# EMPLOYMENT LAWSCENE ALERT: DOL ISSUES UPDATED FMLA GUIDE FOR EMPLOYERS

Today, the U.S. Department of Labor, Wage and Hour Division, issued an updated guide for employers on the Family and Medical Leave Act. The guide is designed to provide essential information about the FMLA for employers, including the obligations under the law and the options available to employers in administering FMLA leave. The updated guide contains flowcharts, helpful hints, and other information to explain the FMLA process and regulations. The  Employer's Guide to The Family and Medical Leave Act can be found here.

---

# O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECTS NEWBOLD AS SHAREHOLDER

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to announce that Joe Newbold was recently elected a shareholder of the firm. Mr. Newbold has been with the firm since 2011 and is a member of the Litigation Practice Group. Joe concentrates his practice in commercial litigation in both state and federal court. He manages a variety of complex cases involving class actions, commercial real estate, franchise litigation, and intellectual property matters. Joe has extensive experience representing plaintiffs and defendants in challenging civil litigation.

Learn more about Mr. Newbold by visiting his full profile.

---

# TAX AND WEALTH ADVISOR ALERT: BUILDING A GREAT PLAN… STEP FOUR: RESULTS, BEHAVIORS, AND BELIEFS

My last blog post focused on how to build the plan to get from where you are to where you want to go. The plan, to bridge the gap to our most awesome future, requires us to figure out what we need to stop, start, and continue doing to get from where we are to where we want to be. Of course, it is not nearly that simple.

Think of all of the situations in which we profess to want change. Maybe we want to have greater sales success. Maybe we want to lose 30 pounds. We might want to cut spending, so that we can save more. Oftentimes what we need to start, stop, and continue doing is obvious or even simple. Yet we consistently fail to do what needs to be done. Why?

I do a lot of performance, executive, and life coaching. This question is the crux of 95% of what people need help with: "I know what I need to do, but I am consistently failing to do it. What is wrong with me?" Answering this question requires us to step back and be a bit analytical about how results are achieved and think about the vision. The vision is a collection of results that will make us feel a certain way, for example, one of my current clients would like to increase his business profits by 30% because that is what is needed to allow his spouse to stay at home with their children. Another client would like to increase his commission income by 20% so that he can purchase his first BMW. As I stated, the "why" is critical, but so is the "what."

Again, going back to the science, the 30% profit growth or the 20% commission growth is the desired result. The first question, then, is "what behaviors do I need to engage in to achieve the result?" Stated another way, the results driving the vision are the natural results of certain behaviors one chooses to start, stop, and continue doing. In both of these cases, with both of these clients, those behaviors are pretty obvious. In other words, each knew what he had to do differently to achieve his vision.

But each month, the focus of our coaching seems to be what he did not do and why. The reason they are not doing what they need to do is both simple and complex. Let's start with the simple.  The reason they are not reaching their goal is that the necessary behaviors to do so violate a belief. For example, take the person who wants to lose 30 pounds. After doing a start, stop, and continue analysis, it is determined that the vision can be attained by no longer eating a bowl of Ben and Jerry's ice cream every night. So the behavior is to cut out the nightly Ben and Jerry's. Most people will stop eating the ice cream, for a while. But then they will have a tough day, or a great day, or see a commercial with ice cream, and have a bowl. Once they have one, they might quit again for a day (and beat themselves up for being weak), but then have another bowl a day or two later. Eventually, the plan is broken, as the necessary behavior of avoiding ice cream is regularly violated. This is just one example of a perceived "inability" to change necessary behaviors in the long-term. We see this all the time, where people spend rather than save, do not pick up the phone to make introductory sales calls, or do not terminate a culturally cancerous employee. They know the behavior that will lead to the result over the long-term, but they choose not to do what needs to be done.

So why, in our example, did the person eat the ice cream? At first blush, it seems simple; he likes ice cream, but there are a lot of things that we like, that we avoid, so why give in? And that question requires the deep introspection necessary for long-term change. This is when the complexity of the plan starts to take form. What belief do I have that causes me to eat ice

cream I should not eat? That is a question that is rarely answered easily, but is critical to achieve the vision. Maybe the answer is that Ben and Jerry's makes me happy, and I believe that it is necessary to eat ice cream to make me happy when I am sad. Or, maybe it is that I have always associated ice cream with celebrations, so to me, a win is not a win without Chunky Monkey. Or, maybe it's that my vision is wrong. Maybe, while I would like to be 30 pounds lighter, it is not important enough for me to give up ice cream.

