax-deferred and related treatment under I.R.C. §§ 351, 332, 355 or 368 generally will qualify as

such for Wisconsin purposes. Complete uniformity of federal and Wisconsin treatment is not necessarily the case, however, and every transaction must be carefully reviewed to determine whether there are any Wisconsin differences from the federal treatment. With respect to tax attribute carryovers in certain corporate reorganizations, for example, Wisconsin modifies I.R.C. § 381 in certain respects.

### S Corporation Income Taxation

The income or loss of subchapter S corporations (technically referred to in Wisconsin as “tax-option” corporations) generally is computed in the same manner as for C corporations (including application of the statutory apportionment rules), and then flows through to the corporation’s owners and is taxed at their applicable Wisconsin rates. With respect to Wisconsin resident shareholders, their entire share of flow-through income generally is taxed by Wisconsin (without regard to apportionment), although credits may be available for income taxes paid to other states on the same income. Nonresident shareholders generally are taxed by Wisconsin on their Wisconsin apportioned share of the corporation’s flow-through income.

Under certain circumstances, Wisconsin imposes a variety of corporate-level taxes on S corporations, including a tax similar to the federal built-in gains tax, at the 7.9% Wisconsin corporate rate.

A corporation that has filed a valid subchapter S election for federal income tax purposes automatically is treated as an S corporation for Wisconsin income and franchise tax purposes, and no separate Wisconsin election has to be made. A corporation that is an S corporation for federal income tax purposes may opt out of S corporation status for Wisconsin purposes, unless it has one or more “qualified subchapter S subsidiaries” (QSSSs). A corporation treated as a QSSS for federal income tax purposes may not opt out of QSSS status for Wisconsin purposes.

Wisconsin has several rules that may apply to S corporations with nonresident (i.e., non-Wisconsin) shareholders. In general, if a shareholder does not pay Wisconsin income tax on the shareholder’s pro-rata share of Wisconsin taxable income, the corporation will be liable for tax on that income. In addition, S corporations (and other flow-through entities, such as partnerships and limited liability companies that are treated as partnerships for income tax purposes) must withhold applicable income taxes from income distributable to nonresident owners. Finally, under certain circumstances, nonresident shareholders are together permitted to file a combined return.

### Sales and Use Taxes

The Wisconsin state sales tax rate is five percent on applicable transactions. Most Wisconsin counties impose additional sales and use tax, which is piggybacked on the state tax. In those counties with the additional taxes, the effective sales and use tax rate can be 5.1%, 5.5%, or 5.6%, depending on the county. In addition, some counties and localities in Wisconsin also impose other limited sales-type taxes, namely in “local exposition districts” and in “premier resort areas,” and the state imposes a rental vehicle fee, a limousine fee, and certain dry cleaning fees.

The sales tax is a privilege tax, imposed on the seller, and is measured by the sales price of the transaction. Sellers may, but are not required to, collect the tax from purchasers. The use tax complements the sales tax and generally applies to the use of any item that has not been previously subject to the sales tax of Wisconsin or another state. Its most common application is

to persons who purchase otherwise taxable items from out of state vendors without paying Wisconsin sales tax.

All sales, leases and licenses of tangible personal property and digital goods in Wisconsin by retailers are subject to tax, unless an exemption applies. By contrast, only certain specifically enumerated services are taxable, and even then, exemptions may apply. The taxable services include, among others, furnishing of rooms or lodging to transients by hotelkeepers; admissions to amusement, athletic, entertainment, or recreational events or places; telecommunications services; telecommunications message services; and certain services on tangible personal property.

The law provides many exemptions, including certain exemptions for the purchase of manufacturing machinery and equipment; the purchase of certain farming equipment; sales for resale or lease; and property used or consumed in manufacturing, under certain circumstances.

In 2009, Wisconsin became the 23rd state to adopt the “Streamlined Sales and Use Tax Provisions.” The bulk of the Streamlined Provisions generally became effective October 1, 2009. The Department has substantially rewritten its administrative code provisions to take into account the many Streamlined Provisions, as well as numerous other law changes enacted in recent years. The changes made by the Streamlined Provisions, combined with other recent legislation and amendments to the administrative code, are the most significant set of changes to the Wisconsin sales and use tax law since its initial adoption in 1961.

The Department of Revenue’s website contains a significant amount of helpful material concerning the Streamlined changes, including legislative background papers, a “taxability matrix” summarizing the operation of the tax, and a PowerPoint presentation which examines in some detail the provisions relating to sourcing, digital goods, bundled transactions, and medical exemptions.

#### Economic Development Surcharge

Wisconsin imposes an Economic Development Surcharge on various taxpayers (including corporations and insurance companies, exempt organizations, and tax-option (S) corporations) that meet certain requirements. The Surcharge ranges from \$25 to \$9,800 per year. The amount of the Surcharge depends upon the type of taxpayer and the amount of taxpayer’s gross receipts. In general, the Surcharge only applies if gross receipts for the year are at least \$4 million, and is calculated based on formulas set forth in the statute, subject to the \$9,800 cap.

With respect to combined groups, the Department takes the position for Surcharge purposes that if one member of the group has “nexus” with Wisconsin; all members of the group have nexus with Wisconsin. Further, and despite the Department’s apparent view that a combined group is treated as a single taxpayer for many income and franchise tax purposes, the Department takes the position that each corporation within the group is nevertheless treated as a separate entity for purposes of the Surcharge.

#### Real Estate Transfer Fee

Wisconsin imposes a real estate transfer fee on the grantor of real estate, at the rate of 30 cents for each \$100 on every conveyance. The law provides many potential exemptions.

#### Property Taxation

All real and personal property is subject to taxation, unless specifically exempt. Exempt property includes (among other things) intangible property; jewelry, household furnishings and apparel; stock-in-trade; computers and computer-related equipment; farm machinery and equipment; manufacturing machinery and equipment; waste treatment equipment; property of the state, counties, cities, villages, towns, and school districts; property of certain nonprofit educational, religious, or benevolent associations; property of certain nonprofit hospitals. Property that is otherwise exempt and that is used in part for a trade or business for which the owner of the property is subject to federal income tax under I.R.C. §§ 511–515 (the unrelated-business taxable income provisions) is subject to property taxation on that portion of the fair market value of the property that is attributable to the part of the property that is used in the unrelated trade or business.

General property is assessed as of the close of January 1 of each year, and the status and value of property is fixed as of that date. Unlike most states, Wisconsin assesses residential and commercial property (other than manufacturing property) at the municipal rather than the county level. Wisconsin thus has over 1,800 separate taxation districts, and over 1,800 separate boards of review. Manufacturing property, by contrast, is assessed by the Wisconsin Department of Revenue.

The basis for assessments generally is full value for real property and true cash value for personal property, both of which have been defined as the fair market value of the property determined by reference to the amount a buyer would pay a seller for the property in an arm's-length transaction. Special rules apply with respect to certain agricultural and undeveloped land.

Certain taxpayers are centrally assessed by the Department of Revenue. These include airlines, railroads, pipeline companies, and telephone companies. In addition, light, heat, and power companies are taxed on their gross revenues in lieu of property tax.

#### Credits and Incentives

Wisconsin historically has provided many tax credits and incentives. For individuals, for example, Wisconsin (a) provides a subtraction modification for 30% of long-term capital gains and (b) conforms to the “small business stock” provisions in § 1202 of the Internal Revenue Code. For corporations, Wisconsin makes available a wide array of income tax credits, including credits for research and development. Many sales and use tax exemptions are available, including exemptions for machinery and equipment used exclusively and directly in manufacturing tangible personal property and for property used or consumed in manufacturing tangible personal property destined for sale. Similarly, a significant property tax exemption is available for certain property used in manufacturing.

In addition to the credits and incentives that are historically available, Wisconsin has recently adopted or expanded a large number of income and franchise tax incentives, and these have drawn considerable interest from investors and businesses. Some of these incentives require pre-certification from the state. The incentives include:

- **Manufacturer's Income and Franchise Tax Credit.** In 2011, the Legislature adopted a nonrefundable tax credit that nearly eliminates tax on income from manufacturing in Wisconsin. The credit was phased in over a four-year period, beginning with a 1.875% credit for tax year 2013. In tax year 2016, the credit was fully phased in at 7.5%. The credit will effectively reduce the rate on Wisconsin income from manufacturing from



7.9% to 0.4%. For partnerships, LLCs or S corporations with qualifying income, the credit applies at the owner level. There are numerous issues concerning the computation of the credit, particularly for manufacturers with operations in multiple states. For the Wisconsin Department of Revenue's views with respect to certain of these issues, see <https://www.revenue.wi.gov/Pages/FAQS/ise-manufagr.aspx> (last visited February 10, 2018).

- **Angel Investment and Early Stage Seed Investment Credits.** The Wisconsin Angel Investment Tax Credit is a credit for individuals and networks of individuals who directly invest in "qualified new business ventures." The Early Stage Seed credit is for certain payments made to certified fund managers to invest in a "qualified new business venture." For this purpose, "qualified new business venture" means a business that (among other requirements) has its headquarters in Wisconsin; has at least 51% of its employees in Wisconsin; has the potential for increasing jobs in Wisconsin or increasing capital investment (or both) in Wisconsin; and is engaged in, or committed to engage in, innovation in specified activities. The credits are 25% of the amount of the qualifying investments and are nonrefundable. The maximum aggregate amount of Angel Investment Credits and Early Stage Seed Investment Credits that may be claimed (by all claimants combined, state-wide) for a tax year is \$30.0 million.
- **Business Development Credit.** For taxable years that begin on or after January 1, 2016, a Business Development Credit is available to eligible claimants certified by the Wisconsin Economic Development Commission ("WEDC"). The credit is equal to the following amounts as determined by WEDC: (a) up to 10% of wages paid to an eligible employee (and, in addition, up to 5% paid to eligible employees employed in an economically distressed area); (b) up to 3% of personal property investment and 5% of real property investment in a capital investment project, as defined; (c) up to 50% of certain training costs; and (d) a percentage of wages paid to an eligible employee if the position was retained or created in connection with the location or retention of corporate headquarters in Wisconsin, under certain circumstances. WEDC may allocate up to \$22 million in tax credits each year. Unused allocations may be carried forward and awarded in the next year.
- **Capital Gain Exclusion.** Eligible individuals may exclude from gross income long-term capital gain from the sale of an investment made after December 31, 2010, and held for at least 5 uninterrupted years, in a business certified by WEDC that has more than 50% of its property and payroll in Wisconsin, or meets certain other requirements.

The Wisconsin Department of Revenue's website contains extensive information concerning these and other tax incentives. See <https://www.revenue.wi.gov/Pages/Businesses/Incentives.aspx> (last visited February 10, 2018).

# Chapter 5 – Labor and Employment

## Federal Considerations

Immigration. With the globalization of world markets, employers located in the United States often seek to employ foreign personnel. A variety of permanent and temporary visas are available depending on various factors such as the job proposed for the alien, the alien's qualifications, and the relationship between the United States employer and the foreign employer. Permanent residents are authorized to work where and for whom they wish. Temporary visa holders have authorization to remain in the United States for a temporary time and often the employment authorization is limited to specific employers, jobs, and even specific work sites.

- Permanent Residency (the "green card"). Permanent residency is most commonly based on family relationships, such as marriage to a United States citizen, or offer of employment. Permanent residence gained through employment often involves a time-consuming process that can take several years to obtain. Therefore, employers considering the permanent residence avenue for an alien employee should ascertain the requirements for that immigration filing prior to bringing the employee to the United States.
- Temporary Visas. The following are the most commonly used temporary visas:
  - E-1 Treaty Trader and E-2 Treaty Investor Visas:
    - These are temporary visas for persons in managerial, executive or essential skills capacities who individually qualify for or are employed by companies that engage in substantial trade with or investment in the United States. E visas are commonly used to transfer managers, executives or technicians with specialized knowledge about the proprietary processes or practices of a foreign company to assist the company at its United States location. Generally, E visa holders receive a five-year visa stamp but only one-year entries at any time.
    - H-1A and H-1B Specialty Occupation Visas: H-1B visas are for persons in specialty occupations that require at least a bachelor's degree. Examples of such professionals are engineers, architects, accountants, and, on occasion, business persons. Initially, H-1B temporary workers are given three-year temporary stays with possible extensions of up to an aggregate of six years. H-1B visas are employer-and job-specific. H-1A visas are for registered nurses only.
    - L-1 Intracompany Transferee Visas: Most often utilized in the transfer of executives, managers or persons with specialized knowledge from international companies to United States-related companies, L-1 visas provide employer-specific work authorization for an initial three-year period with possible extensions of up to seven years in certain categories. As in the case of certain E visa capacities, some L managers or executives may qualify for a shortcut in any permanent residence filings.

- B-1 Business Visitors and B-2 Visitors for Pleasure: These visas are commonly utilized for brief visits to the United States of six months or less. Neither visa authorizes employment in the United States. B-1 business visitors are often sent by their overseas employers to negotiate contracts, to attend business conferences or board meetings, or to fill contractual obligations such as repairing equipment for brief periods in the United States. B-1 or B-2 visitors cannot be on the United States payroll or receive United States-source remuneration.
  - TN Professionals: Under the North American Free Trade Agreement, certain Canadians and Mexicans who qualify and fill specific defined professional positions can qualify for TN status. Such professions include some medical/allied health professionals, engineers, computer systems analysts, and management consultants. TN holders are granted one-year stays for specific employers and other employment is not allowed without prior INS approval. Particularly with regard to Canadians, paperwork required for filing these requests is minimal.
  - F-1 Academic Student Visas Including Practical Training: Often foreign students come to the United States in F-1 status for academic training or M-1 status for vocational training. Students in F-1 status can often engage, within certain constraints, in on-campus employment and/or off-campus curricular or optional practical training for limited periods of time. Vocational students cannot obtain curricular work authorization but may receive some post-completion practical training in limited instances.
  - J Exchange Visitor Visas: These visas are for academic students, scholars, researchers, and teachers traveling to the United States to participate in an approved exchange program. Training, not employment, is authorized. Potential employers should note that some J exchange visitors and their dependents are subject to a two-year foreign residence requirement abroad before being allowed to change status and remain or return to the United States.
  - O-1 and O-2 Visas for Extraordinary Ability Persons: O-1 and O-2 visas are for persons who have extraordinary abilities in the sciences, arts, education, business or athletics and sustained national or international acclaim. Also included in this category are those persons who assist in such O-1 artistic or athletic performances.
  - P-1 Athletes/Group Entertainers and P-2 Reciprocal Exchange Visitor Visas: These temporary visas allow certain athletes who compete at internationally recognized levels or entertainment groups who have been internationally recognized as outstanding for a substantial period of time, to come to the United States and work. Essential support personnel can also be included in this category.
  - There are a number of other non-immigrant visas categories that may apply to specific desired entries. When planning to bring foreign personnel to the United States, United States employers should allow several months for processing by the Immigration and Naturalization Service, as well as the Department of State and Department of Labor. Furthermore, employers should be aware that certain corporate changes, including stock or asset sales, job position restructuring, and changes in job duties, may dramatically affect (if not invalidate) the employment authorization of foreign employees.

## Labor and Employment Statutes

- Age Discrimination in Employment Act ("ADEA"): The ADEA forbids discrimination based on age in employment decisions. The ADEA applies to employers engaged in interstate commerce who have twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.
- Americans with Disabilities Act ("ADA"): The ADA proscribes discrimination in employment based on the existence of a disability. Furthermore, the Act requires that employers take reasonable steps to accommodate disabled individuals in the workplace. This Act applies to employers engaged in interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.
- Employee Polygraph Protection Act ("EPPA"): The EPPA greatly restricts polygraph testing of employees. The Act applies to all employers engaged in interstate commerce. Exempted are employers whose primary business purpose is running a security service or manufacturing, distributing or dispensing a controlled substance.
- Equal Pay Act ("EPA"): The EPA was an amendment to the Fair Labor Standards Act and is designed to promote equal pay for men and women who do the same jobs. Therefore, if the minimum wage provision of the FLSA is applicable to one's business, then the EPA is applicable as well.
- Fair Labor Standards Act ("FLSA"): The FLSA establishes the minimum wage, overtime and child labor laws for employers engaged in industries affecting interstate commerce, regardless of the number of employees.
- Family and Medical Leave Act ("FMLA"): The FMLA requires that eligible employees be allowed to take up to twelve weeks of unpaid leave per year for the birth or adoption of a child or the serious health condition of the employee or the spouse, parent or child of the employee. This Act applies to all employers engaged in commerce where the employer employs fifty or more employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year.
- Federal Contractors: Employers that are federal contractors or subcontractors, depending on the type and size of their contracts, may have affirmative action obligations under Executive Order 11246 and the Vocational Rehabilitation Act. Certain federal contractors are also covered by the Drug-Free Workplace Act.
- Other Federal Regulations: Many employers operate in industries that are regulated by federal agencies. For example, the Department of Transportation requires employers to drug test employees who drive motor vehicles of over 26,000 pounds. Employers in regulated industries must be aware of any requirements imposed by federal or state regulations.
- National Labor Relations Act and Labor Management Reporting and Disclosure Act: These statutes set forth the guidelines governing labor-management relations. They apply to all employers who are engaged in any industry in or affecting interstate commerce, regardless of the number of employees. Employers who operate under the Railway Labor Act are not subject to these Acts.

