Employers: "Wisconsinize" Your Handbooks and Policies

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Wisconsin has some unique qualities discovered by newcomers, among them cheese curds, booyah and supper clubs. New employers in Wisconsin, or those operated by national or international entities, may also encounter provisions of Wisconsin employment law that go beyond or differ from federal law. This article will highlight some of those areas.

Sexual Orientation. Although there are currently cases pending before the United States Supreme Court to determine whether discrimination on the basis of sexual orientation violates federal law under the Civil Rights Act of 1964, the Wisconsin Fair Employment Act (WFEA) has long prohibited employment discrimination on the basis of sexual orientation, which is defined in the WFEA as "having a preference for heterosexuality, homosexuality, or bi-sexuality, or having a history of such a preference or being identified with such a preference." Wis. Stat. § 111.31(13m). As recent as 2017, the Seventh Circuit Court of Appeals (the federal circuit which includes Wisconsin) ruled that workplace discrimination based on sexual orientation also violates federal civil rights law in this circuit. Cases heard and decided in other circuits have resulted in the issues now pending before the U.S. Supreme Court, which should finally resolve the status of federal law on a nationwide basis.

Marital Status Discrimination. Wisconsin includes "marital status" within the prohibited bases of discrimination under the WFEA. The law was primarily intended to prevent employers from favoring single applicants over married ones who might have more family obligations. Case law has clarified that the prohibition against marital status discrimination is designed to protect the status of being married in general, not to protect against employment action based on the fact of being married to a particular person. Thus, if an employer is rejecting an applicant not because they are married, but because their spouse owns a competing business, they do not violate this provision. The WFEA also includes an exception which allows employers to prohibit individuals from directly supervising or being directly supervised by his or her spouse.

Use or Nonuse of Lawful Products. Also included within the prohibited bases of discrimination under the WFEA is the "use or nonuse of lawful products off the employers premises during nonworking hours . . . ." Presumably lobbied into legislation during the heyday of the big breweries in Wisconsin to prohibit

employers from adopting policies to hire only teetotalers, it has also been cited in more recent years to stop employers from refusing to hire smokers because of the fears of lost time or the future impact on health plans. Since the protection only extends to usage "off the employers premises during nonworking hours", it should not be misconstrued to interfere with an employer's right to maintain smoke free premises. Employers are free to regulate possession or use of such products at work or on company property. Employers can also respond to instances where off-duty use of alcohol or other products might impact the employee's ability to perform his or her job. Should Wisconsin legalize recreational marijuana in the future, this provision of the WFEA may move into the spotlight once again. Employers will need to differentiate and document the difference between off-duty usage and being under the influence at work or otherwise impacting the workplace.

Wisconsin Family and Medical Leave Act. Wisconsin's FMLA predates the federal leave law by a number of years. There are several differences, including the eligibility standards for employees, apportionment of the types of leave, substitution of paid leave requirements and others. Wisconsin employers are wise to fashion their policies in a way which blends the state and federal provisions in a manner which provides maximum employer flexibility.

Disability Accommodation. As in other areas mentioned, Wisconsin provided protection for disability discrimination (then referred to in the law as "handicap") long before the federal Americans with Disabilities Act (ADA). While both laws have similar objectives and protections, Wisconsin's law has broader definitions that may bring more conditions under the law's protection, and also obligates employers to consider additional measures for accommodating individuals with disabilities than may be required under the interpretations which have evolved under the ADA. Wisconsin employers need to be cautious about relying solely on federal cases or guidance without considering how the WFEA may expand their obligations.

After enjoying a brandy old-fashioned at a local supper club, executives of businesses with employees in Wisconsin should periodically review their employee handbooks, contracts and employee policies to be conscious of these and other unique aspects of Wisconsin law.