The ice cream example is a good one because it is relatable, but in my coaching, I see this frequently in the professional world. Let's go back to the advisor who needed to grow commissions by 20% to buy the BMW. He knew that he needs to make 90 calls a day to meet the goal, but was only making 40 calls every other day. He knew what needed to be done, but was not doing it. So we had to dig down to figure out why. What did he believe that caused him to not pick up the phone as much as he should have? With him, after a lot of discussion, he admitted that those calls made him feel like a "cheesy salesperson" rather than a professional advisor. Digging even deeper, we discovered he is an introvert and hates "forced conversations" with strangers. Also, as a millennial, he knew he lacked phone skills and was more comfortable with email and texting. If I would have stopped where most coaches do, by simply telling him to make more calls, the vision would have never been achieved. The vision is only achievable by first addressing the belief that is getting in the way—"phone conversations make me uncomfortable." You then have to figure out a way to be true to that belief, while still achieving the vision (i.e., email and texting as a way of communication). Building a team to delegate those activities (i.e., hire a phoning assistant) could also achieve the vision. Or perhaps, coming to the personal conclusion, that while phoning is an unpleasant task, it is worth it to achieve the vision.

So, to accomplish true change, the process needs to be:

- What behaviors accomplish the vision?
- What do I need to start, stop, and continue doing to achieve those behaviors?
- Then go to the "third why." Why am I not currently engaging in those behaviors?

For example, to meet my retirement goal, I need to save 10% of my income, but I am currently only saving 2%—why?

- Under my budget, I can only afford to save 2%—why?
- My budget takes into account my large lease payment on my car—why do I have a large lease payment and an expensive car?
- I believe people will see me as more successful if I drive a nice car, and I believe successful people will only do business with someone successful—why do you believe that? What evidence exists that shows that belief is true? Wouldn't a successful person be able to save 10% of their income for retirement? Is this really about what I want and am I projecting my beliefs onto others?

As a mentor once told me, all the power is in the third "why." I believe that—and the reason

is the third “why” is not the reason or the assumption, but rather the emotion, be it fear, insecurity, arrogance, or whatever that is really at the core of the behavior, that is preventing you from getting where you want to go.

So as you now build the plan, the steps are:

- Paint the vision (where am I going and why?)
- Determine, using empathetic honesty where I am right now
- Figure out the behaviors necessary to get from where I am to where I am going
- Determine what I need to start, stop, and continue doing
- Figure out what beliefs are getting in the way by going to the third “why”
- Either change the belief, change the behaviors, or change the vision
- Measure the results and recalibrate if necessary

At the end of the day, the truth is, if the vision is important enough, you will achieve.

---

# EMPLOYMENT LAWSCENE ALERT: WISCONSIN COURT OF APPEALS ISSUES DECISION ON MEANING OF “SUBSTANTIAL FAULT” IN UNEMPLOYMENT

This week, the Wisconsin Court of Appeals issued an important ruling on what “substantial fault” means in the context of unemployment compensation. In 2013, the Wisconsin legislature amended the unemployment insurance statutes to state that, in addition to discharge for misconduct and voluntary termination of work, employees would be denied unemployment benefits if they were terminated by the employer for “substantial fault by the employee connected with the employee’s work.” The statute defines “substantial fault” as “those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee’s employer but does not include any of the following: 1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction. 2. One or more inadvertent errors made by the employee. 3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment.” Wis. Stat. 108.04(5g)(a).

In O*perton v. Labor and Indus. Review Comm’n et al*., 2015AP1055 (Wis. Ct. App. April 14, 2016) an employee who worked as a cashier had made eight cash handling errors over twenty months, including not requesting to see identification for a credit card purchase of $399 on what turned out to be a stolen credit card. The employer issued her multiple written

warnings, and she was warned that further errors could result in termination. After she failed to get identification related to the stolen credit card, she was terminated for her cash handling errors.

Both the Department of Workforce Development and the Labor and Industry Review Commission (LIRC) found that the employee was ineligible for unemployment benefits because her discharge was for substantial fault based on the fact that she continued to make cash handling errors after receiving multiple warnings. Despite LIRC's arguments that the court should defer to its experience and judgment in employment issues, the Court of Appeals took a very narrow view of what constitutes "substantial fault." The Court of Appeals found that there had been no evidence presented that the cash handling errors were "infractions" that violated any specific rule of the employer. The Court of Appeals then went on to determine that the employee's cash handling errors fell into the second category of what is not substantial fault because they were "inadvertent," and it did not matter that warnings had been given because that is not a part of the "inadvertent error" analysis.