- Occupational Safety and Health Act ("OSHA"): OSHA is the act that established the mechanism for establishing and enforcing safety regulations in the workplace. It applies to all employers who are engaged in an industry affecting commerce, regardless of the number of employees.
- Title VII: Title VII is the broad civil rights statute that forbids discrimination in hiring based on race, religion, gender and national origin. It applies to employers engaged in interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.
- Worker Adjustment Retraining and Notification Act ("WARN"): WARN requires employers to give sixty days' notice to their employees of plant closings or mass layoffs. This Act applies to all businesses that employ 100 or more employees, excluding part-time employees, and to businesses that employ 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime).
- Immigration Reform and Control Act ("IRCA"): IRCA requires that employers verify employment authorization for all employees hired on or after November 6, 1991. Employers are subject to significant fines and penalties for failure to comply with documentation requirements under IRCA, as well as for hiring unauthorized workers or discriminating against persons who appear or sound foreign.

#### Employee Benefits

- Employee Retirement Income Security Act of 1974 ("ERISA"): ERISA governs implementation and maintenance of most types of employee benefit plans, including most retirement programs, life and disability insurance programs, medical reimbursement plans, health care plans, and severance policies. ERISA sets out a detailed regulatory scheme mandating certain reporting and disclosure requirements, setting forth fiduciary obligations and, in most types of retirement plans, coverage, vesting and funding requirements. ERISA generally preempts state laws governing employee plans and arrangements.
- Consolidated Omnibus Budget Reconciliation Act ("COBRA"): COBRA requires employers to make continuing coverage under medical reimbursement and health care plans available to certain terminated employees, at the cost of the employees. The usual period for which this coverage must be continued is eighteen months. COBRA contains very specific procedures for notifying terminated employees of their COBRA rights.

## State of Wisconsin Considerations

Employers doing business in Wisconsin have a number of statutory and common law legal duties to fulfill. Some of the statutory laws parallel or are similar to federal laws, including in such areas as equal employment opportunity, family and medical leaves and labor relations. In addition, significant employee rights and employer duties have developed through the application of common law principles to work place issues.

#### Statutory Issues

Equal Employment Opportunity. The Wisconsin Fair Employment Act (“WFEA”), Wis. Stat. § 111.31, et seq., makes it an act of employment discrimination to refuse to hire or to terminate, or to discriminate against any individual in promotion, compensation or in the terms, conditions or privileges of employment based on age (40 and over), race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, sexual orientation, use or nonuse of lawful products off the employer’s premises during nonworking hours, and membership in the national guard, state defense force or any reserve component of the military forces (state or federal). The WFEA prohibits unfair honesty and genetic testing. Wis. Stat. §§ 111.37, 111.372. WFEA requires employers to treat women who are pregnant or have pregnancy disabilities in the same way other employees are treated in their ability or inability to work. Wis. Stat. § 111.36(1)(c). The WFEA also prohibits an employer from discharging or otherwise discriminating against an individual for opposing any discriminatory practice under this act or for making a complaint, testifying or assisting in any proceeding under this act. Wis. Stat. § 111.322.

Discrimination complaints under the WFEA must be filed within 300 days from the date of the alleged discrimination. Wis. Stat. § 111.39(1). Claims are filed with the Equal Rights Division (“ERD”) of the Department of Workforce Development (“DWD”). Wis. Admin. Code DWD § 218.03(2). The date of the alleged discrimination is when the employee knew or should have known of the alleged discriminatory act. Upon the conclusion of the ERD’s investigation of a discrimination complaint, the ERD issues an initial determination which either: (1) dismisses the complaint because no probable cause was found; or (2) forwards the complaint to the hearing section of the ERD for a hearing on the merits of the complaint when probable cause was found. Wis. Admin. Code DWD §§ 218.14-218.20. An initial determination of no probable cause may be appealed within 30 days. Wis. Admin. Code DWD § 218.08.

- The parties may enter into a settlement at any time throughout the proceedings with or without the assistance of the DWD. Wis. Admin. Code DWD § 218.09. Discovery may be undertaken after the matter has been certified for hearing. Wis. Admin. Code DWD §§ 218.14, 218.15. The ERD hearing is administrative in nature with administrative appeals being taken to the Labor and Industry Review Commission (“LIRC”) and then to state circuit court. Wis. Stat. § 111.395; Wis. Admin. Code DWD § 218.21. Any decision made by the LIRC is given deference and a state circuit court will sustain a judgment unless it directly contravenes a statute, is clearly contrary to legislative intent, or lacks a rational basis. See *Crystal Lake Cheese Factory v. Labor & Indus. Review Comm’n*, 264 Wis. 2d 200, 664 N.W.2d 651 (2003). The remedies under WFEA are limited to back pay; make whole fringe benefit relief, such as an order compelling reinstatement, promotion or hiring; and interest and attorney’s fees to the prevailing complainant. Wis. Stat. § 111.39(4)(c).

Wisconsin Family or Medical Leave Act. The Wisconsin Family or Medical Leave Act (“FMLA”), Wis. Stat. § 103.10, contains a number of provisions that are different and, in some instances, more liberal than the counterpart federal law. FMLA complaints must be filed within thirty days of the wrongful event or when the employee should have reasonably known a violation occurred, whichever is sooner. Wis. Stat. § 103.10(12)(b). The ERD conducts investigations of complaints and the DWD will issue a decision and order within 30 days after the hearing. Wis. Stat. § 103.10(12)(d). If there is a violation, the DWD may order the employer to provide requested family leave or medical leave, to reinstate the employee, to provide back pay accrued

not more than two years before the complaint was filed or to pay reasonable attorney fees to the complainant. Wis. Stat. § 103.10(12)(d). Employees or the ERD may bring a civil action in state circuit court against an employer to recover damages after the completion of the administrative action. Wis. Stat. § 103.10(13)(a).

- The Wisconsin FMLA applies to an employee if the employer has fifty or more permanent employees and the employee has been employed for more than 52 consecutive weeks and worked at least 1,000 hours during the preceding 52-week period. Wis. Stat. § 103.10. The FMLA requires employers to provide the following to qualified employees: (1) up to two weeks in a calendar year when work is missed while the employee cares for an immediate family member with a serious health condition; (2) up to two weeks in a calendar year when work is missed because the employee is unable to work due to a serious health condition; and (3) up to six weeks in a calendar year while the employee cares for a new-born child or a child placed for adoption, provided the leave commences within 16 weeks of birth or placement for adoption. Wis. Stat. § 103.10(3) and (4). When the employee returns to work from a medical leave, the employer must return the employee to the same position if the position is available or, if the position is unavailable, to an equivalent position with equivalent compensation, benefits, working shift, hours, and other terms and conditions of employment. Wis. Stat. § 103.10(8); See *Mitchell v. Dutchment Mfg., Inc.*, 389 F.3d 746 (7th Cir. 2004) (noting that the equivalency requirement for job restoration does not apply to intangible or immeasurable aspects of the job by holding that the employer did not violate FMLA by assigning an assembly worker returning to work new tasks which were not overly time consuming or physically demanding).
- Employers must post, in one or more conspicuous places, where notices to employees are customarily posted, a notice of employee's rights under the statute in a form provided by the department. Wis. Stat. § 103.10(14). Any employer with at least 25 employees must post notice of the company policy regarding family and medical leave. *Id.*
- Family leave provided under Wis. Stat. § 103.10 is unpaid; however, the employer may provide a more generous leave policy. The employee may substitute unpaid family leave provided under the statute for paid leave provided by the employer. Wis. Stat. § 103.10(5)(b). In most circumstances, sick leave or paid time off benefits may be substituted by the employee when FMLA leaves are taken. See, e.g., *Aurora Medical Group v. Dep't of Workforce Dev.*, 230 Wis. 2d 399, 602 N.W.2d 111 (Ct. App. 1999) (holding that an employer was required to allow an employee to substitute paid sick time for unpaid statutory leave, even though the employer's plan only allowed employees to take sick leave for an actual illness and the employee took statutory leave to adopt a child). However, employers cannot require employees to substitute paid time off for unpaid state FMLA leave.

**Wage Claims.** Chapter 109 of the Wisconsin Statutes requires employers to pay wages due and owing to employees. Employers, except for logging operations and farm labor, must pay the employees' wages at least once a month unless the employer and employees have entered into a collective bargaining agreement dictating a different schedule for payment. Wis. Stat. § 109.03(1). Wages are defined broadly as "remuneration payable to an employee for personal

services, including salaries, commissions, holiday and vacation pay, overtime pay, severance pay or dismissal pay, supplemental unemployment benefit plan payments when required under a binding collective bargaining agreement, bonuses and any other similar advantages agreed upon between the employer and the employee or provided by the employer to the employees as an established policy.” Wis. Stat. § 109.01(3).

- Except for certain sales employees, an employee who quits or is discharged must be paid wages no later than the regular date such payments would be made under the employer’s established payroll schedule or 31 days from termination, whichever is earlier. Wis. Stat. § 109.03(2). When an employer ceases business operations, all unpaid wages must be paid at the usual place of payment within 24 hours of the time of separation from payroll. Wis. Stat. § 109.03(4).
- The Labor Standards Bureau (“LSB”) of the ERD investigates wage claims. The LSB may sue the employer on behalf of the employee to collect any wage claim or wage deficiency. Wis. Stat. § 109.09(1). The LSB has a lien on all property of the employer, real or personal, in Wisconsin for the full amount of any wage claim or wage deficiency. Wis. Stat. § 109.09(2). The statute of limitations period for wage claims is two years. Wis. Stat. § 109.09(1). An employee may maintain a private cause of action to recover unpaid wages, including obtaining attorney fees as the prevailing party. Wis. Stat. § 109.03(6); *Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 588 N.W.2d 67 (Ct. App. 1998). Administrative, civil and criminal penalties may be imposed on an employer. Wis. Stat. § 109.11.

Notice of Mergers, Liquidations, Relocations or Cessation of Operations. The Wisconsin plant closing law is more stringent than the federal Worker Adjustment and Retraining Notification Act (“WARN Act”). An employer in Wisconsin who employs 50 or more people and has decided to cease doing business or conduct a mass layoff has to notify the DWD at least 60 days prior to ceasing business or conducting the mass layoff. Wis. Stat. § 109.07(1m). The employer shall provide in writing all information concerning payroll, affected employees and the wages and other remuneration owed to such employees. *Id.*

A “business closing” includes a “permanent or temporary shutdown of an employment site or of one or more facilities or operating units at an employment site or within a single municipality that affects 25 or more employees.” Wis. Stat. § 109.07(1)(b). Wisconsin law defines “mass layoff” as involving 25 percent of the employer’s work force or 25 employees, whichever is greater or at least 500 employees. Wis. Stat. § 109.07(1)(f). New or low-hour employees, as defined by the statute, are not included in counting affected employees. Employers are required to post, in one or more conspicuous places where notices to employees are customarily posted, a notice in a form approved by the Department of Labor setting forth employees’ rights. Wis. Stat. § 109.07(7).



- Administrative charges have to be filed with the ERD within 300 days of the business closing or mass layoff. Wis. Stat. § 109.07(4)(a). The Department of Justice may proceed with a state circuit court action to recover the payment on behalf of the employee. Wis. Stat. § 109.07(4)(b).

Personnel Records. Upon the request of an employee, which the employer may require in writing, an employer must permit the employee to inspect any personnel documents which are used or which have been used in determining the employee's qualifications for employment, promotion, transfer, additional compensation, termination or other disciplinary action, and any medical records. Wis. Stat. § 103.13(2). Employees also have the right to copy or receive a copy of the records. Wis. Stat. § 103.13(7). The employer may charge a reasonable copying fee not to exceed the actual cost or reproduction. *Id.* The employer must grant at least two requests by an employee per year and must provide the employee with an opportunity to inspect the personnel data within seven days of the employee's request. Wis. Stat. § 103.13(2). An employee or former employee involved in a current grievance against the employer may designate, in writing, a representative to inspect the personnel records. Wis. Stat. § 103.13(3).

- An employee may submit a written statement of explanation or rebuttal to personnel records if the employee disagrees with any information contained within them. Wis. Stat. § 103.13(4). The employer shall attach the written statement to the disputed portion of the personnel record and the statement must be included whenever the disputed portion of the personnel record is released to a third party. *Id.*
- There are statutory exceptions to the inspection and copying requirement relating to records of possible criminal offenses, letters of reference, test documents, certain planning documents, third-party information of a personal and private nature and records relevant to any other pending claim between the employer and the employee which may be discoverable in a judicial proceeding. Wis. Stat. § 103.13(6).

Government Posting Requirements. Wisconsin requires employers to display posters on unemployment benefits, fair employment, business closings and mass layoffs, honesty testing, discontinuance of health care benefits, rights to family and medical leave, health care worker protection, and hours minors may work. Wis. Stat. §§ 109.07(7), 109.075(7), 103.10(14), 111.37(3), 146.997(6). The required posters must be placed in a prominent location on the company premises. See, e.g., *In-Sink-Erator v. Dep't of Indus., Labor and Human Relations*, 200 Wis. 2d 770, 547 N.W.2d 792 (Ct. App. 1996). The posting requirements may vary based on the size or type of workforce.

Wisconsin Employment Peace Act. Private sector employer labor relations matters are regulated by a state law administered by the Wisconsin Employment Relations Commission ("WERC"). The Wisconsin Employment Peace Act ("WEPA") appears at Wis. Stat. § 111.01, et seq. WEPA guarantees Wisconsin employees certain statutory rights, such as the right to form, join, or assist labor unions. Wisconsin employees' prescribed rights also include the right "to bargain collectively through representatives of their own choosing," and the right to engage in "lawful, concerted activities for the purpose of collective bargaining." Wis. Stat. § 111.04(1). WEPA enumerates what constitute unfair labor practices by employers. The following practices are prohibited: refusal to bargain with the employees' designated representative, deducting dues without employee written authorization, discharging or discriminating against employees for union membership or activity; encouraging or discouraging union membership by

discrimination in hiring, termination, or conditions of employment; and interfering with a labor union's formation. Wis. Stat. § 111.06. Wisconsin is also a right-to-work state, in which employees have the "right to refrain from self-organization; forming, joining, or assisting labor organizations; bargaining collectively through representatives; or engaging in activities for the sole purpose of collective bargaining or other mutual aid and protection." Wis. Stat. § 111.04(2).

**The Minimum Wage Law.** The law applies to all private and public employers, including non-profit organizations. No wages shall be paid that are less than a living wage, unless one of the limited statutory exceptions applies. The department may grant licenses to authorize certain employers to provide subminimum wages. These employers include those who employ disabled workers, operate rehabilitation facilities, or participate in legitimate student-learner programs. Wis. Admin. Code DWD § 272.09. Employees who receive tips or gratuities receive a separate minimum wage rate. The DWD is responsible for administering this wage-hour law which addresses the payment for hours worked of the minimum wage and overtime. The state law requirements generally parallel the requirements of the Fair Labor Standards Act.

**Unemployment Insurance.** Chapter 108 of the Wisconsin Statutes provides unemployment benefits for employees. Employers fund a system that provides unemployment insurance to employees who earn no or reduced wages in particular work weeks through no fault of their own. The system is based upon contributions an employer makes on a quarterly basis in relationship to wages that were paid to employees, up to a statutorily determined wage maximum. Each employer's contribution rate should vary in accordance with its own unemployment costs. The system is administered by the Unemployment Insurance Division of the DWD. An administrative process of investigation and hearing is used to determine the eligibility of an employee for benefits. An employee claiming unemployment benefits entitlement may only do so for a period of up to 26 weeks. Beyond this time, unemployment benefits are available during periods of prolonged state and national unemployment. Wis. Stat. § 108.06.

Employees separated from employment are disqualified from receiving benefits or must meet additional conditions to receive benefits if any of the following conditions apply to them: their employment termination was voluntary; they were discharged for misconduct; they failed to apply for or accept suitable work without good cause; they are independent contractors; they are unemployed because of a strike; or their license, required by law to perform their type of work, has been suspended or terminated due to their own fault. The Wisconsin lockout statute provides an exception to the rule that an employee who has left or lost work due to a strike or other bona fide labor dispute is ineligible for unemployment compensation. Wis. Stat. § 108.04(10); see also *Brauneis v. LIRC*, 236 Wis. 2d 27, 612 N.W.2d 635 (2000).

**Worker's Compensation.** Chapter 102 of the Wisconsin Statutes, the Worker's Compensation Act (WCA), primarily governs worker's compensation in Wisconsin and is administered by the DWD. The WCA protects workers who have been injured or became ill because of work activities relating to or arising out of the employment relationship. Employers engaging in business in Wisconsin and who employ three or more full-time or part-time workers are required to have insurance sufficient to pay statutory benefits and expenses, unless they are approved for self-insured status.

- Under the WCA, employees' injuries are categorized, and each category has a damage limit established. There are two categories of benefits that employees may receive: (1) temporary disability benefits, which are payable during an injured worker's healing period; and (2) permanent disability benefits, which are payable if a worker remains disabled after the healing period has ended. The general rule for permanent total disability awards is that the injured worker must prove a total loss of earning capacity. However, Wisconsin's "odd-lot" doctrine provides that if an injured worker can demonstrate that "because of injury, age, education, and capacity, [he] is unable to secure continuing gainful employment," he has prima facie placed himself in the odd-lot category, and the burden shifts to the employer to prove employability and the availability of jobs. Wis. Stat. § 102.44; *Balczewski v. DILHR*, 76 Wis. 2d 487, 495, 251 N.W.2d 794 (1977).
- A worker is ineligible for temporary disability benefits if the employee's employment is terminated or suspended by the employer for misconduct or substantial fault. Wis. Stat. § 102.43(9)(e).
- In addition to primary compensation for temporary and permanent disability benefits, the worker's compensation insurer must pay medical expenses, travel expenses, wage loss protection, as well as physical and vocational rehabilitation expenses. Furthermore, primary compensation may be increased by 15 percent if the illness or injury is caused by a safety violation known to the employer. Wis. Stat. § 102.57. Primary compensation may be decreased by 15 percent if the illness or injury is caused by the employee's disregard of known and enforced safety rules, or the employee's failure to use necessary safety devices. Wis. Stat. § 102.58. An employee is ineligible for compensation for wages when he or she violates a company drug or alcohol policy and the violation causes the injury. Wis. Stat. § 102.58. If the employer refuses to rehire an employee who suffered a compensable injury when appropriate employment within the employee's physical and mental limitations is available, the employer may be liable for paying lost wages during this period of refusal, not exceeding one year of back pay. Wis. Stat. § 102.35(3).

Non-compete Statute. Wisconsin's non-competition law provides that covenants not to compete that contain provisions limiting ex-employees from competing within a specified territory and during a specified time are lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Wis. Stat. § 103.465. Non-disclosure agreements also fall within the scope of Wis. Stat. 103.465. Any covenant that imposes an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint. Wisconsin does not permit blue-penciling of overbroad restrictive covenants.

#### Miscellaneous Statutory Employment Responsibilities

- Grooming requirement. At the time of hiring, each employee is to be notified about any hairstyle, facial hair or clothing requirements. Wis. Stat. § 103.14.
- HIV testing. The law on AIDS testing specifically prohibits employers from requiring that employees or prospective employees undergo testing for HIV, unless the proper state officials determine that the individual presents a significant risk of transmitting HIV to

others through employment. Furthermore, the terms or conditions of an employee's job or position cannot be affected by an employee's undergoing testing for HIV. The Wisconsin statute also prohibits agreements between employers and employees in which the employer offers extra pay or benefits to induce the employee to take an AIDS test. Wis. Stat. § 103.15.

- Deductions for faulty workmanship, loss, theft, or damage. Deductions may not automatically be taken by an employer from the pay of an employee for defective or faulty workmanship, lost or stolen property or damage to property. Wis. Stat. § 103.455. The employee must consent in writing to the deduction after the "loss" or damage occurred, but before it may be taken.
- One day of rest in seven. Employers operating factory or mercantile establishments shall allow every employee at least 24 consecutive hours of rest in each calendar week, unless an exception applies. During such period, the employer will not allow an employee to work except in cases of machinery breakdown or other emergency situations. However, the law does not require that the rest must be given every 7 days. For example, an employer may legally schedule work for 12 consecutive days within a two-week period if the days of rest fall on the first and last days of the two-week period. Wis. Admin. Code DWD §275.01(1).
- Certain employees are exempted from the law, including those who state in writing that he or she voluntarily chooses to work without a day off in seven consecutive days, janitors, security personnel, those whose job duties on Sunday only involve feeding live animals or maintaining fires, as well as those employed in the manufacturing and distribution of dairy products, in bakeries, in flour and feed mills, and in hotels and restaurants. Employers may ask the department to waive provisions of this law in unusual circumstances. Wis. Stat. § 103.85.
- Overtime Pay Requirements. Wisconsin has a general overtime pay requirement. Wis. Stat. § 103.02. Employees must be paid 1-1/2 times the regular rate of pay for all hours worked above 40 hours per week if they are employed by any of the following: factories, mercantile establishments; restaurants, hotels, motels, and resorts; beauty parlors; retail and wholesale stores; laundries; express and transportation firms; telegraph offices; and telephone exchanges. Non-profit employers are not required to pay overtime pay under Wisconsin's wage laws. There is no required daily overtime pay for adults. Whether daily overtime must be paid to minors under the age of 18 depends on factors such as whether the work is agricultural or not, the minor's age, and if school is in session.
- Jury duty. In determining seniority or pay advancement, the status of the employee shall be considered uninterrupted by the jury duty service. Wis. Stat. § 756.255.
- Wisconsin Donation Leave Act. (WDLA). Eligible employees must be able to use up to six weeks unpaid leave per 12-month period to undergo and recover from bone marrow or organ donation. Wis. Stat. § 103.11.
- Prohibition on lie detector tests. Under Wisconsin law, an employer may not directly or indirectly request or require a job applicant to take a lie detector test. Wis. Stat. §§ 111.31(4) and 111.37. Furthermore, an employer is prohibited from taking or threatening to take the following actions: discharging, disciplining, discriminating against, or refusing

to hire an individual either for his or her refusal to take a lie detector test or based on the results of such a test. Exemptions to the general rule exist. These exemptions apply to employers in the business of providing security personnel and those that manufacture or distribute a controlled substance. Furthermore, employers are not prohibited from requesting an employee to submit to a lie detector test if the test is ordered in conjunction with an ongoing investigation involving economic loss or injury to an employer's business, and the employer gives sufficient notice of the test and the purpose for it to the employee.

- Prohibition on genetic testing. Wisconsin law prohibits employers from requiring a genetic test from any person as a condition of employment, or from making an agreement offering a person employment, pay, or a benefit in return for taking a genetic test. However, if an employee requests a genetic test in writing, to be administered in connection with a worker's compensation claim, or in determining the worker's susceptibility to potentially toxic substances in the workplace, then the test is not prohibited. Wis. Stat. § 111.372(1)(a), (3), and (4).
- Medical Examinations. Employers may require prospective or current employees to take medical examinations. The cost of these examinations must be paid by the employer if they are a condition of being hired or remaining employed. Wis. Stat. § 103.37(2m). For example, insurers providing group health insurance coverage are required to make available an opportunity for an employee or former employee to elect to continue group medical insurance, at that employee's own expense for up to 18 months after group insurance has ended, or to convert to individual coverage.

## Common Law Developments

The common law developments in Wisconsin have produced a significant body of case law that further defines employer duties and employee rights. The major case developments have been in the following areas: (1) the at-will employment relationship; (2) contractual or quasi-contractual modifications of the employment at-will relationship; (3) wrongful discharge in violation of public policy; (4) bad faith in the employment relationship; (5) tortious interference with contract; and (6) defamation, libel and slander.

**The At-Will Employment Relationship.** Absent an individual employment contract or a collective bargaining agreement, employment in Wisconsin is at-will, meaning an employee may resign or be terminated at any time for any reason or no reason, provided that a termination does not violate the law. See, e.g., *Winkelman v. Beloit Mem'l Hosp.* 168 Wis. 2d 12, 483 N.W.2d 211 (1992); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983). Wisconsin courts have held that expressions of permanent or life-time employment, absent any additional consideration beyond an employee's services, constitute nothing more than at-will employment. *Smith v. Beloit Corp.*, 40 Wis. 2d 550, 162 N.W.2d 585 (1968); *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967). Under the appropriate facts, a just-cause employment relationship may be formed based upon certain verbal assurances of job security. *Garvey v. Buhler*, 146 Wis. 2d 281, 430 N.W.2d 616 (Ct. App. 1988).

**Contractual or Quasi-Contractual Modifications - Employee Handbooks.** Statements made in an employee handbook may be sufficient to alter the at-will employment status of employees in

Wisconsin, if those statements evidence an intention to be bound to an employment relationship other than an at-will relationship. Where the requisite intent is present, an employee's continued employment constitutes sufficient consideration to support the application of termination standards and procedures contained in an employee handbook. *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985). The mere issuance of a handbook will not, however, automatically create an employment contract. *Id.* at 167.

- An employer can avoid a finding that its handbook constitutes a contract that alters the at-will employment relationship by properly drafting the handbook. For example, handbook disclaimers emphasizing the at-will status of employees can be effective in retaining that status and precluding a finding of an employment contract as a result of an employee handbook. *Olson v. 3M Co.*, 188 Wis. 2d 25, 523 N.W.2d 578 (Ct. App. 1994); *Bantz v. Montgomery Estates, Inc.*, 163 Wis. 2d 973, 473 N.W.2d 506 (Ct. App. 1991). Even a disclaimer will not necessarily avoid a finding of a contract, however, if the employer's agents represent that the handbook is binding on the employer. *Clay v. Horton Mfg. Co.*, 172 Wis. 2d 349, 493 N.W.2d 379 (Ct. App. 1992); *Ferraro*, 124 Wis. 2d at 158-59, 368 N.W.2d at 669.
- Handbook provisions that are stated in language that is permissive and that provide the employer with discretion aid in avoiding a finding of a contract based on an employee handbook. *Bantz*, 163 Wis. 2d 973. In contrast, language that mandates how the employer must behave is more likely to result in the finding of a contractual relationship. *Id.*
- Similarly, handbooks that are drafted as mere "guidelines" for employees, rather than as definite rules regulating discipline and discharge, are more likely to be found to maintain the at-will employment status. See, e.g., *Wolf v. F & M Banks*, 193 Wis. 2d 439, 534 N.W.2d 877 (Ct. App. 1995).
- Furthermore, a contract is not created if the employer reserves the right to unilaterally change the handbook terms without notice. *Bantz*, 163 Wis. 2d 973; *Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.*, 229 Wis. 2d 751, 601 N.W.2d 318 (Ct. App. 1999).

**Public Policy Exception.** Wisconsin courts recognize a narrow public policy exception to the at-will employment doctrine. Under the exception, an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy clearly stated in existing law. *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983); *Batteries Plus, LLC v. Mohr*, 2001 WI 80, 244 Wis. 2d 559, 628 N.W.2d 364. The constitution, a statute, or an administrative regulation can act as the existing law that is the source for the exception. *Winkelman v. Beloit Mem'l Hosp*, 168 Wis. 2d 12, 483 N.W.2d 211 (1992). Employees discharged for refusing to violate public policy may recover contract damages, including reinstatement and back pay, but cannot recover attorney's fees. *Id.* at 28-29.

**Bad Faith in the Employment Relationship.** Wisconsin courts have expressly rejected a cause of action against employers based on a violation of an implied covenant of good faith and fair dealing. *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983). See also *Hale v. Stoughton Hosp. Ass'n, Inc.*, 126 Wis. 2d 267, 376 N.W.2d 89 (Ct. App. 1985).

Tortious Interference with Contract. An employer may be liable in Wisconsin for tortious or intentional interference with contract where the employer has interfered with the employment contract between an employee and another employer so as to cause the employee's termination or other breach of the contract. At-will employees may assert such a claim in Wisconsin. See, e.g., *Lorenz v. Dreske*, 62 Wis. 2d 273, 214 N.W.2d 753 (1974).

Defamation, Libel and Slander. Wisconsin courts recognize a limited cause of action against employers for defamation. See, e.g., *Zinda v. Louisiana Pacific Corp.*, 149 Wis. 2d 913, 440 N.W.2d 548 (1989). However, Wis. Stat. § 895.487 grants immunity from all civil liability to an employer who gives reference information concerning an employee or former employee, unless a lack of good faith on the part of the employer is shown by clear and convincing evidence. A presumption of "good faith" may be rebutted only on a showing that: (a) the employer knowingly provided false information in the reference; (b) the employer provided the reference maliciously; or (c) the employer provided the reference in violation of the Wisconsin Fair Employment Act.

## Chapter 6 – Environmental Law

### Federal Considerations

Resource Conservation and Recovery Act ("RCRA"): 42 U.S.C. § 6901, et seq. RCRA's primary goal is to control the generation, transportation, storage, treatment, and disposal of hazardous waste. The administration of RCRA has been delegated to a number of states by statute (including to South Carolina through the Hazardous Waste Management Act) and, therefore, the states regulate most aspects of hazardous waste management within their borders.

- By statute, the disposal of hazardous waste is prohibited except in accordance with a permit. Section 7003 of RCRA authorizes the Federal Environmental Protection Agency (the "EPA") to bring suit against any person or entity contributing to the handling, storage, treatment or disposal of a hazardous waste in a manner presenting an imminent and substantial endangerment to health or the environment.
- RCRA was amended in 1984 by the Hazardous and Solid Waste Amendments of 1984, which added new requirements pertaining to groundwater contamination. Currently, a permit for a treatment, storage or disposal facility must detail required corrective action for any release of hazardous waste from any solid waste management unit, regardless of when the waste was placed on the site.

The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"): 42 U.S.C. § 9601, et seq. CERCLA, or Superfund as it is commonly called, was enacted in 1980 to provide for the clean-up of abandoned disposal sites. It also provides a vehicle for the EPA to recover for damage to natural resources caused by hazardous substance releases. This statute has possibly generated more litigation and controversy in the past decade than any other federal legislation.

- CERCLA allows the government and private parties to sue "potentially responsible parties," or "PRPs" for reimbursement of clean-up costs caused by releases, actual or threatened, of hazardous substances. Liability is strict, joint and several, with little or no regard for causation. By statute, there are four categories of persons liable for clean-up costs:
  - "Owners or operators" of the contaminated facility. A "facility" is virtually any place in which a hazardous substance is found. The current owner or operator is liable, regardless of when the hazardous substance was disposed of at the facility and whether the present owner or operator did anything to contribute to the release.
  - "Owners or operators" of the facility at the time of release of the hazardous substances. Any person who contracted or arranged to have hazardous substances taken to, disposed of, or treated at a facility. This category generally applies to generators and manufacturers.
  - Transporters of hazardous substances.
- There are limited defenses under Superfund that are narrowly construed. A PRP can escape liability if it can establish that the hazardous substance release was caused solely by an act of war, an act of God, or an act of unrelated third parties. This latter



"third party" defense does not apply if the damage from hazardous substances was caused by an employee or agent of the PRP, or a third party acting in connection with a contract with the PRP.

The Clean Air Act ("CAA"): 42 U.S.C. §7401, et seq. The CAA regulates air pollutants under federal standards implemented and enforced by the states. The Act was amended in 1990 to add several new programs, including acid rain control and stratospheric ozone protection programs, coupled with modification of existing programs for attaining the national ambient air quality standards ("NAAQS") and reducing emissions of hazardous air pollutants. Because of the nature of air pollution and its sources, this program is generally considered to be the most complex of the federal environmental programs.

- Under the Act, air emissions are regulated through various controls. EPA is expected to issue standards for 150 to 200 industrial source categories of air pollutants by the year 2000. The sources that will be affected range in size from large petrochemical complexes to neighborhood dry cleaners.
- The CAA, as amended, requires a new operating permit for all "major" air sources, with state administration and enforcement. A significant new feature is a permit fee based on tons of pollutants emitted on an annual basis; the permit fees are to fund and support the state operating permit programs.

The Clean Water Act ("CWA"): 33 U.S.C. § 1251, et seq. The CWA regulates the discharge of pollutants into all navigable waters. The CWA prohibits the discharge of any pollutant into the water of the U.S. unless a permit has been issued. Permits are issued by either the state under an approved state program or by the EPA if the state program has not been approved. South Carolina's program has been approved. The permit limits are based upon EPA's effluent limitation regulations and are incorporated into a National Pollutant Discharge Elimination System ("NPDES") permit.

- The CWA effluent limitations for industrial dischargers will also specify standards for pretreatment for those who discharge to a publicly owned treatment work. In 1990, EPA promulgated new rules regarding permits for storm water discharges under the NPDES permit program.

#### Solid Waste Program (Subtitle D)

- Encourages states to develop comprehensive plans to manage non-hazardous industrial solid waste and municipal solid waste,
- Sets criteria for municipal solid waste landfills and other solid waste disposal facilities, and
- Prohibits the open dumping of solid waste.

#### Hazardous Waste Program (Subtitle C)

## State of Wisconsin Considerations

### Regulatory and Enforcement Agencies

Wisconsin Department of Natural Resources (DNR) <http://dnr.wi.gov/>

- DNR is the primary environmental regulatory agency in Wisconsin. DNR's jurisdiction includes the traditional environmental regulatory areas of air, water, solid, and hazardous waste management. DNR exercises its jurisdiction pursuant to state law and delegated authority from the EPA. DNR's authority also includes forestry, parks and recreation, fish and wildlife management, endangered resources, and law enforcement.
- DNR recently completed a major internal reorganization that led to the relocation of several commonly used permitting programs in an effort to better serve permit applicants and improve efficiency. Two new internal divisions that businesses are likely to interact with are the Environmental Management Division and the Business Support and External Services Division.
- DNR also administers the Small Business Environmental Assistance Program. DNR formerly administered the State's Petroleum Environmental Cleanup Fund Award (PECFA) program. Under 2015 Wisconsin Act 55, the PECFA program has sunset. As of July 20, 2015, no new sites are being accepted into the program.

Wisconsin Economic Development Corporation (WEDC) <http://wedc.org>

- WEDC administers state-funded grant programs addressing the redevelopment of contaminated property (brownfields).

Wisconsin Department of Safety and Professional Services (DSPS) <http://dsps.wi.gov>

- The DSPS has statutory authority to establish statewide standards for erosion control at construction sites of public buildings and buildings that are places of employment. DSPS also regulates, pursuant to a Memorandum of Understanding with DNR, regulates erosion control activities at commercial building sites of one acre or larger.

Wisconsin Department of Justice (DOJ) <http://www.doj.state.wi.us>

- DOJ, also known as the Office of the Attorney General, is responsible for enforcement of the state's environmental regulatory laws in the courts. The Assistant Attorneys General at DOJ represent the various state agencies in prosecution and defense of judicial proceedings. DOJ generally receives its cases upon "referral" from the appropriate state agency, and the Assistant Attorney General assigned to the case works closely with the agency's legal counsel and technical staff. DOJ also has independent public nuisance prosecution authority.