The important takeaway for Wisconsin employers is the fact that inadvertent errors, even if repeated after a warning, do not constitute substantial fault under the unemployment statutes. Therefore, in issuing warnings for performance related deficiencies, employers need to cite specific policies and rules that the employee has violated. This will give employers a better chance of showing that the employee has committed an infraction, rather than an inadvertent error, and should be denied unemployment benefits if such an infraction is repeated. At this point in time, it is not certain as to whether this matter will be taken to the Wisconsin Supreme Court. We will keep you updated on any further developments.

---

## WISCONSIN COURT OF APPEALS ISSUES DECISION ON MEANING OF "SUBSTANTIAL FAULT" IN UNEMPLOYMENT

This week, the Wisconsin Court of Appeals issued an important ruling on what "substantial fault" means in the context of unemployment compensation. In 2013, the Wisconsin legislature amended the unemployment insurance statutes to state that, in addition to discharge for misconduct and voluntary termination of work, employees would be denied unemployment benefits if they were terminated by the employer for "substantial fault by the employee connected with the employee's work." The statute defines "substantial fault" as "those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not

include any of the following: 1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction. 2. One or more inadvertent errors made by the employee. 3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment." Wis. Stat. 108.04(5g)(a).

In *Operton v. Labor and Indus. Review Comm'n et al.*, 2015AP1055 (Wis. Ct. App. April 14, 2016) an employee who worked as a cashier had made eight cash handling errors over twenty months, including not requesting to see identification for a credit card purchase of $399 on what turned out to be a stolen credit card. The employer issued her multiple written warnings, and she was warned that further errors could result in termination. After she failed to get identification related to the stolen credit card, she was terminated for her cash handling errors.

Both the Department of Workforce Development and the Labor and Industry Review Commission (LIRC) found that the employee was ineligible for unemployment benefits because her discharge was for substantial fault based on the fact that she continued to make cash handling errors after receiving multiple warnings. Despite LIRC's arguments that the court should defer to its experience and judgment in employment issues, the Court of Appeals took a very narrow view of what constitutes "substantial fault." The Court of Appeals found that there had been no evidence presented that the cash handling errors were "infractions" that violated any specific rule of the employer. The Court of Appeals then went on to determine that the employee's cash handling errors fell into the second category of what is not substantial fault because they were "inadvertent," and it did not matter that warnings had been given because that is not a part of the "inadvertent error" analysis.

The important takeaway for Wisconsin employers is the fact that inadvertent errors, even if repeated after a warning, do not constitute substantial fault under the unemployment statutes. Therefore, in issuing warnings for performance-related deficiencies, employers need to cite specific policies and rules that the employee has violated. This will give employers a better chance of showing that the employee has committed an infraction, rather than an inadvertent error, and should be denied unemployment benefits if such an infraction is repeated. At this point in time, it is not certain as to whether this matter will be taken to the Wisconsin Supreme Court. We will keep you updated on any further developments.

---

## EMPLOYMENT LAWSCENE ALERT: DANE COUNTY JUDGE FINDS RIGHT-TO-WORK LAW

# UNCONSTITUTIONAL

On March 9, 2015, Governor Scott Walker signed Act 1 (Wisconsin's Right-to-Work legislation) into law, which allows workers covered by a collective bargaining agreement to not pay union dues if they choose not to do so (our previous blog on the law can be found here). Opponents of the law immediately went to work trying to defeat the new law. In late March, the Dane County Circuit Court denied the Wisconsin State AFL-CIO and two labor unions' bid for a preliminary injunction that would have halted implementation of the law. However, this past Friday, the same Court ruled that Wisconsin's Right-to-Work law is unconstitutional (full opinion here).

The unions argued that Act 1 effects an unconstitutional taking of their property without just compensation in violation of Article I, § 13 of the Wisconsin Constitution by "prohibiting the unions from charging nonmembers who refuse to pay for representative service which unions continue to be obligated to provide" by law. Article I, § 13 of the Wisconsin Constitution provides "[t]he property of no person shall be taken for public use without just compensation therefor." The unions successfully argued that their service of providing collective bargaining representation to all employees constitutes "property" subject to a protectable interest under Wisconsin's Constitution. The unions then successfully convinced the circuit court that Act 1 effectuates a taking of their property by requiring the unions to provide services to non-paying nonmembers, because the exclusivity principle of Section 9 of the National Labor Relations Act requires that a union elected by a majority of workers in a bargaining unit must represent all employees, whether or not such employees support the union. The circuit court then opined that Act 1 creates a "free-rider" problem whereby non-union members could refuse to pay for services that the unions are required, by law, to provide to them under the duty of fair representation.