## Regulatory Programs

### Air Pollution

- Wis. Stat. Ch. 285; Wis. Admin. Code NR 400–499  
<http://dnr.wi.gov/topic/AirQuality/>  
<http://dnr.wi.gov/topic/AirQuality/rules.html>
- DNR administers the state air pollution control program. To manage the state's air quality, DNR uses both a network of air quality monitors and a series of air pollution control rules that limit emissions from air pollution sources based on various criteria. In addition, the EPA has authorized DNR to implement certain federal requirements under the Clean Air Act that are contained in the Code of Federal Regulations.

- To ensure that facilities meet their emission limits, the DNR Air Management Program uses tools such as air pollution control permits; compliance inspection of facilities; annual continuous emission testing or periodic emission testing ("stack testing"); and annual emission inventory reports and certifications. Air program requirements are periodically examined and revised as necessary to reflect factors such as:
  - changing state and federal mandates,
  - improved control technology,
  - increased knowledge of how human health is affected by varying exposures to air pollutants, and
  - increased knowledge of how pollutants affect plants, animals, soils and water resources.
- In 2006, DNR created the registration operation permit (ROP) for the air program. The ROP attempts to streamline the air permitting program for small sources, in order to make the permitting process quicker, more uniform and less costly to administer. The ROP also has less stringent monitoring requirements, and enables facilities to begin construction sooner. There are now three types of ROPs available to facilities in Wisconsin. The Type A ROP is available to facilities whose actual emissions are, and will continue to be, less than 25% of the major source thresholds (except for lead emissions, which will be limited to 0.5 tons per year). The Type B ROP applies to facilities with emissions up to a 50% major source threshold, and the Type C ROP applies specifically to printer facilities and contains requirements similar to the Type A ROP, except that there are higher thresholds for Hazardous Air Pollutants emissions.
- The Federal CAA requires each state to operate a small business assistance program to help small businesses understand and comply with state and federal air pollution regulations. The Wisconsin Small Business Environmental Assistance Program is a free, confidential, and non-regulatory resource to small business owners throughout the state. DNR administers this program in Wisconsin. It includes industry-specific resources designed to help businesses determine their environmental obligations and improve sustainability.
- In 2015, DNR updated the suite of regulations (the NR 400 series) that implement Wisconsin's air management program. Specifically, the changes were designed to simplify and streamline the permitting program. The changes include allowing a broader range of pre-permit construction activities while a construction permit is pending and exempting "natural minor sources" (facilities that have a maximum emissions threshold below certain prescribed levels) from the requirement that they obtain an operating permit.

#### Wastewater—Wisconsin Pollution Discharge Elimination System (WPDES), Water Quality, and Wastewater Treatment

- Wis. Stat. Ch. 283; Wis. Adm. Code Ch. NR 200 & NR 208  
<http://dnr.wi.gov/topic/wastewater/permits.html>
- DNR regulates municipal, industrial, and significant animal waste operations that discharge wastewater to surface or groundwaters through the WPDES permit program.

The WPDES permits establish the performance standards for the discharger's wastewater treatment systems and set numeric criteria that the discharger must meet. The permit is the discharger's approval to discharge a set quantity of wastewater at a specific location. The permits are issued for a maximum 5-year time frame. In addition to discharge based permit programs such as the WPDES, the DNR has initiated numerous overall water quality based planning and assessment programs.

- With regard to wastewater treatment, publicly and privately owned domestic wastewater treatment facilities are required to conduct a Compliance Maintenance Annual Report (CMAR) pursuant to Chapter NR 208. The chapter's requirements also apply to owners of a sanitary sewer collection system covered by a WPDES permit. The CMAR is a self-evaluative tool by which owners of wastewater treatment facilities measure the performance of the facility and assess its level of compliance with permit requirements for a given year. The CMAR is designed to encourage and perhaps require owners of treatment facilities to take action to prevent violations of permit effluent limits and to avoid water quality degradation.
- In *Andersen v. DNR*, 2011 WI 19, 332 Wis. 2d 41, 796 N.W.2d 1, the Wisconsin Supreme Court held that DNR's authority and, in turn, the scope of administrative review for challenges to WPDES permits, was limited to challenges based on state law.
- DNR promulgated stringent statewide water quality standards for phosphorus and additional rules to guide implementation of those new standards in 2010. See Wis. Admin. Code Chs. NR 102 and 217. In 2014, shortly before those standards were to go into effect, the legislature passed a law creating a multi-discharger variance, or MDV. The MDV is a form of "legislated variance" that extends the time for point source dischargers to comply with new stringent phosphorus standards by making payments that will be used to reduce nonpoint phosphorous contributions to Wisconsin surface waters. EPA approved Wisconsin's phosphorous MDV in early 2017.
- 2011 Wisconsin Act 151 granted DNR authority to administer a program that oversees the trading of water pollution control credits. Wis. Stat. § 283.84(6). This program was created largely in reaction to the initial adoption of stricter phosphorus standards. The water quality trading program remains available, though rarely used, to WPDES permit holders to obtain compliance with effluent limits such as phosphorus standards. The trading program allows a WPDES permit holder to comply with its WPDES permit effluent limits by entering into a binding written agreement with another party that requires the other party to reduce their pollutant load by more than they are already required to by permit, granting the net reduction credit to the initial WPDES permit holder.

#### Storm water/Runoff Management

- Wis. Stat. Ch. 283; Wis. Adm. Code Chs. NR 151 & NR 216  
<http://dnr.wi.gov/topic/stormwater/>
- DNR regulates urban and rural storm water runoff that comes from such sources as construction sites, lawns, streets and parking lots and drains into storm sewers to be discharged to rivers, streams, lakes and groundwater without treatment. Those affected by the rules include municipalities, industrial dischargers, and construction site

dischargers. For example, Chapter NR 151 contains performance standards for both agricultural and non-agricultural facilities designed to protect water quality by preventing polluted runoff from entering waterways.

- In addition, Chapter NR 216 provides for permitting programs aimed at controlling and reducing storm water runoff from various entities. First, Ch. 216 requires that numerous specified Wisconsin municipalities obtain coverage under a municipal storm water discharge permit. Additionally, Ch. 216 requires that certain industrial facilities obtain coverage under an industrial storm water discharge permit and develop and implement a site-specific storm water pollution prevention plan. Finally, Ch. 216 requires that owners of large construction sites that involve land disturbing activities affecting one or more acres obtain coverage under a construction site storm water discharge permit and ensure that site-specific erosion and storm water management plans are in place at the construction site. General stormwater discharge permits for municipalities, industrial areas, and construction activities have been developed by DNR under the WPDES program.
- In 2010, the Wisconsin Supreme Court issued an opinion addressing common law liability for the flow of surface water discharges over adjacent properties. The court stated that Wisconsin has adopted the reasonable use rule which provides that a land owner may alter the flow of surface waters from his property without incurring liability so long as the flow of surface water is reasonable. See *Hocking v. City of Dodgeville*, 2009 WI 70, 318 Wis. 2d 681, 768 N.W.2d 552.
- Also in 2010, DNR promulgated revised non-point source runoff management performance standards at Wis. Admin. Code Chapters NR 151, 153 and 155. The revised standards clarified prior performance standards, increased regulation of certain non-point sources and modified some criteria for obtaining cost-sharing from the State of Wisconsin. In 2016, DNR announced that it would begin a rulemaking effort to update NR 151 to include a targeted performance standard designed to enhance protect groundwater quality in certain hydrologically sensitive regions of the state.

#### Solid Waste Management

- Wis. Stat. Chs. 287, 289; Wis. Admin. Code Ch. NR 500  
<http://dnr.wi.gov/topic/waste/solid.html>
- DNR administers the regulation of the generation, transportation, treatment, storage, and disposal of solid waste, including standards for the siting, operation and closure of solid waste disposal facilities. For example, Wisconsin has established a comprehensive and unique program for the siting of landfills. Under this program, the landfill proponent has the obligation to negotiate operating conditions and related commitments with the municipality in which the proposed landfill will be located in exchange for waiver or approval of local permits by the municipality. The program further provides for arbitration before the Wisconsin Waste Facility Siting Board in the event the parties cannot reach a negotiated agreement.
- In 2009, the legislature enacted Act 44, prohibiting the sale in Wisconsin of certain mercury-containing products, such as thermometers, thermostats, manometers and other instruments and devices. Act 44 also prohibits the sale of certain mercury-

containing household items and cosmetics. Act 44 does provide a mechanism for manufacturers of mercury containing products to petition DNR for exemption from the statute's prohibitions, but any manufacturer seeking an exemption must have certain safety systems in place and meet other criteria to qualify for exemption.

- Also in 2009, the legislature enacted Act 50, prohibiting the disposal of certain household electronic devices in landfills or incinerators unless those devices cannot be recycled. Act 50 requires television and computer monitor (seven inches or longer), computer and printer manufacturers to recycle a certain amount of those devices on an annual basis. Act 50 also provides that recycling credits are available to manufacturers that exceed recycling targets while shortfall fees are assessed against those that do not meet the target.
- In 2013, DNR promulgated administrative rules to address increased interest in composting. The rules established voluntary quality standards for high-quality compost and created a class of "source-separated compostable material" that can be composted with little environmental or public health risk.

#### Hazardous Waste Management

- Wis. Stat. Ch. 291; Wis. Admin. Code Ch. NR 600  
<http://dnr.wi.gov/topic/waste/hazardous.html>
- DNR administers "cradle-to-grave" management of hazardous waste, including standards for the operation and closure of facilities which generate, transport, treat, store, and dispose of hazardous waste. DNR has received approval to administer this program, along with the program under the Solid Waste Facilities Statute and its implementing regulations, in lieu of the federal RCRA program.
- Wisconsin's hazardous waste and used oil rules are contained in the NR 600 series. The rules are based on EPA's hazardous waste and used oil rules. Wisconsin's rules adopt federal rule changes and closely follow the organization and content of the federal rules. The rules are also relatively consistent with other states' hazardous waste and used oil rules.

#### Hazardous Substance Spills

- Wis. Stat. Ch. 292; Wis. Admin. Code Ch. NR 700  
<http://dnr.wi.gov/topic/spills/>
- Wis. Stat. § 292.11, as implemented and administered by the DNR spills program, establishes requirements for the notification, investigation, and remediation of releases of a hazardous substance by a person who "possesses or controls" a hazardous substance or "causes the discharge" of a hazardous substance. Case law has interpreted this statute broadly. *In State v. Mauthe*, 123 Wis. 2d 288 (1985), the court held that this statute (the "Spill Statute") imposed liability on the current owner of property where hazardous substances had been released even though that owner did not cause the contamination. In *State of Wisconsin v. Chrysler Outboard Corp.*, 219 Wis. 2d 130 (1998), the court interpreted the term "cause" as used in the Spill Statute very broadly to include conduct which took place before enactment of the statute in 1978 and imposed liability for investigation and cleanup on former owners of contaminated

property and on generators of hazardous substances who sent wastes off-site for disposal.

- If a responsible party is unable or unwilling to report or remediate the hazardous spill as required by the Spill Statute, DNR is authorized to identify, locate, monitor, contain, remove, or dispose of the hazardous substance or take any other emergency action that it deems appropriate.

#### Water Withdrawals

- Wis. Stat. Ch. 281; Wis. Admin. Code Ch. NR 800  
<http://dnr.wi.gov/topic/wells/http://dnr.wi.gov/topic/wells/highcapacity.html>
- The construction and operation of high capacity wells is regulated by DNR. A well (or well system) is considered “high capacity” if it has the capacity to pump more than 70 gallons per minute, or 100,000 gallons per year. Permits are issued by DNR in accordance with criteria provided in Wis. Stat. § 281.34 and Wis. Admin. Code Ch. NR 812.09.
- In 2011, the Wisconsin Supreme Court held that, despite the regulatory framework set out in Wis. Stat. chapter 281 and chapter NR 800, DNR has a duty to consider the public trust doctrine when issuing high capacity well permits. The court held that DNR “has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state.” *Lake Beulah Management District v. Dep’t of Natural Res.*, 2011 WI 54, at 3 (July 6, 2011).
- Pursuant to the Court’s holding, DNR “is required to consider the environmental impact of a proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to waters of the state” and that DNR should use “both its expertise in water resources management and its discretion to determine whether its duty as trustee of public trust resources is implicated by a proposed high capacity well permit application.” *Id.* at 29-30.
- In a companion case, the Wisconsin Supreme Court held that a local ordinance purporting to require permits for certain wells that withdraw water from the area around Lake Beulah was preempted by the legislature’s grant of authority to DNR to regulate high capacity wells. *Lake Beulah Mgmt. Dist. v. Village of East Troy*, 2011 WI 55 (July 6, 2011).
- In 2013, the Wisconsin Legislature passed Act 20, which prohibits citizen challenges to high capacity well approvals or applications on the basis that the State failed to consider cumulative environmental impacts of the proposed well together with existing wells.
- Wisconsin is a party to the Great Lakes Compact (GLC), which is a formal agreement among Great Lakes states to address water withdrawals and diversions of Great Lake water outside the Great Lake basin. Pursuant to the GLC, DNR has promulgated rules requiring registration, reporting and permitting of high capacity water withdrawals within the State. See Wis. Admin. Code Chapters NR 852, 856, 860. To the extent practicable, the GLC rules have been made consistent with prior high capacity well permitting and reporting rules, and certain withdrawals in the Lake Superior or Lake Michigan basin may require additional analysis from DNR and the applicant to be approved.

## Brownfields Redevelopment

- <http://www.dnr.state.wi.us/org/aw/rr/rbrownfields/index.html>
- Specific provisions of the Spill Statute are designed to facilitate Brownfields cleanup through exemptions for municipalities which acquire contaminated property through tax delinquency or bankruptcy, through limitations on the application of more stringent standards adopted post-cleanup, and through liability exemptions for lenders, personal representatives, property owners impacted by off-site discharges, and participants in Wisconsin's Voluntary Party Cleanup Liability Exemption Program.
- Investigation and remediation of contaminated properties is regulated by the NR 700 series of the Wisconsin Administrative Code. In 2013, after years of development by DNR and stakeholders, significant revisions to the NR 700 series went into effect. The 2013 changes included the adoption of new vapor intrusion rules and significant changes to soil cleanup standards. The revisions also provide changes that should speed the remediation process.

## Navigable waters, wetlands, floodplain/shoreland zoning, dams and the Public Trust Doctrine

- Wis. Stat. Chs. 30 & 31; Wis. Admin. Code Chs. NR 103 & NR 300.  
<http://dnr.wi.gov/topic/shorelandzoning/>
- DNR regulates any activities within certain distances of and/or affecting any navigable body of water. "Navigability" is defined broadly to include all water bodies capable of floating a boat of the shallowest draft during the spring flood season. Wisconsin water law is based on the doctrine of riparian rights, slightly modified by the doctrine of prior appropriation rights. Riparian owners on streams and rivers own the bed to the thread, subject to the Public Trust Doctrine which holds all navigable bodies of water open to public use. The State owns the bed of all lakes under the Public Trust Doctrine, subject to the riparian owners' limited rights to reasonable placement of piers, sand blankets, and the like. Boathouses, houseboats, piers, shoreline improvements, structures or fill on the bed of any navigable body of water, and dams are subject to regulation. 2011 Act 167 also authorized DNR to issue general permits for activities regulated in Ch. 30, which is expected to reduce the need for individual permitting of these matters.
- Floodplain and shoreland zoning requirements establish setback requirements and management obligations to protect those areas. In recent years, significant legislative reforms to Wisconsin's shoreland zoning statutes have altered state and local regulatory authority.
- Wisconsin's wetland permitting regime was overhauled in recent years. 2011 Wisconsin Act 118 created a general permitting scheme for certain discharges, including for development activities with minimal wetland impacts or where the coverage under a general permit is consistent with federal wetlands regulation.
- For discharges to wetlands that must obtain an individual permit, Act 118 maintained requirements to avoid, minimize, and mitigate adverse effects on wetlands. It expanded the range of "practicable alternatives" which must be considered when deciding which alternative is the "least environmentally damaging" practicable alternative, but also narrowed the geographic scope of the practicable alternatives analysis. Notably, Act 118



requires mitigation consistent with federal regulations in any individual wetlands permit, but at a minimum 1.2:1 ratio (meaning that a permit applicant must create or restore 1.2 acres of wetlands for every 1 acre of adversely affected wetlands).

- In November 2014, the DNR and Army Corps of Engineers entered into an agreement to create the Wisconsin Wetland Conservation Trust, a DNR-administered program that will enable the payment of fees in lieu of wetlands mitigation. While access to the program is not guaranteed and depends upon several factors, the program provides additional compliance flexibility for holders of individual wetlands permits.

#### Green Tier Program

- Wis. Stat. § 299.83  
<http://dnr.wi.gov/topic/greentier/>
- The Green Tier program is designed to encourage and reward superior environmental performance by offering a variety of benefits and incentives to participating entities. In order to participate in the program, the individual entity or chartered group must have demonstrated superior environmental performance and must be willing to continue to improve its performance. There are two levels of Green Tier participation. Tier 1 is designed to encourage innovation, collaboration, and new environmental goal setting. Tier 2, which involves more stringent participation requirements, emphasizes superior environmental performance and utilizes contracts between the participating entity and the DNR as a means of providing customized regulatory flexibility in exchange for proportional environmental performance.
- 2009 Wisconsin Act 30 updated elements of the statute to make administering the law more efficient and clear while improving and expanding the law's ability to realize both environmental and business results. Act 30 also allows the DNR secretary to waive certain enforcement record eligibility requirements to participate in the Green Tier program if the waiver is consistent with the purposes of the program and will not erode public confidence in the integrity of the program.

#### Environmental and Agricultural Impact Analysis

- Wisconsin Environmental Policy Act (WEPA)  
Wis. Stat. § 1.11 and pertinent Wis. Admin. Code sections for each agency.
- WEPA requires that each agency of the state consider the environmental implications of any action (permit, approval, license, grant, construction project, etc.) it takes. Each agency has adopted regulations which categorize its actions for initial determinations as to whether an EIS (Environmental Impact Statement) or an EA (Environmental Assessment) must be prepared. Modeled on NEPA, WEPA case law closely tracks the federal interpretations.
- DNR implements its obligations under WEPA in accordance with Wis. Admin. Code Ch. NR 150. In 2014, DNR updated Ch. NR 150. The new NR 150 does away with an EA process to determine whether an EIS should be required and instead categorizes DNR actions into four categories that require varying levels of environmental review.
- Agricultural Impact Statements (AIS)

- Wis. Stat. § 32.035
- The Wisconsin Department of Agriculture, Trade and Consumer protection (DATCP) is required to prepare an agricultural impact statement (AIS) for projects which involve the actual or potential exercise of the power of eminent domain and if any interest in more than five acres of any farm operation may be taken. Designed as part of the state's farmland preservation program, the AIS requirement can be met through preparation of an EIS, if one is being prepared by DATCP or another lead agency. This requirement primarily impacts municipalities and utilities which have condemnation authority.

# Chapter 7 – Intellectual Property

## Federal Law and State Law

Copyright Law: This area is governed exclusively by federal law. Title 17, U.S.C.

- **In General.** Copyright law provides the author of a copyrightable work (or such person's employer in the case of a "work made for hire") with certain specific exclusive rights to use, distribute, modify and display the work. Generally, works are entitled to copyright protection for the life of the author plus 70 years. However, as to works made for hire, as well as anonymous or pseudonymous works, copyright protection is for the shorter of 95 years after publication or 120 years after creation. Anyone who without authority exercises the rights reserved exclusively to the copyright owner is considered to infringe the copyright and may be liable for actual or statutory damages and may be subject to injunctive relief.
- **Copyrightable Works.** Works of authorship that qualify for copyright protection include literary works, musical works (including lyrics), dramatic works, choreographic works, audiovisual works, pictorial, graphic and sculptural works, sound recordings, and architectural works. The Computer Software Copyright Act of 1980 expressly made computer software eligible for copyright protection, a point previously in doubt. The precise scope of copyright protection for computer software has not yet been fully defined. Constantly developing technology is likely to present many new issues, presently unforeseen. All works eligible for copyright protection must meet two specific requirements. First, the work must be fixed in some tangible form; there must be a physical embodiment of the work so that the work can be reproduced or otherwise communicated. Second, the work must be the result of original and independent authorship. The concept of originality does not require that the work entail novelty or ingenuity, concepts of importance to patentability.
- **Advantages of Copyright Registration.** Copyright protection automatically attaches to a work the moment that the work is created. However, "registration" of the work with the U.S. Copyright Office provides advantages. A certificate of registration is prima facie evidence of the validity of the copyright, provided registration occurs not later than five years after first publication. With respect to works whose country of origin is the U.S., registration is a prerequisite to an action for infringement. If the work is registered before infringement or within three months of publication, the copyright owner may be entitled to statutory damages; otherwise, the owner may be entitled to actual damages and infringer profits. Registration also is a useful means of providing actual notice of copyright to those who search the copyright records.
- **Copyright Registration Application Process.** In order to obtain registration of copyright, an application for registration must be filed with the U.S. Copyright Office. The application must be made on the specific form prescribed by the Register of Copyrights and must include the name and address of the copyright claimant, the name and nationality of the author, the title of the work, the year in which creation of the work was completed, and the date and location of the first publication. In the case of a work made

for hire, a statement to that effect must be included. If the copyright claimant is not the author, a brief statement regarding how the claimant obtained ownership of the copyright must be included. An application must be accompanied by the requisite fee, and a copy of the work must be submitted.

- **Copyright Notice.** For works first published on or after March 1, 1989, use of the copyright notice is optional. Before March 1, 1989, the use of the notice was mandatory on all published works. Omitting the notice on any work first published before that date could have resulted in the loss of copyright protection if corrective steps were not taken within a certain amount of time.
- If a copyright notice is used, the notice should be located in such a manner and location to sufficiently demonstrate the copyright claim. The notice should consist of three elements. First should be the symbol of an encircled "C," or the word "copyright," or the abbreviation "copr." Second should be the year of first publication. Third should be the name of the copyright owner.
- **Works Made for Hire.** In a "work made for hire" the employer is presumed to be the author. Authorship is significant because a copyright initially vests in the author. The parties can rebut the presumption of employer authorship by an express written agreement to the contrary. The term "work made for hire" applies to any work created by an employee in the course and scope of employment. On occasion there is dispute as to whether a work created by an employee arose from the employment. Employers often require execution of a formal employment agreement under which the employee expressly agrees that all copyright rights will belong to the employer. A similar agreement is also advisable in connection with the engagement of an independent contractor to perform copyrightable services for a business, but the employer should be aware that only certain types of works may be considered a "work made for hire" when created by an independent contractor. If the particular matter cannot be a "work made for hire," the employer should negotiate an agreement for the assignment of the copyright by the independent contractor.
- **Copyright Protection for Foreign Authors.** Copyright protection is available under U.S. law for foreign authors until the copyrightable work is published. If the work has been published, the availability of continued U.S. copyright protection is dependent upon the location of the publication and the nationality or domicile of the author. Copyright protection continues in the U.S. subsequent to publication if publication by the foreign author occurs in the U.S., or occurs in a country that is a party to the Universal Copyright Convention or to the Berne Convention, or occurs in a country named in a Presidential copyright proclamation. If the work is first published by a foreign author outside the U.S., continued copyright protection in the U.S. is only available if the foreign author is either a domiciliary of the U.S. or a national or domiciliary of a country that is party to a copyright treaty to which the U.S. is also a party. A person is generally a domiciliary of the country in which the person resides with the intention to remain permanently.

**Patents:** This area is governed exclusively by federal law. Title 35, U.S.C.

- **In General.** One who invents a new machine or device or a new manufacturing process may be able to obtain a U.S. patent. A U.S. patent provides the inventor with the

exclusive right for a specified time to make, use, import, offer to sell, or sell in the U.S. the patented invention. Anyone without authority from the patent holder who makes, uses, imports, or sells in the U.S. the patented invention during the life of the patent is considered to "infringe" the patent and may be liable for damages. Direct patent infringement is considered a strict liability tort, and patent rights are enforceable by the patent owner in U.S. federal courts.

- A utility patent, which generally governs the functional aspects of a machine, manufacturing process, or composition of matter is enforceable beginning at the grant of the patent and ending 20 years (plus additional days for certain delays) after the application filing date in the United States (or from certain earlier filed applications to which the subject application claims priority). A design patent, which covers the design or appearance of an article of manufacture, is enforceable for 15 years from the granting date of the patent. A provisional patent, which is filed before a regular patent application, establishes a priority filing date and provides up to 12 months to further develop the invention without filing a regular patent application.
- Effect of Foreign Patents. A foreign patent is generally not enforceable in the U.S. Furthermore, an invention that is the subject of a foreign patent cannot be the subject of a U.S. patent, unless an application for a U.S. patent is filed within one year following issuance of the foreign patent. Accordingly, an inventor who holds a foreign patent and who fails to apply for a U.S. patent within one year from the date of issuance of a foreign patent will usually have no recourse against others who use the invention in the U.S.
- Patentability under Federal Patent Statutes. To be eligible for a federal utility patent, an invention must fall into one of the classes of patentable subject matter set forth in the United States patent statutes. These classes are machines (e.g., a mechanism with moving parts), articles of manufacture (e.g., a hand tool), compositions of matter (e.g., a plastic), and processes (e.g., a method of refining). An improvement falling within any of these classes may also be patentable. Inventions falling outside these categories are not patentable, unless some other statutory provision applies.
- In addition to being within one of the four classes and being fully disclosed, a utility invention must also be:
  - "novel," in that it was not previously patented, described in a printed publication, or in public use, on sale, or otherwise available to the public;
  - "non-obvious" to a person having ordinary skill in the relevant art; and
  - "useful," in that it has utility and actually works.
- A design patent may be obtained for the ornamental design of an article of manufacture. A design patent is generally viewed as weaker protection than a utility patent because the patent protects only the appearance of an article, and not its construction or function. This, however, is very much dependent on the type of component patented.
- A plant patent may be obtained by anyone developing a new variety of asexually reproduced plant, such as a tree or flower. Some plants may also be protectable with a utility patent or under the Plant Variety Protection Act, administered by the United States Department of Agriculture.

- In order to determine the patentability of an invention, it is often useful to search the records of the U.S. Patent and Trademark Office and/or other available databases. A patent search is customarily performed by a patent attorney, patent agent, or other individual with similar technical training. A patent attorney or patent agent may be asked to render an opinion regarding the patentability of a particular invention. An inventor can then make an informed decision as to whether to proceed with the cost of an actual patent application.
- Patent Application Process. A U.S. patent application must be filed with the U.S. Patent and Trademark Office (USPTO). A complete patent application includes four elements. First, the application must include the "specification." The specification is a description of what the invention is and what it does. The specification can be filed in a foreign language, provided that an English translation, verified by a certified translator, is filed within a prescribed period. Second, the application must include an oath or declaration. The oath or declaration certifies that the inventor believes himself or herself to be the first and original inventor. If the inventor does not understand English, the oath or declaration must be in a language that the inventor understands. Third, the application must include drawings, if essential to an understanding of the invention. Fourth, the appropriate fee must be included.
- After a proper application is filed, it is assigned to an examiner at the USPTO with knowledge of the particular subject matter. The examiner makes a thorough review of the application and the status of existing concepts in the relevant technical area to determine whether the invention meets the requirements for patentability. The patent review process generally takes from 18 months to three years, although for a fee expedited examination of an application is available. Rejection of a patent application by the examiner may be appealed to the Patent Trial and Appeal Board. Decisions of the Patent Board may be appealed to the United States Court of Appeals for the Federal Circuit. Provisional patent application requirements are less stringent than a regular patent application. The oath or declaration of the inventor and claims are not required and the application is held for the 12-month period without examination.
- Markings. After a provisional or regular patent application has been filed, the product made in accordance with the invention may be marked with the legend "patent pending" or "patent applied for." After a patent is issued, products may be marked "patented" or "pat.," together with the U.S. patent number. Marking is not required, but it may be necessary to prove marking in order to recover damages in an infringement action (an injunction may also be available as an infringement remedy in special circumstances, as may be attorney fees).
- Rights to Patented Inventions. Disputes sometimes arise between employers and employees over the rights to inventions made by employees during the course of employment. Because of this, employers often require employees to execute formal agreements under which each signing employee agrees that all rights to any invention made by the employee during the term of employment will belong to the employer.

Trademarks: This area is governed by both state and federal law.

- In General. A trademark is often used by a manufacturer to identify its merchandise and to distinguish its merchandise from items manufactured by others. A trademark can be a word, a name, a number, a slogan, a symbol, a device, or a combination. A trademark should not be confused with a trade name. Although the same designation may function as both a trademark and a trade name, a trade name refers to a business title or the name of a business; a trademark is used to identify the goods manufactured by the business. A business that sells services rather than goods may also use a service mark to distinguish its services. Generally, service marks and trademarks receive the same legal treatment.
- Selection of Trademark. A manufacturer should carefully consider the trademark selected for its merchandise. The level of protection against infringement of a trademark varies with the "strength" or "uniqueness" of the trademark. "Descriptive" marks are the weakest and least defensible. A descriptive trademark is a name that describes some characteristic, function, or quality of the goods. A "fanciful" mark, the strongest type of mark, is a coined name that has no dictionary definition.
- Evaluation should also include consideration of the likelihood of success in obtaining federal and state registrations of the trademark. For example, a trademark that is "merely descriptive" cannot be registered under either federal or South Carolina law.
- Selection of a trademark should be accompanied by a trademark search to determine whether another manufacturer has already adopted or used a mark that is the same or similar to the one desired. Publications provide lists of existing trademarks, registered and unregistered, and there are businesses that specialize in trademark searches. Actual and potential trademark conflicts should be avoided, lest the manufacturer become involved in an expensive infringement lawsuit. Of even greater concern is the potential loss of the right to use a mark after considerable expenditure in advertising merchandise bearing the mark.
- Advantages of Trademark Registration. Under the trademark laws of the United States and South Carolina, the principal method of establishing rights in a trademark is actual use of the trademark. "Registration" of a trademark is not legally required but can provide certain advantages.
- Federal registration of a trademark is presumptive evidence of the ownership of the trademark and of the registrant's exclusive right to use of the mark in interstate commerce, strengthening the registrant's ability to prevail in any infringement action. Federal registration is also a prerequisite for bringing a lawsuit under the federal trademark laws.
- After five years of continued use of the mark following federal registration the registrant's exclusive right to use of the trademark becomes virtually conclusive. Federal registration may assist in preventing the importation into the U.S. of foreign goods that bear an infringing trademark. There are also other less tangible advantages of registration, such as the goodwill arising out of the implication of government approval of the trademark.
- State registration provides some advantages, not as extensive as federal registration. State registration is usually advisable, particularly in situations in which a manufacturer's sales will occur only in South Carolina.

- Federal Registration Application Process. 15 U.S.C. § 1051, et seq. Federal trademark registration requires that a trademark application be filed with the U.S. Patent and Trademark Office. The application must identify the mark and the goods with which the mark is used or is proposed to be used, the date of first use, and the manner in which it is used. The application must be accompanied by payment of the requisite fee, a drawing page depicting the mark, and three specimens of the mark as it is actually used. After the application is filed, it is reviewed by an examiner who evaluates, among other matters, the substantive ability of the mark to serve as a valid mark and the possibility of confusion with existing marks. If the examiner rejects the application, the examiner's decision can be appealed to the Trademark Trial and Appeals Board. An adverse decision by that body can be appealed to federal court.
- If the application is approved, the mark is published in an official publication of the Patent and Trademark Office. Opponents of the registration have thirty days after publication, or such additional time as may be granted, to challenge the registration. If no opposition is raised, or if the opponent's claims are rejected, an applicant whose mark is already in use receives a "certificate of registration."
- An applicant whose trademark is proposed for registration before actual use receives, upon approval of the application, a "notice of allowance." An application who receives a notice of allowance must within six months of the receipt of the notice furnish evidence of the actual use of the trademark. The applicant then is entitled to a certificate of registration. Failure to furnish evidence of the actual use of the mark within the time allowed results in rejection of the application.
- Post-Certificate Federal Procedures. A certificate of trademark registration issued by the Patent and Trademark Office remains in effect for ten years. However, registration expires at the end of six years, unless the registrant furnishes evidence of continued use of the trademark. The initial ten-year term of a certificate of registration can be renewed within the term's last six months for an additional ten-year term by furnishing evidence of continued use of the mark and paying a fee.
- After at least five years of continuous use of a trademark following the receipt of a certificate of registration, a registrant can seek to have the status of the trademark elevated from "presumptive" evidence of the registrant's exclusive right to use of the trademark to virtually conclusive evidence of an exclusive right. To do so, the registrant must furnish the Patent and Trademark Office with evidence of continuous use of the trademark for at least five years. Additionally, there must not be any outstanding lawsuit or claim that challenges the registrant's rights to use the mark.



## Chapter 8 – Dispute Resolution

### Federal Court System

The trial courts of the federal court system are the U.S. District Courts. Each district has four federal district court judges who are appointed by the President for life terms upon approval by the United States Senate. Appeals are to the Seventh Circuit Court of Appeals.

The federal district courts are courts of limited jurisdiction. The types of cases they may hear are mandated by both the U.S. Constitution and federal statute. They have exclusive jurisdiction over bankruptcy, patent and copyright, antitrust, postal matters, internal revenue, admiralty, and federal crimes, federal torts, and customs. All other jurisdiction is concurrent with that of the state courts. There are generally two ways to gain access to the federal district courts when there is such concurrent jurisdiction. First is diversity jurisdiction, which involves disputes between citizens of different states with an amount in controversy exceeding \$50,000. To be brought in federal court, there must be complete diversity, i.e., none of the plaintiffs may be a citizen of the same state as any of the defendants. The second primary basis involves a federal question, i.e., presenting an issue arising under the Constitution, statutes, or treaties of the United States. If a party's case does not fit within one of the statutorily mandated jurisdictions, there is no recourse to the federal courts.

The workings of the federal district courts are governed by the Federal Rules of Civil Procedure, promulgated by the U.S. Supreme Court and approved by the U.S. Congress. These are a uniform body of procedural rules applicable to every federal district court in the U.S. Each federal district court also establishes its own rules applicable only to the procedure in that district court.

These rules often set forth very specific guidelines for the handling of an action, and close attention must be paid to them. Thus, one participating in a suit in federal district court must be aware of that court's local rules as well as the Federal Rules of Civil Procedure.