Right-to-Work laws have been enacted in twenty-four other states, and none have been struck down. The Seventh Circuit, which Wisconsin is a part of, in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), rejected similar arguments brought by unions challenging Indiana's recently enacted right-to-work law. The circuit court, however, was not persuaded by the decisions in other jurisdictions and expressly held that it was not obligated to reconcile its decision with the Seventh Circuit's decision in *Sweeney*. In justifying its decision, the circuit court found that one important difference between the Indiana and Wisconsin laws is what qualifies as "just compensation." Applying Indiana law, the Seventh Circuit ruled that the ability to exclusively bargain on behalf of employees was a special privilege that qualified as "just compensation;" whereas, under Wisconsin law, the circuit court rejected such a theory and found that Wisconsin has a long history of equating "just compensation" with the payment of money.

Wisconsin's Attorney General and the Department of Justice have already stated that the

State will appeal the ruling, which is likely to be overturned on appeal. In the meantime, the Department of Justice is likely to file a motion to stay the ruling until a higher court can decide the issue. We will keep you posted as matters develop.

---

## EMPLOYMENT LAWSCENE ALERT: WISCONSIN ENACTS LAW ON FRANCHISOR JOINT EMPLOYER LIABILITY

Although federal administrative agencies such as the National Labor Relations Board, the Occupational Safety and Health Administration, and the Department of Labor have recently pushed to expand the definition of "joint employer" under their respective laws, employers in Wisconsin can take some solace in recent legislation. Under Wisconsin Senate Bill 422, which became effective March 2, 2016, there is now a presumption that a franchisor is not an employer of a franchisee's employees for the purposes of Wisconsin unemployment insurance, Wisconsin workers' compensation, Wisconsin wage and hours laws, and Wisconsin fair employment laws. A franchisor can only be subject to liability for its franchisee's employees under those laws if 1) it agrees in writing to assume liability or 2) it exercises a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised for the purpose of protecting the franchisor's trademarks and brand.

The law is meant to prevent franchisors who use a traditional franchisor-franchisee model from being held legally responsible for matters over which they did not exert control. Wisconsin franchisors should make sure that they are not taking any control over day-to-day operations of their franchisees, as that could expose them to liability under Wisconsin laws. Additionally, this does not impact how such franchisors would be treated under federal law, as mentioned above.

---

## EMPLOYMENT LAWSCENE ALERT: WISCONSIN SUPREME COURT ISSUES DONNING AND DOFFING DECISION

On March 1, 2016, the Wisconsin Supreme Court issued a decision in *United Food and Commercial Workers Union, Local 1473 et al. v. Hormel Foods Corporation*. The majority

determined that the time employees spent putting on and taking off clothes and equipment for their jobs was “work” under the Wisconsin statutes and that employees should, therefore, be compensated for that time.

The Court took into consideration the fact that the employer’s work rules required that such clothing and equipment be worn so that the company met food and work safety regulations. Because the Court’s majority determined that the employees’ “principal activity” was producing food products and that the clothing and equipment was necessary for that production, the Court’s majority held that the putting on and taking off of these items was “integral and indispensable” to the work and should, therefore, be compensated. The dissent disagreed, based, in part, on the U.S. Supreme Court’s decision in *Integrity Staffing v. Busk*, stating that putting on and taking off the clothing was not a part of safely cleaning and canning food and, therefore, did not need to be compensated.

The Court also rejected the employer’s arguments that such time was “*de minimis*” because the case involved more than $500 in unpaid wages per year for each employee. Additionally, the majority noted that, although the “*de minimis*” defense is frequently used under the federal Fair Labor Standards Act, no Wisconsin court has ever applied to it Wisconsin wage and hour laws.

Employers must carefully consider what pre- and post-shift activities must be compensated. Although this decision helps clarify requirements related to donning and doffing for Wisconsin employers, our advice to employers remains the same—time spent performing activities related to an employee’s duties, which includes donning and doffing protective gear that is necessary for performing an employee’s job duties, should generally be compensated.