### State of Wisconsin Court System

#### Wisconsin State Courts

The Wisconsin state court system is organized into three tiers. The circuit court is the lowest-level state court. The Court of Appeals is at the intermediary level. The highest tier is the Wisconsin Supreme Court. In addition, local communities may establish their own municipal court system pertaining to municipal ordinances.

- Trial Courts in Wisconsin
  - Circuit Courts. In Wisconsin, the circuit court is the trial court of general jurisdiction and has original jurisdiction over civil and criminal matters unless another court has been given exclusive jurisdiction. The circuit court may also hear appeals from municipal courts and review state agency decisions.
    - With the exception of three two-county circuits, each circuit contains only one county and is bounded by the county lines. Circuit judges are elected

to six-year terms. Currently, there are 249 circuit court judges in Wisconsin. Interim vacancies are filled by gubernatorial appointees. Chief judges are appointed by the supreme court and serve two-year terms supervising each of the ten administrative districts into which the circuit courts are divided. All circuit courts follow Wisconsin civil procedure, codified in Chapters 801-807 of the Wisconsin Statutes. Individual county circuit courts may have local rules governing deadlines, motions practice, discovery and other matters. Some county circuit courts, including Milwaukee County, are subdivided into subject matter dockets (e.g., criminal, civil, probate, family law, juvenile law, etc.). In those subdivided counties, judges rotate between divisions at set intervals. When a judge “rotates off” a case, a new judge is assigned.

- The circuit courts are also served by court commissioners, who are attorneys licensed to practice law in Wisconsin. Depending on the size of the county, a county may have full or part-time court commissioners authorized to conduct much court business on their own.
- Municipal Courts

Under the Wisconsin Statutes, cities, villages and towns are also authorized to establish municipal courts, which have exclusive jurisdiction over municipal ordinance violations having monetary penalties. Municipal judges are elected to terms of two to four years, depending on the local governing body.
- The Wisconsin Supreme Court

The Wisconsin Supreme Court serves as the highest tribunal for all state cases involving issues not appealable to the United States Supreme Court and is the final authority on the Wisconsin Constitution. The Supreme Court consists of seven justices elected to 10-year terms. Vacancies are often filled by gubernatorial appointees, however, because the Wisconsin Constitution provides that only one justice may be elected in any given year. Appointees then serve until they are replaced by an elected justice. The Chief Justice is chosen by seniority.
- Court of Appeals
  - The court of appeals exercises appellate jurisdiction and possesses supervisory authority over all lower courts within the state. As a matter of right, final judgments and orders of the circuit courts can be appealed to the court of appeals. The court also has discretion to hear appeals of other judgments and orders.
  - The court of appeals consists of sixteen judges elected in four districts. These four districts are headquartered in Milwaukee, Waukesha, Wausau, and Madison. The judges sit for six-year terms. No more than one appeals court judge can be elected in any district in any given year, and each judge must live in the district in which he or she is elected.

An appeal usually is heard by a panel consisting of three judges. Although a single judge can hear certain types of cases, any party may request that the case

be heard by the full panel. Whether a case will be heard by the full panel is a decision left to the chief judge, who is named by the supreme court for a three-year term.

- The court of appeals generally hears cases in the order in which appeals are filed, but may give preference to criminal cases when it can do so without undue delay to the civil cases. The court predetermines in each case whether oral arguments are necessary, and if not, the court decides the case on the bases of the trial court records and the written briefs submitted. Oral argument at the court of appeals level is fairly rare.

- Supreme Court

Appellate jurisdiction in the Supreme Court is permissive, not a matter of right. In order to exercise appellate jurisdiction upon request of a party, three justices must agree to grant the requesting party's petition for supreme court review. The court also may accept cases that the court of appeals certifies to it. When the court of appeals requests supreme court certification, it is generally on an issue of first impression and statewide importance. The Supreme Court also possesses the authority to decide to review a matter before the court of appeals. Finally, a case may come to the Supreme Court through original jurisdiction. The court will only accept original jurisdiction of a case if four of the seven justices agree.

## Chapter 9 – Financing Investments

### Tax-exempt Financing Opportunities in Wisconsin

Tax-exempt financing is available for a wide range of purposes to the various local governmental units in the State of Wisconsin. Bonds and promissory notes may be issued by counties, cities, towns, villages, technical college districts, sewerage districts, school districts and other governmental entities. Generally, the laws governing the issuance of such public debt is governed by Wisconsin State Chapter 67.

With respect to tax-exempt financing for private companies, the Wisconsin Economic Development Corporation's Industrial Revenue Bond Program ("IRB") allows various Wisconsin Governmental bodies, including cities, villages, community development authorities, the recently created Public Finance Authority and towns to support industrial development through the sale of tax-exempt bonds. Generally, federal law defines eligible projects for such IRB transactions. IRBs are a means of financing the construction, expansion and/or equipping of, primarily, manufacturing facilities.

### Commercial Banking Opportunities in Wisconsin

Wisconsin has a strong system of intrastate banking. According to the Division of Banking of the Wisconsin Department of Financial Institutions, there are approximately 170 Wisconsin state-chartered banks and 14 Wisconsin savings institutions. Many national banks maintain a significant presence in Wisconsin, as described below. Wisconsin banking institutions offer a wide array of financing alternatives, including real estate loans, construction loans, agricultural loans, commercial loans, and Small Business Administration loans. The Wisconsin Department of Financial Institutions regulates and supervises the various financial industries within the state.

### Out-of-state Financial Institutions in Wisconsin

Several large out-of-state financial institutions maintain significant presences in the State of Wisconsin. Each provides a full range of commercial and personal banking services in the State of Wisconsin. From largest to smallest in terms of Wisconsin presence, the five largest are:

- BMO Harris Bank N.A. maintains a very large presence in the State of Wisconsin, largely through the acquisition, in July, 2011, of M&I Marshall & Ilsley Bank. Prior to the acquisition, M&I was the largest bank in the State of Wisconsin that was based in the State of Wisconsin.
- U.S. Bank National Association maintains a very large presence in the State of Wisconsin, largely through the acquisition and merger of First Wisconsin Bank into U.S. Bank National Association in 2002.
- JPMorgan Chase Bank N.A. maintains a very large presence in the State of Wisconsin, largely through the acquisition and merger of Bank One, NA into JPMorgan Chase Bank N.A. in 2004.
- PNC Bank, National Association

- Wells Fargo Bank, National Association

## Prominent Foreign Banks in Wisconsin

Other than BMO Harris Bank N.A., whose ultimate parent holding company is based in Canada, there are no foreign (i.e. non-United States of America) banks that maintain any significant presence in the State of Wisconsin.

## Wisconsin Securities Issues

Registration of securities:

A person must register an offering and sale of any security unless it qualifies for a state or federal covered securities registration exemption. Wis. Stat. 551.302. Registration involves the compilation and filing of registration materials with the Wisconsin Department of Financial Institution's Division of Securities (the "WDFI Division"). Wis. Stat. 551.303-304. Registration may also be filed with the WDFI Division either by coordination or qualification. Id. Registration by coordination may be used if a statement has already been filed with the SEC in connection with the same offering. Registration by qualification may be used for filings by issuers relying on a federal exemption including Regulation A (Tier 1), Regulation D (Rule 504), or the intrastate "safe harbor" provision of Rule 147.

Registration exemptions:

- **25 or fewer security holders:** Offerings of securities in which the issuer has no more than 25 security holders following the offering (excluding certain institutions and individual accredited investors).
- **25 or fewer offers:** Transactions in which there are no more than 25 offers directed to not more than 25 persons (excluding certain institutions and individual accredited investors) in Wisconsin during any 12 month period.
- **Federally covered securities:** Covered securities receive a federally imposed exemption on the state level. This includes securities listed or authorized for listing on the New York or American Stock Exchange, the NASDAQ Stock Market, or a similar determined listing standard. This also includes securities issued by an investment company registered under the Investment Company Act of 1940.
- **Federal Regulation D-Rule 506 exemption:** Offers and sales of securities made in reliance on the exemptions provided by Rule 506 of Regulation D under the Securities Act of 1933.
- **Federal Regulation D-Rule 505 repeal:** Before October 2016, Wisconsin allowed exemption for transactions made in reliance on exemption provided by Rule 505 of Regulation D under the Securities Act of 1933. Wisconsin's legislature has not yet amended section 551.23(19) to incorporate the recent repeal of Rule 505.

Broker-dealer, investment advisor registration:

- **Broker-Dealer:** A firm or individual who offers and sells securities to the public, regardless of its location, must be licensed to conduct business in Wisconsin. There is no de minimis or sophisticated investor exemption for broker-dealers.
- **Investment Adviser:** Any person who, for compensation, engages in the business of advising others related to the value of securities, investment of securities, sale of securities, or issues analyses or reports related to securities. Wisconsin state regulated investment advisers must register as an investment adviser with the WDFI Division if they have a place of business in Wisconsin or if they have more than five Wisconsin clients in a 12 month period. This registration requirement does not include an individual who performs only clerical or ministerial acts. Federally-regulated advisers only need to make a notice filing with the WDFI Division if they have a place of business in Wisconsin or if they have more than five Wisconsin clients in a 12 month period.

Antifraud provisions:

- **Sales and Purchases:** It is unlawful for any person, in connection with the offer, sale or purchase of any security in Wisconsin, to employ any device or scheme to defraud; to make any untrue statements of material fact or omit material factual statements; and to engage in any act, practice, or business course which would operate fraud.
- **Market manipulation:** It is unlawful for any person to effect any transaction in a security, which involves no change in the beneficial ownership, for the purpose of creating a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security; to create actual or apparent active trading in the security or raising or depressing the price of the security, for the purpose of inducing the purchase or sale of the security by others; or inducing the purchase or sale of any security through disseminating information that the price of the security to the effect that the price of the security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the price of the security.
- **Broker-dealer activities.** It is unlawful for a broker-dealer to effect in Wisconsin any transaction in, or to induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.
- **Advisory activities.** It is unlawful for a person, in connection with the offer, sale, or purchase of a security: to employ any device, scheme or artifice to defraud another person; or to engage in any act, practice, or business course which operates or would operate as a fraud or deceit upon the other person.

# Chapter 10 – Real Estate

## Ownership

Who can hold title in Wisconsin?

- Title may be held by any individual, corporation, partnership, limited liability company, or trust subject to the limitations on ownership of property by aliens as further described below.

When can an individual own property in your state? Explain. Be sure to include information concerning foreigners.

- Real property may be owned by both single and married individuals. Wisconsin law does not impose an age limit related to the ownership of property. However, the age of majority in Wisconsin is 18 by which an individual may enter into a legally enforceable contract. Therefore, an individual under that age is restricted in purchasing real estate but may acquire real estate through gift or inheritance at any age. Aliens may acquire land but may not acquire, own or hold any interest in Wisconsin real estate totaling more than 640 acres of land. Aliens are those individuals who are not residents of any state within the United States. There are certain exceptions to the rule against ownership of Wisconsin real estate by aliens. Special recordation, divestiture, forfeiture and reporting rules also apply to alien ownership of Wisconsin property.

When can a domestic/foreign business entity own property in Wisconsin?

- A corporation is a legal entity, created under state law, consisting of one or more shareholders but regarded under law as having an existence and personality separate from such shareholders. Corporations are subject to the state's rules governing ownership of property by aliens under Chapter 710 of the Wisconsin Statutes. Corporations created outside of the United States or entities controlled by 20% or more of alien residents or alien corporations may acquire, own and hold title to real estate in Wisconsin provided that the real estate owned does not total more than 640 acres. When acquiring or transferring real estate, a corporation may be required to provide to the title company corporate documents such as articles of incorporation and bylaws.
  - What advantages does a corporation have when purchasing property?  
One advantage of owning real estate through a corporation includes limitations on liability for the shareholders. If the property is used for the production of income, or generates profit upon its disposition, such money is subject to a separate corporate tax and will incur double taxation upon disbursement to the shareholders.
  - What are the disadvantages?  
One disadvantage of owning real estate through a corporation is that the entity may have to provide additional supporting documentation in order to buy or sell real property, such as Articles of Incorporation, Consents and/or other authorizing documentation.

When can domestic/foreign partnerships own property in your state? Explain the advantages, the disadvantages.

- A partnership is an association of two or more persons who can carry on business for profit as co-owners. A partnership may hold title to real property in the name of the partnership. Partnerships controlled by 20% or more of alien residents or alien corporations may acquire, own and hold title to real estate in Wisconsin provided that the real estate does not total more than 640 acres. Although partnerships avoid the risk of double taxation that corporations face because of their pass-through nature, the partners may be subject to liabilities unless the partnership is a limited liability partnership. A title company will need to review the partnership agreement as part of a real estate transaction.

When can limited liability corporations own property in your state?

- This form of ownership is similar to both the corporation and the partnership and harmonizes the benefits of each. Like the corporation, its existence is separate from its owners so the owners will have limited liability. The entity will also enjoy the pass-through taxation structure of partnerships. Limited liability companies provide the most flexibility to structure the company's functions and activities, which may foster the disposition and acquisition of real estate. The company will need to provide its articles of organization to the title company when it acquires or sells real estate. Similar to corporations and partnerships, a limited liability company controlled by 20% or more of alien residents or alien corporations may not own more than 640 acres of real estate in Wisconsin.

## Concurrent Ownership

Two or more individuals or entities may have interests in real estate concurrently. Chapter 700 of the Wisconsin Statutes recognizes three forms of concurrent interests: joint tenancy, tenancy in common and marital property. Tenancies by the entireties are not recognized under Wisconsin law and have been supplanted by Wisconsin's Marital Property Act, Chapter 766 of the Wisconsin Statutes, which is addressed in Section C.

- Tenancy in common
- A tenancy in common is the least restrictive form of ownership where each owner has an undivided share of the property. The shares are typically split 50/50 between two owners, but this form of ownership provides flexibility for tenants in common to agree upon different ownership structures. One other advantage of a tenancy in common is each owner's ability to sell or transfer the interest in the property without the consent of the other co-tenants. The interest held by a tenant in common continues after death, which enables a tenant in common to pass the interest to an heir. However, property subject to this form of ownership is also subject to probate.
- Joint tenancy
- Joint tenancy is a form of ownership between two or more owners where each has a share of the whole and undivided interest with the right of survivorship. The primary advantage of joint tenancy is the right of survivorship whereby each joint tenant retains the right to a proportionate share of the property in the event one of the death of one of



the joint tenants. This right of survivorship also provides a tax benefit to the remaining joint tenants as no taxes are imposed upon any ownership realignment due to a joint tenant's death. Furthermore, probate of the deceased tenant's shares of joint tenant property may be avoided because such shares pass directly to the remaining joint tenants. The duties and responsibilities shared between joint tenants, such as the right to proportionate shares of rent and profits, and duties to avoid waste and pay proportionate shares of maintenance, repairs and taxes may serve as both a benefit and burden depending on each joint tenant's contributions to and uses of the land. This form of concurrent ownership is not necessarily advantageous when the desire of the parties is to create multiple undivided ownership percentages that can be further transferred and encumbered by the respective owners.

- Tenancies by the entirety
- Tenancies by the entirety are not recognized under Wisconsin law and have been supplanted by Wisconsin's Marital Property Act, Chapter 766 of the Wisconsin Statutes, which is addressed in Section C.

## Spousal Rights

- What rights does a spouse, partner have to properties in the event of death or separation?
- Wisconsin enacted the Marital Property Act in 1986, which governs the property rights between spouses. In large part, the Act dictates that whatever the married couple acquires after the "determination date," which is the later of the date of their marriage or when the married couple moved to Wisconsin belongs to each spouse equally. Any real estate owned prior to the determination date solely by one spouse will remain individual property absent a transfer to both spouses. Real estate that is marital property is governed by a right of survivorship, much like real property held by joint tenancy. In the event of one spouse's death, all marital property passes directly to the surviving spouse by law. Spouses are still able to own individual property separate from their spouse. One common instance where individual property rights may arise includes situations such where real property is transferred by gift from a third party solely to one spouse. A spouse may not individually assign, create a security interest in, mortgage or otherwise encumber marital property.
- What responsibilities does a spouse, partner have in the execution of mortgages?
- Spouses are required to act in good faith with respect to one another in matters involving marital property. This responsibility may not be altered by a marital property agreement. Moreover, spouses must avoid creating waste upon real estate constituting marital property in the event of separation.

## Purchase/Sale of Property

### Purchase

What are the procedures in drafting purchase agreements?

- Purchase/Sale Agreement Forms. The Wisconsin Department of Safety & Professional Services\* (the "WDSPPS") has issued purchase and sale agreement forms for use in real estate transactions. Different forms are available depending upon whether the property is residential, commercial, vacant, or a farm. These forms provide for the identification of the buyers and sellers, the identification of the property, the purchase price, and various conditions and contingencies. The use of these forms is quite common, particularly in residential transactions. Use of these forms is mandatory for licensed real estate brokers in the State of Wisconsin who draft purchase and sale agreements. See Wisconsin Administrative Code RL 16.04.
- Attorneys are not required to use the form purchase and sale agreements that have been developed by the WDSPPS and often develop their own custom forms based upon the particular circumstances of a transaction. These forms obviously vary based upon the nature of the transaction and the interests of the parties involved, but, at a minimum, must include the terms necessary to satisfy the Statute of Frauds (see above). In addition, purchase agreements typically include terms and conditions related to due diligence review, title and survey requirements, representations and warranties of the parties, prorations of taxes and other payments that may be applicable to the property, closing requirements and additional documents that may be necessary to address other property and interests that may be involved in the transaction, as well as other terms and conditions that may be required by the parties.

What should a purchase statement in Wisconsin include?

- Conveyance and Inheritance Language. Valid conveyances of real estate interests can be accomplished through the use of the words "grant and convey" in conveyance documents. It is not necessary to use words of inheritance to create or convey a fee. All of a grantor's interests are passed through a conveyance unless the grantor expressly or necessarily implies differently through the terms of the conveyance. See Section 706.10 Wisconsin Statutes.
- Residential Disclosure Form Required. All persons transferring residential real property of one to four dwelling units by sale, exchange or land contract, except personal representatives, trustees and conservators if those persons have never occupied the property transferred, must furnish to buyer(s) a real estate condition report in the form set forth in Chapter 709 of the Wisconsin Statutes. See also Chap. Ag. 134, Wisconsin Administrative Code, for specific disclosure requirements imposed on landlords in a residential rental context.
- Statutory Environmental Disclosures. Except as part of the residential disclosures above, there is no statutory requirement of detailed environmental disclosures to buyers.

What state legislation protects buyers against fraud?

- Statute of Frauds. A valid conveyance of real estate must meet certain statutory requirements found in Section 706.02, Wisconsin Statutes. The statute requires that the conveyance be a writing that contains the identification of all parties, the identification of the real estate involved, the interest conveyed and any material term upon which the conveyance arises or terminates. This written document must be signed by or on behalf of each grantor. In the case of a lease or contract to convey, it must be signed by or on

behalf of each party to the agreement or contract. Except for purchase money mortgages, all marital homestead conveyances must be signed by or on behalf of both spouses. The final requirement is that the written document be delivered.

- **Statutory Warranties of Title.** According to Section 706.10(5) of the Wisconsin Statutes, an unmodified warranty made by a grantor includes various covenants. These covenants, for the benefit of the grantees, grantees' heirs, successors and assigns, include that the grantor is lawfully seized of the land at the time of conveyance, the grantor has good right to convey land or title, and that the grantor's title is free from all encumbrances. The grantor also makes the covenant that the grantor will defend the title and quiet possession of the land except for matters arising out of open and notorious rights of easement, or out of public building, zoning or use restrictions.
- **Uniform Vendor and Purchaser Risk Act.** Wisconsin has adopted the Uniform Vendor and Purchaser Risk Act as Section 706.12 of the Wisconsin Statutes. The Act provides rights and liabilities to vendors and purchasers in the event that property is destroyed or taken through eminent domain proceedings before or after possession or title transfer occur.
- **Common Law Disclosures.** Principles of disclosure applicable to a purchase and sale transaction also arise by virtue of the common law of misrepresentation. The general elements of the tort of misrepresentation are: (1) the representation made by the defendant is of a fact; (2) the representation of fact is untrue; (3) and the plaintiff believes such representation to be true and relies thereon to its detriment. In *Matter of Estate of Lecic*, 104 Wis. 2d 592, 603, 312, N.W.2d 773 (1981). In Wisconsin, there are three types of misrepresentation causes of action: (1) intentional misrepresentation; (2) negligent misrepresentation; and (3) strict responsibility. These are discussed at length in *Ollerman v. O'Rourke Co., Inc.*, 94 Wis. 2d 17, 288 N.W.2d 95 (1980). The elements of proof vary with each of the different types. Failure to disclose a fact may, provided there is some duty of disclosure, fall under the tort of intentional misrepresentation. This duty to disclose may arise when information is asked for or the circumstances would call for a response in order that the parties be on equal footing. The Ollerman court explained that this duty to speak may be present when the seller has a special means or knowledge not available to the purchasers or if the existence of the condition is material to the transaction, that is, it influences whether the transaction is concluded at all or at the same price. A buyer is required to exercise reasonable diligence to ascertain facts germane to a purchase transaction. *Kanack v. Kremiski*, 96 Wis. 2d 426, 432, 291 N.W.2d 864 (1980). Wisconsin law provides that reliance upon statements is not justifiable if the falsity of the statements could have been discovered through the exercise of ordinary care. In a misrepresentation case, reliance must be justifiable. *Ritchie v. Clappier*, 109 Wis. 2d 399, 404, 326 N.W.2d 131 (App. 1982).
- **Implied Warranties.** Wisconsin follows the general rule that there are no implied warranties of quality in the sale of real estate. *Dittman v. Nagel*, 43 Wis. 2d 155, 168 N.W.2d 190 (1969). Section 706.10(6), Wisconsin Statutes., provides that, except as provided by law, no warranty or covenant shall be implied in any conveyance. Wisconsin case law has held that there is an implied warranty of habitability which arises in situations involving residential leases. *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d

409 (1961). There is also a specific statutory provision stating that where there is a conveyance evidencing a transaction under which a grantor undertakes to improve the premises in order to accommodate the grantee's specified use and occupancy, there is an implied covenant that the improvements shall be performed in a workmanlike manner and shall be reasonably adequate to equip the premises for such use and occupancy. Section 706.10(7), Wisconsin Statutes.

- **Other State Law Protections.** In addition to the various statutory and common law disclosure requirements described above, certain other state statutes may apply to protect the interests of a purchaser (or borrower) involved in a real estate transaction. The Wisconsin Consumer Act (Chapters 421-427, Wis. Stats.) provides certain consumer protections to purchasers and borrowers in certain limited circumstances. While most commercial transactions are excluded from the scope of the Consumer Act, certain residential transactions, smaller mortgage loans and land contract transactions can come within the scope of the regulation. If applicable, the Consumer Act can require additional disclosure obligations to be met, as well as grant additional payment rights to borrowers.

What kind of taxes are levied on a seller, buyer?

- **Transfer Tax.** A transfer tax is due on conveyances at the rate of \$3 per \$1,000 of value (rounded, where appropriate, to the next \$100). Conveyances include leases of 99 years or more, but do not include easements or mortgages. The transfer tax is payable by the seller. Pursuant to Wisconsin Statute 77.21.
- There are various exemptions from payment of the transfer tax, which are set forth in Section 77.25 of Wisconsin Statutes. The exemptions include, for example, some (but not all) conveyances involving a governmental entity, conveyances pursuant to corporate mergers, conveyances within families for nominal consideration, and conveyances by will, descent or survivorship. A transfer tax return must be submitted to the register of deeds at the time of recording, although the tax return is not actually recorded.

How are taxes prorated in your state between buyer/seller?

- Buyers and Sellers in Wisconsin are free to negotiate the proration of real estate taxes. The stock language of the purchase and sale agreement form promulgated by the WDSPPS for Residential Offer to Purchase states that the net general taxes shall be prorated on the basis of the net general taxes for the current year, if known, otherwise upon the net general taxes for the preceding year, but, again, the parties are free to negotiate a different methodology for proration of taxes at closing.
- Parties should also be aware of any delinquent taxes, special assessments, or pending or completed reassessments of property tax value which may affect the proration of taxes.

Closing

Wisconsin procedures that affect the following:

## Deed

- General Recording Requirements. Section 706.05 of Wisconsin Statutes provides that every instrument offered for record (including but not limited to deeds transferring real property) shall:
  - Bear original signatures.
  - Contain an authentication or acknowledgment.
  - Identify the land in a form which can be indexed.
  - For most deeds, be accompanied by a Real Estate Transfer Tax Return (“RETR”) and transfer tax.
  - The City of Milwaukee has a separate Certificate of Code Compliance that applies to residential property if the dwelling falls in a designated area within the city.
  - Bear the name of the drafter.
  - In many counties, identify the tax key number of the land.
  - Be accompanied by certain fees and taxes (see below).
  - Other Issues Involving Conveyances of Real Estate.
- Other Issues Involving Conveyances of Real Estate
  - Statute of Frauds. A valid conveyance of real estate must meet certain statutory requirements found in Section 706.02, Wisconsin Statutes. The statute requires that the conveyance be a writing that contains the identification of all parties, the identification of the real estate involved, the interest conveyed and any material term upon which the conveyance arises or terminates. This written document must be signed by or on behalf of each grantor.
  - Conveyance and Inheritance Language. Valid conveyances of real estate interests can be accomplished through the use of the words “grant and convey” in conveyance documents. It is not necessary to use words of inheritance to create or convey a fee. All of a grantor’s interests are passed through a conveyance unless the grantor expressly or necessarily implies differently through the terms of the conveyance. See Section 706.10 Wisconsin Statutes.
  - Statutory Warranties of Title. According to Section 706.10(5) of the Wisconsin Statutes, an unmodified warranty made by a grantor includes various covenants. These covenants, for the benefit of the grantees, grantees’ heirs, successors and assigns, include that the grantor is lawfully seized of the land at the time of conveyance, the grantor has good right to convey land or title, and that the grantor’s title is free from all encumbrances. The grantor also makes the covenant that the grantor will defend the title and quiet possession of the land except for matters arising out of open and notorious rights of easement, or out of public building, zoning or use restrictions.
  - Uniform Vendor and Purchaser Risk Act. Wisconsin has adopted the Uniform Vendor and Purchaser Risk Act as Section 706.12 of the Wisconsin Statutes. The Act provides rights and liabilities to vendors and purchasers in the event that

property is destroyed or taken through eminent domain proceedings before or after possession or title transfer occur.

- Requirements For Recordation Of Deeds
  - Uniform Law on Notarial Acts Adopted. The Uniform Law on Notarial Acts was adopted, as set forth in Section 706.07 of Wisconsin Statutes. Authentication is also permitted.
  - No Witnesses. Witnesses are not required by statute under Section 706.05 of the Wisconsin Statutes.
  - Corporate Signatures. The authorized signature of any one officer of a private corporation is sufficient for corporate conveyances, unless the corporation has specified otherwise in its bylaws, articles of incorporation or corporate resolutions. A corporate seal is not required by Section 706.03 of the Wisconsin Statutes.
  - RETR and Transfer Tax. An RETR and transfer tax are required for recording a deed on most transfers of real property, though not all. The RETR is an online form which requires certain information be entered into regarding the buyer, seller, property value and property use. Under Section 77.255 of Wisconsin Statutes, a transfer tax return must be submitted to the register of deeds at the time of recording for all real property conveyances except for conveyances solely to designate a Transfer on Death (“TOD”) beneficiary. The transfer tax due on non-exempt conveyances is \$3 per \$1,000 of value (rounded, where appropriate, to the next \$100). Conveyances include leases of 99 years or more, but do not include easements or mortgages. The transfer tax is payable by the seller Pursuant to Wisconsin Statute 77.22(1). As referenced above, there are various exemptions from payment of both the RETR and transfer tax, which are set forth in Section 77.25 of Wisconsin Statutes. The exemptions for payment of a transfer tax include, for example, some (but not all) conveyances involving a governmental entity, conveyances pursuant to corporate mergers, conveyances within families for nominal consideration, and conveyances by will, descent or survivorship.
  - Recording Fee. Wisconsin Statute 59.43(2)(ag)(1) stipulates that Wisconsin counties charge a standard recording fee of \$30 per document (not based on number of pages). A standard format is required for the first page of most documents presented for recording. The register of deeds will provide a sample of the standard format upon request. Documents to be recorded must be in black or red ink, except for signatures and coded map notations.
  - Rental Weatherization. Previously, Section 101.122, Wisconsin Statutes requires that residential structures meet certain weatherization standards. Section 101.122, Wisconsin Statutes, however, was repealed on September 21, 2017. Any deed or other ownership conveyance document submitted to a Wisconsin Register of Deeds on or after January 1, 2018 will not require be required to comply with the weatherization standards.

## Bill of Sale

A Bill of Sale is an instrument evidencing a sale of tangible personal property which names the seller and buyer and describes the property sold (See Wisconsin Statutes § 700.01(1)). A Bill of Sale is often used to transfer personal property or equipment being conveyed in connection with a transfer of real property. Under Section 700.20, Wisconsin Statutes, unless otherwise expressed in the bill of sale, grantees on a bill of sale are presumed to own equal undivided interests in the personal property being conveyed.

## Mortgage

- **General Provisions.** In Wisconsin, mortgages are used as opposed to deeds of trust. For purposes of creating a mortgage and pledging one's interest there are no extensive language requirements, only "I hereby mortgage." Often times the mortgage will contain an assignment of leases and rents as well. Mortgages in Wisconsin will also be enforced based upon the lien theory.
- **Priorities of Mortgage.** Wisconsin is a race-notice state, so that in general priorities are determined based upon those first in time with notice. However, special priorities may be granted to certain mortgagees including mortgages executed to a state or national bank or to a state or federally chartered credit union; a mortgage banker; an insurer licensed to do business in Wisconsin; federal savings and loans associations or federal savings banks; the Department of Veterans Affairs; mortgages assigned to or executed to the United States; State of Wisconsin or other municipal bodies; and authorities created by statute such as the Wisconsin Health and Educational Facilities Authority and the Wisconsin Housing and Economic Development Authority. In general, a mortgage will be subordinate to certain liens granted by operation of law, such as liens for payment of real estate taxes, child support and special assessments. Generally speaking, future advances made under a commitment or as protective advances have the same priority as the mortgage recording date, although a detailed analysis of the situation should be made in consultation with the statute.
- **Execution of Mortgages.** Mortgages are to be executed as other conveyances of land. Therefore, they must follow the formal requirements stipulated by statute. The formal requirements include identification of the parties, identification of the land, identification of the interest conveyed, and signature by or on behalf of each of the grantors and delivery.
- In addition to the formal requirements for conveyance, Wisconsin Statutes stipulate formal requirements for recordation. These requirements include that the document contains any signatures required by law, that the first page of the document be in a specific form, that the document accurately and completely describes the property affected, that the document identifies who prepared the document and the document is properly authenticated or notarized. For purposes of authentication or notarization, only certain public officers and members of the State Bar of Wisconsin may authenticate documents, whereas any of those persons or a notary public may acknowledge documents.
- The text of Mortgages, like other recorded documents, must be only in black or red ink, other than the signatures, which can be in different colors. Mortgages, however, are not

subject to the real estate transfer tax in Wisconsin and therefore a real estate transfer return is not required for the recordation of mortgages. With respect to taxes, there is no real estate or other taxes assessed against only a mortgage interest in the property.

### Financing

Wisconsin is a mortgage state, not a deed of trust state. As such, a lender's interest in financed property is secured by a recorded mortgage (as detailed herein) and a promissory note signed by the borrower. Wisconsin lenders typically obtain a lender's policy of title insurance, with the lender and borrower responsible for ensuring that the title coverage and endorsements required by the lender are incorporated into the lender's title policy. The borrower is generally responsible for paying the cost of the lender's policy of title insurance and all endorsement thereto. At closing, all existing financing must be satisfied and released of record, unless buyer and seller have made other arrangements to the contrary.

### Closing Statement

In Wisconsin, closing statements are typically drafted by the title company insuring the transaction in question. The closing statement sets forth the flow of funds between the parties, including the purchase price, loan payoffs, proration for the month of closing (including but not limited to property taxes, rental income, and utilities), and expenses to be assumed by the buyer and seller. The cost to prepare the closing statement (and closing costs in general) is typically divided equally between buyer and seller. Buyer and seller each sign the closing statement to acknowledge its accuracy prior to closing.

### Foreclosures in Wisconsin

- **Mortgage Foreclosure.** In 2016, Wisconsin joined the majority of states that have enacted some requirements that credit agreements must be in writing to be enforceable. See Wisconsin Statutes, § 241.02(3). In Wisconsin for a mortgage foreclosure, suit may be brought on the note or the mortgage together or sequentially. Power of sale is not an available remedy.
- In a foreclosure action, Wisconsin law will require a judgment to be formally entered against the mortgagor. Once a judgment of foreclosure has been entered, the mortgagor is granted a statutory right of redemption. Mortgages which are \$25,000 or less in value may be subject to provisions of the Wisconsin Consumer Act, which provides a mandatory right to cure for the mortgagor.
- The redemption period allows the mortgagor, or any junior lien holder, to redeem the mortgage by paying the amount entered in judgment along with any taxes, interests, and costs subsequent to judgment which are then due and payable. If the mortgagor or a junior lien holder takes steps to redeem the mortgage property, payment must be made to the clerk of courts for the county where the property is located. Upon proper payment of all amounts due to the clerk of courts, the mortgagor is granted a certificate of discharge. If a junior lien holder redeems the mortgage, the junior lien holder takes a subrogated interest of the original mortgagee and can take steps at law and equity to collect from the original mortgagor.



- The period of redemption is based upon the type of property which was mortgaged and whether a deficiency judgment had been requested or waived. The redemption periods are summarized below:

TYPE	DEFICIENCY	PERIOD
Residential	Requested	12 Months
Residential	Waived	6 Months
Non-Residential	Requested	6 Months
Non-Residential	Waived	3 Months
Abandoned	N/A	2 Months

- In determining what type of property is mortgaged and whether a shortened redemption period is available, the mortgagee must strictly comply with the Wisconsin Statutes. For example, to waive the deficiency for the purpose of shortening the redemption period, the agreement of the mortgagor must be set forth in the mortgage.
- In addition, no judgment may be entered until 20 days after the lis pendens is filed.
- Receivers. While in the course of a foreclosure proceeding, the mortgagee may also apply for a receiver to be appointed for protection of property and rents. The basis for the appointment of receiver must be danger of material injury to the property, loss of rents, and potential or past history of waste, including nonpayment of taxes or insurance. If a deficiency judgment has been waived, no appointment of receiver is allowed. Further, factors supporting the appointment of receiver are rarely found to be present with respect to residential mortgaged property.