---

## "THE JUDGMENT IS AFFIRMED BY AN EQUALLY DIVIDED COURT"

With a one sentence opinion, the United States Supreme Court issued its first deadlocked ruling following the death of Justice Antonin Scalia. The ruling came in a creditors’ rights case that languished before the Court for some time, hinting of a divided Court on the issue prior to Scalia’s death.

In *Hawkins v. Community Bank of Raymore*, the United States Court of Appeals for the Eighth Circuit addressed a dispute between a bank and a developer that defaulted on its loans from the bank. The two members of the developer and their spouses guarantied the loans. The spouses of the guarantors of the loan sued the bank, alleging they were required to guaranty

the loan only because of their spousal status and, therefore, were discriminated against pursuant to the Equal Credit Opportunity Act ("ECOA"). The district court granted summary judgment to the bank, holding that the spouses were not "applicants" who gained protections of the ECOA. The Eighth Circuit affirmed, reasoning the plain language of the ECOA provides that a person is an "applicant" only if he or she requests credit, but a guarantor does not, simply by executing a guaranty, request credit, and, therefore, the marital status protections of the ECOA did not apply. Conflicting authority exists in the Sixth Circuit.

The Supreme Court granted the petition for writ of certiorari in March of 2015, and oral argument was held in October of 2015. The Court had not issued a decision as of Scalia's death on February 13, 2016, indicating a potentially close decision.

The one sentence decision indicating the deadlock was issued on March 22, 2016. When the Supreme Court is deadlocked at 4–4, the decision of the lower court stands, but it does not have precedential value. Therefore, the bank remained victorious over the spouses, and the circuit split remains unresolved.

Although certainly short and sweet, the Court's first deadlocked decision following the death of Justice Scalia speaks volumes on what future United States Supreme Court decisions hold.

---

# UNDUE INFLUENCE IN WISCONSIN PART 3: ALTERNATIVE METHOD OF PROOF

*This is the third and final article in a series on undue influence in Wisconsin.*

The second method of challenging a will or gift made during a lifetime on grounds of undue influence, a so-called *inter vivos* conveyance requires that the party establish only two elements. Doing so raises a rebuttable presumption of undue influence.

Moving forward with such evidence shifts the burden from the person raising the issue of undue influence to the proponent of the will or the recipient of the conveyance.[1] If rebutting testimony is introduced, the trier of fact does not need to accept the presumption and may reject it and accept the rebutting evidence.[2]

## Existence of Confidential or Fiduciary Relationship

The first element of the second method requires a finding that a confidential or fiduciary relationship exists between the testator/grantor and the favored beneficiary. The basis for the presumption is not merely the existence of a personal relationship between the testator

or grantor and the beneficiary. Instead, it's the ease with which a confidant can dictate the contents or influence the drafting of a will or particular conveyance, or it's the ease with which such an individual can control or influence the draftsman of such a document.[3]

If the person charged with undue influence is not the actual draftsman or the procurer of the draftsman, evidence must be presented which shows that the testator or the grantor depends upon the advice of the confidant in relation to the subject of the will or conveyance. Establishment of this element requires more than showing that a confidential relationship exists between the parties. It requires proof.

The proof offered will be circumstantial because "if a beneficiary has either instructed the draftsman as to the contents of the will or has unduly influenced the testator as to the disposition of his property, he would not testify that he had done so."[4]

## Suspicious Circumstances

The final element of the second method requires that suspicious circumstances surround the execution of the will or conveyance. This element requires a detailed review of factual circumstances.

To prove this element, the Supreme Court has found it sufficient to provide:

- Evidence that proves the conveyance was hastily drafted by a layman or drafted with the active participation of the influencer either in the actual drafting of the document or in the procurement of an individual to draft the document.
- Evidence of a weakened condition, be it physical or mental, of the testator or grantor, all of which culminate in sudden and unexplained changes in the attitude of the testator towards the disposition of his or her property.[5]

As was discussed in our prior article in relation to the fourth element of the classic undue influence case, proof of this element requires more than simply suspicious results. The suspiciousness must be judged in light of the totality of the circumstances.

---

[1] *In Re Estate of Kamesar*, 81 Wis. 2d 151, 164, 259 N.W.2d 733 (1977).
[2] *Cooper*, 28 Wis. 2d at 399.
[3] *Estate of Fetcher*, 88 Wis. 2d 199, 219, 277 N.W.2d 143 (1979).
[4] *Estate of Velk*, 53 Wis. 2d 500, 507, 192 N.W.2d 844 (1972).
[5] *Estate of Komarr*, 46 Wis. 2d 230, 240, 175 N.W.2d 473 (1970).