#### Land Contracts

As an alternative to a note and mortgage, conveyance of property is also allowed by land contract. The land contract in Wisconsin provides that a seller will transfer the equitable interest in the property to the buyer for, typically, a small down payment and payment of the balance on terms over a number of years. During the course of the land contract, the seller retains bare legal ownership of the property and only transfers formal title with a deed upon satisfaction of the land contract. The case law treats the seller's interest as if it were a mortgage lender's interest.

Land contract financing can be advantageous to the buyer, but also has an advantageous remedy to the seller. Land contracts in Wisconsin are subject to strict foreclosure. Strict foreclosure is subject to the discretion of the court based upon the equitable interest as they stand upon commencement of the proceedings. However, if applied, it can be a costly remedy to the buyers. The WDSPS has promulgated an optional form for land contracts.

#### Easements

An easement is a non-ownership interest in real property that is in the possession of another person which creates two distinct property interests – a servient estate and a dominant estate. Easements can be used for numerous purposes and can run for the benefit of a particular property (i.e., appurtenant to a parcel) and/or for the benefit of a particular beneficiary (i.e., "in

gross”). Easements may arise over time or based on certain circumstances and actions without the existence of a specific agreement, most notably through prescription or necessity. Under Wisconsin Statute 893.28(1), an easement by prescription may arise without benefit of a specific agreement by “continuous adverse use of rights in real estate of another for at least 20 years.” Likewise, an easement by necessity may exist when a party can show a) common ownership of two parcels prior to severance of the landlocked parcel and b) that as a result of the severance; the landlocked parcel lacks access to a public roadway. *McCormick v. Schubring*, 2003 WI 149, ¶11. However, given the variety of issues that may arise with regard to easements, the best practice is to prepare and record a carefully crafted document that describes the precise nature of the rights and interests granted, the remaining rights of the grantor (i.e., servient estate) with regard to the property encumbered by the easement and other related matters to insure that the proper scope of rights and interests are agreed to by the parties. Written easements must satisfy the requirements of Section 706.05 of Wisconsin Statutes (summarized in Deeds, Section A above) in order to be recorded.

Under Wisconsin Statutes, § 893.33(6), a recorded easement may only be enforced within 40 years of the recording of such easement is recorded, subject to the following exceptions:

- Any re-recording of such easement, including a mention of such easement in a deed or other document recorded against the property encumbered by such easement, extends the time period under 893.33(6) for 40 years from the date of such re-recording.
- Any easement last recorded prior to July 1, 1980 that would have expired by statute under Wisconsin Statute 893.15(5), 1977 Stats (such period generally being 60 years from the date of the recording of such easement) will expire on the date that is the earlier of (a) 60 years from the date of recording of such easement, or (b) 40 years after July 1, 1980. See *TJ Auto LLC v. Mr. Twist Holdings LLC*, 2014 WI App 81.

## Leases

### Residential

- Leases. Leases for more than one year must satisfy the statute of frauds requirements under Section 706.02 Wisconsin Statutes. In addition, the amount of rent or other consideration, the time for commencement and expiration of the lease and a reasonably definite description of the premises, must be part of the written lease. The commencement and description may be satisfied by the tenant's occupancy of the premises. Section 704.03 Wisconsin Statutes.
- Residential Rental Practices. The Department of Agriculture, Trade and Consumer Protection\* have promulgated rules for residential rental practices and can be found in the Wisconsin Administrative Code ATCP 134. These rules provide for limits on water heater thermostat settings, landlord duties to maintain premises in habitable conditions (subject to rental abatement or the right to move), notice to tenant of annual renewal clause, the prohibition on retaliatory conduct, required disclosures, prohibited lease practices and provisions, as well as other issues.
- Under Wisconsin Statutes, § 704.44, there are a number of terms that must not appear in a Wisconsin residential lease. These terms include, but are not limited to, terms allowing extra judicial eviction, the imposition of liability on a tenant for causes clearly

beyond the tenant's control, and a requirement that a tenant pay the landlord's legal fees incurred in enforcing the lease. Likewise, Wisconsin Statutes, § 106.50(5m)(dm) requires that every residential lease contain statutorily prescribed domestic abuse disclosure. Inclusion (or failure to include, as the case may be) a term prohibited or required under Section 704.44 or 106.50(5m)(dm) has the effect of voiding the entire lease, so it is important that residential landlord's strictly comply with these provisions of Wisconsin law.

- **Liens.** The landlord has no right to a lien on the property of a tenant unless it is provided by Sections 704.05(5) (landlord ability to have a lien on abandoned personal property for costs incurred for removal or storage), 704.90 (lien right on tenant property in self-storage facility), or 779.43 (lien rights for hotel keepers, livery stables, garages, marinas and pastures). The parties to the lease may also create a lien right for the landlord by express agreement. There is no common law right to distraint for rent in Wisconsin. Section 704.11 Wisconsin Statutes.
- **Notices for Termination of Tenancies.** Unless the parties agree otherwise in a lease for more than one year, Section 704.17 of the Wisconsin Statutes provides that tenancies may be terminated only after the following notices are given for the various breaches of the lease.
  - When the tenant fails to pay a month-to-month lease, the landlord must provide the tenant with 5 days' notice including the right to cure, or 14 days' notice without the right to cure.
  - If there is waste or any other breach by a month-to-month tenant, the landlord must provide 14 days-notice without cure rights.
  - The waste and the failure to pay of a year-to-year tenant or a tenant under written lease for a period less than one year requires that landlord provide 5 days' notice with the right to cure, or 14 days' notice without cure rights, but only if there has been a payment default and notice provided during the previous year.
  - A tenant who fails to make a due payment that involves a lease that is longer than one year has 30 days to cure after receiving notice from the Landlord.
  - If the tenancy is a periodic tenancy, the landlord must provide notice at least 28 days in advance of the end of a rental period.
  - A year-to-year agricultural tenancy requires that the landlord must provide notice 90 days before the end of the rental period.
  - There are other rules for the form and manner of the notices under Section 704.19 and Section 704.21 of the Wisconsin Statutes.
- **Mitigation.** Mitigation of damages is a duty that exists in Wisconsin landlord and tenant law. Landlords must allege and prove that the landlord has made efforts to mitigate. The burden for proving that the efforts of the landlord are not reasonable rests with the tenant. Section 704.29 Wisconsin Statutes.
- **Holdover Tenants.** The tenant's possession of the premises beyond the lease period entitles the landlord to twice (2) the rental value apportioned on a daily basis for the time the tenant remains in possession. The landlord can receive higher damages if the

landlord can prove damages in excess of the statutory computation. Section 704.27 Wisconsin Statutes.

- Security Deposits. Wisconsin law provides that the tenant is entitled to double the amount of the security deposit if the landlord fails to return a residential security deposit, or fails to state the reasons for withholding the security deposit, within 21 days.
- Fair Housing. Beyond the federal law on fair housing, Wisconsin has enacted additional provisions regarding discrimination in housing. Those additions can be found in Section 106.04 of the Wisconsin Statutes.
- Mobile Home Parks. Wisconsin has enacted a separate statute regulating mobile home parks. The legislation provides that all leases in mobile home parks must be for at least one year. Other provisions include prohibitions on mobile home park owners regarding considerations of the mobile home's age or change in occupancy or ownership, and tenancy termination. The notice requirements of Section 704.17 also apply to mobile home parks. See Section 710.15 Wisconsin Statutes.
- Automatic Renewal. Under Wisconsin Statutes, § 704.15, a clause whereby a lease automatically renews or extends unless one party gives notice to the other party to the contrary not enforceable against the tenant unless the landlord, at least 15 days but not more than 30 days prior to the time specified for the giving of such notice to the landlord, gives the tenant written notice of the existence of the provision in the lease for automatic renewal or extension.
- Self-Service Storage Facilities. Section 704.90 of the Wisconsin Statutes supplements the law regarding landlord and tenant relationships in the area of self-service storage facilities.

## Commercial

Generally speaking, absent a written agreement to the contrary, commercial leases are subject to the same rules as residential leases under Wisconsin law, unless a statute or regulation is expressly limited to residential leases. However, commercial leases are generally presumed to be between sophisticated parties with generally equal negotiating power, and as such, the landlord and tenant are able to contract for a wide variety of terms, which terms will be enforceable against the parties provided the lease in question otherwise meets the requirements for a valid contract.

## Wisconsin Zoning

- Generally. Municipalities are creatures of the state and therefore derive their power from state law. *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982). Under both the Wisconsin Constitution and state statute, municipalities are given broad authority to plan for and regulate the use of land. Article XI, § 3 of the Wisconsin Constitution is popularly known as the “Home Rule Amendment.” This constitutional provision authorizes incorporated municipalities (including cities and villages) to “determine their own affairs” in all areas except for those that are reserved exclusively to the state. The area of land use is one of the areas that is largely, but not exclusively, left to municipalities to determine for themselves.

- The state has delegated specific authority to each of the different local units of government: counties, cities, villages and towns. See *Quinn v. Town of Dodgeville*, 122 Wis.2d 570, 364 N.W.2d 149 (Wis. 1985). Cities derive their authority to plan for and regulate the use of land from Wis. Stat. § 62.23. Villages are also authorized to regulate land use under Wis. Stat. § 62.23, as applied to them through Wis. Stat. § 61.35. Towns may exercise zoning authority only in limited circumstances as described under Wis. Stat. § 60.10(2).
- Planning Authority. City councils and village boards have broad authority to appoint a plan commission for the purpose of planning for the future growth of their jurisdictions. Wis. Stat. § 62.23(1). The basic functions of the plan commission are established in Wis. Stat. § 62.23(2), and including designing and adopting a “comprehensive plan” for the municipality which meets the requirements of Wisconsin’s “Smart Growth Law,” which is described in greater detail below. Under Wis. Stat. § 62.23(5), the plan commission must also review the “location and architectural design of any public building; the location of any statue or other memorial; the location, acceptance, extension, alteration, vacation, abandonment, change of use, sale, acquisition of land for or lease of land for any street, alley or other public way, park, playground, airport, area for parking vehicles, or other memorial or public grounds and the location, extension, abandonment or authorization for any public utility whether publicly or privately owned.” Towns may also exercise this planning power, if they have adopted village powers pursuant to Wis. Stat. § 60.10(2).
- Wisconsin's Smart Growth Law. Wisconsin’s “Smart Growth Law”, Wis. Stat. § 66.1001, was originally adopted in 1999. Generally, the law encourages communities in Wisconsin to engage in land use planning, and requires that municipalities act in compliance with the comprehensive plans they create when establishing local subdivision regulation and zoning. Under the law, a municipality’s comprehensive plan must address nine elements, including housing, transportation, utilities, and land-use, and once created, that plan will be binding on future zoning rules in the municipality (unless adopted by a regional planning commission, see *Wis. Stat. § 61.1001(5)*). Due to continuing controversy regarding the “Smart Growth Law,” certain sections have not been fully implemented, and attempts to amend the law are ongoing. See Wisconsin’s Comprehensive Planning Law, Legislative Reference Bureau, 2015. Practitioners are encouraged to review the status of the legislation before advising clients.
- Zoning Authority. A land use plan is not much of a tool unless a city or village also has a mechanism by which to implement the vision embodied in the plan. Statutory authority for zoning is found in Wis. Stat. § 62.23(7). In contrast with the plan commission’s authority to adopt a comprehensive plan, which is administrative, the power to zone is a legislative power. Courts have recognized zoning as a valid exercise of a municipality’s police power. *City of Milwaukee v. Leavitt*, 31 Wis. 2d 72, 142 N.W.2d 169 (1966); *Zwiefelhofer v. Town of Cooks Valley*, 338 Wis.2d 362, 809 N.W.2d 362 (2012). Both the inherent constitutional police power and the statutory authority to zone are broad, not narrow. *Town of Richmond v. Murdock*, 70 Wis. 2d 642, 235 N.W.2d 497 (1975). The policies embodied in a municipality’s zoning are a matter within the municipality’s legislative discretion. *City of LaCrosse v. Elberston*, 205 Wis. 207, 237 N.W. 99 (1931). Owing to the legislative nature of zoning, judicial interference is limited to cases where a municipality (1) abuses its discretion, (2) exceeds its authority, or (3) errs as a matter of

law. *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982). Local communities therefore have a considerable degree of latitude in deciding whether and how to rezone property.

### Wisconsin Mineral Rights

- Generally. The fee simple owner of land has the authority to treat the mineral rights on his parcel as a property right which may be sold, gifted, or conveyed with, or separately from, the surface estate. A fee simple owner may also reserve the mineral rights in a conveyance of the property. Conveyances of mineral interests may be recorded by the register of deeds in the applicable county in the real estate records index. Wis. Stat. § 705.055. With regard to the extraction of minerals from a property, there are separate rules for nonmetallic (including aggregate, sand, and other types of rock), metallic (including copper, lead, and zinc), and ferrous mining under Wisconsin law. See Wis. Stat. § 295. Most notably, once severed, the surface and mineral estates may be merged due to a lapse in the mineral rights under the Lapse and Reversion in Minerals Law, as described below.
- “Dormant Minerals” Statute. The Lapse and Reversion of Interest in Minerals Law, otherwise known as the “Dormant Minerals Statute” is established in Wis. Stat. § 706.057 and requires that mineral rights be used at least once in a twenty year period (subject to certain grandfathering exceptions), or be subject to merger with the surface estate. If the mineral rights are not used, the owner of the surface estate may file and record a claim of ownership over the mineral rights on the property. Under the Dormant Minerals Statute, “use” of mineral rights has a broad and forgiving definition. Mineral rights may be “used” if there is mining of the minerals, the mineral rights are conveyed, property taxes are paid on the mineral rights, or the owner of the mineral rights records a statement of claim concerning the mineral interest. Wis. Stat. § 706.057(2). If there has been a lapse, the owner of the mineral rights may cure the lapse by recording a statement of claim complying with Wis. Stat. § 706.057(4) before the owner of the surface estate is able to record a claim. After an owner of a surface estate files and records a claim contesting that there has been a lapse of mineral rights, the owner of the mineral estate still has three years to file a claim for declaratory judgment of the ownership of the mineral interest. After three years, if no declaratory judgment claim is filed by the owner of the mineral rights, or is unsuccessful, the ownership of the lapsed mineral rights will revert back to the owner of the surface estate. Wis. Stat. § 706.057(9).

### Eminent Domains

- In Wisconsin, the power of eminent domain is derived from the Wisconsin Constitution, Art. I, § 13. The Legislature has delegated this power by statute to numerous authorities and has specified the purposes for which such power can be used. See *e.g.* Wis. Stat. Ch. 32. Generally, departments, municipalities, boards, commissions, public officers, and various public and quasi-public business entities are delegated this power. “Takings jurisprudence has developed from two competing principles: on one hand, respect for the property rights of individuals; on the other, recognition that the government retains the ability, in furtherance of the interests of all citizens, to regulate an owner’s potential uses of land.” *Zealy v. City of Waukesha*, 201 Wis. 2d 365 (1996). Some of the purposes for which the Legislature has specified that condemnation can be used are



highway construction or improvement, reservoirs, dams, public utility sites, waste treatment facilities, city redevelopment and energy lines. See *The Rights of Landowners Under Wisconsin Eminent Domain Law*, Wisconsin Department of Administration, 2016.

## Chapter 11 – Miscellaneous

### Requirements for Qualification to Do Business in Wisconsin

A foreign business corporation must file Form 21, Certificate of Authority Application to qualify in Wisconsin with the Wisconsin Department of Financial Institutions. The application must be accompanied by a current (not more than 60 days old) Certificate of Status issued by the Secretary of State or other public custodian of corporate records in the state in which the corporation is organized.

The computation of the filing fee is \$100 for the first \$60,000 of capital represented in Wisconsin plus \$3.00 per \$1,000 of representation over \$60,000. Form 21 B, Adoption of Fictitious Name must be filed simultaneously with Form 21 only when its true and legal corporate name is not available for use in Wisconsin due to an existing entity already on record by the same name.

### Applicability of Wisconsin Usury Laws

In Wisconsin, loans to entities and other commercial loans are exempt from statutory interest rate limits. However, with respect to the collection of post-judgment interest, there are two limitations that may apply. First, a judgment obtained in Wisconsin accrues interest established at a rate of 12% per annum. Wis. Stat. § 815.05(8). A court may find that this statutory interest rate is the only rate permitted after entry of a judgment, in particular if the judgment is entered solely on a promissory note. Second, interest on a foreclosure judgment is limited to the pre-default rate provided to be paid on the underlying mortgage debt. Wis. Stat. § 846.12.

### Notice of Business Activities

On a yearly basis, all corporations and limited liability companies must file an annual report with the Wisconsin Department of Financial Institutions to report business activities for the prior year. Fees vary based on the type of business entity. The reports are due in the quarter in which the entity was originally created.

### Restrictions on Specific Professions

Wisconsin has customary state and local licensing for professions such as law, medicine, brokers-dealers, investment advisers, accounting, real estate, insurance agents, and many other professions, without any unusual restrictions for such professions. Refer to the Wisconsin Department of Safety and Professional Services for questions relating to licensing for such professions.

### Business Name Registration Requirements

An organization may use a “Doing Business As” or tradename by filing a Registration of Tradename/Trademark with the Wisconsin Department of Financial Institutions. The filing fee is \$15.00 and the registration is effective for ten (10) years, after which the filing may be renewed using the same form.





## Chapter 12 – Appendix

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