# 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.

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# EMPLOYMENT LAWSCENE ALERT: HOW WISCONSIN'S KNIFE LAW REFORM IMPACTS

# EMPLOYERS

On February 7, 2016, 2015 Assembly Bill 142 became law, amending the Wisconsin Statutes related to how knives are, among other things, regulated by concealed carry permits. The law no longer requires an individual to have a concealed carry permit in order to lawfully carry a concealed knife, including a switchblade or automatic knife. There is, however, an exception where the individual is not allowed to possess a firearm under state law (i.e., a felon), then that individual is also not allowed to carry a concealed knife that is a "dangerous weapon." Local ordinances are not permitted to impose stricter laws than the state law, other than in buildings or parts of a building that are owned, operated, or controlled by a political subdivision of the state.

Although the State of Wisconsin will no longer require that knives, including switchblades, be subject to conceal carry permits, employers still have a duty to make sure that their workplaces are safe for their employees, customers, and visitors. If appropriate, employers should review their handbooks and policies to see if they have a Weapon-Free Policy that prohibits employees from carrying weapons, including knives, inside company buildings and other areas where the employer conducts business.

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# EMPLOYMENT LAWSCENE ALERT: CONTINUED EMPLOYMENT IS RULED VALID CONSIDERATION FOR NON-COMPETES IN WISCONSIN

On April 30, 2015, the Supreme Court of Wisconsin issued its long-awaited decision in *Runzheimer International Ltd. v. Friedlen*, in which it came to the conclusion that the promise of continued at-will employment is valid consideration for a restrictive covenant.

In *Runzheimer*, the employee had worked for his employer for fifteen years when the employer required all employees to sign restrictive covenants or be terminated. The employee signed the restrictive covenant, but after he was terminated more than two years later, he went to work for a competitor in breach of that agreement, and the employer sued. The employee then claimed that the agreement was invalid because it lacked consideration.

In Wisconsin, forbearance in exercising a legal right is valid consideration. The Court reasoned that, because Wisconsin is an employment at-will state, companies have a legal right to terminate employees at any time for a good reason, a bad reason, or no reason at all, as long as it does not violate existing law or public policy. Therefore, giving up the legal right

to terminate an employee at that moment in exchange for the employee signing a covenant not to compete is valid consideration.

The court emphasized that its holding in *Runzheimer* is consistent with its 1994 holding in *NBZ, Inc. v. Pilarski* where the Wisconsin Supreme Court held that the promise of continued employment did not provide sufficient consideration to support a restrictive covenant entered into by an existing employee. The Wisconsin Supreme Court distinguished its holding in *NBZ* by finding that, in that case, the employee's employment had not been conditioned upon her signature and the employer did not promise to do anything else in exchange. Without these elements, there can be no consideration to support enforcement of the agreement under Wisconsin law.

Therefore, under the Wisconsin Supreme Court's holding in *Runzheimer*, in order for continued at-will employment to be valid consideration for a restrictive covenant agreement, employers must condition the employee's continued employment upon the employee actually signing the agreement. In order to maintain that position in any action that might challenge the issue of consideration, an employer must actually terminate any employee who refuses to sign the restrictive covenant for it to validly assert that continued employment was conditioned upon the employee's signature to the agreement.

Wisconsin has now joined the majority of jurisdictions, which hold that a promise to continue an at-will employee's employment is lawful consideration for a restrictive covenant. The *Runzheimer* decision now permits Wisconsin employers to require their existing employees to sign new or modified restrictive covenant agreements without promising employees anything more than continued at-will employment.

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## EMPLOYMENT LAWSCENE ALERT: GOVERNOR WALKER SIGNS RIGHT-TO-WORK BILL

Wisconsin Governor Scott Walker has officially signed Right-to-Work legislation, which, as discussed in last Friday's blog, will allow workers covered by union representation to not pay union dues if they do not wish to.  Although the union will still have the right to collectively bargain on behalf of all private-sector employees in a bargaining unit, employees can elect not to pay the union dues or fees.  This law affects new collective bargaining agreements, as well as the renewal, modification, or extension of a current collective bargaining agreement. However, employees who are currently under a collective bargaining agreement will have to continue paying union dues until that agreement expires or is renewed, modified, or extended.  The full text of the bill can be found here.

# EMPLOYMENT LAWSCENE ALERT: WISCONSIN ASSEMBLY PASSES RIGHT-TO-WORK BILL — GOVERNOR WALKER EXPECTED TO SIGN BILL ON MONDAY

Today, Friday, March 6, 2015, the Wisconsin State Assembly after a marathon session passed right-to-work legislation by a vote of 62 to 35. The State Senate had previously approved the right-to-work legislation by a vote of 17 to 15 the previous week. The votes were cast according to party lines. The fast-tracked bill will be sent to Governor Scott Walker for signature, which could occur as early as Monday. The bill is aimed at making Wisconsin more attractive to businesses by prohibiting as a condition of employment membership in a labor organization, and, accordingly, provides employees the freedom to choose as to whether they want to pay union dues. Union supporters strongly opposed the bill arguing that the bill harms unions and slows job growth. However, Republican Assembly Speaker Robin Vos said that in Indiana, which passed a similar bill in 2012, unions have not shrunk and jobs have grown.

Once Governor Walker signs the bill, Wisconsin will become the 25th right-to-work state in the country following recent right-to-work legislation passed in Indiana and Michigan. The right-to-work legislation will affect only private-sector workers. The Wisconsin bill would make it a crime punishable by up to nine months in jail to require a worker who is not in a union to pay dues.

Right-to-work is an often misinterpreted concept, as it does not guarantee any right to employment. Under federal labor law, a union that is elected to represent a bargaining unit must represent all workers, even those who have voted against the union. In states that do not have right-to-work laws, all employees in the bargaining unit are required to pay their fair share of union dues for that representation, even if they voted against the union and do not wish to pay union dues. In right-to-work states, however, which Wisconsin will soon be, employees cannot be compelled to pay any union dues or fees in a workplace where an union represents employees through a collective bargaining agreement even though such employees will be covered by the collective bargaining agreement. Wisconsin's right-to-work legislation also makes it unlawful to require any individual to become or remain a member of an union.

Once Governor Walker signs the bill, the new right-to-work law will apply upon the renewal, modification, or extension of any private sector collective bargaining agreement. This means that for collective bargaining agreements currently in place as of the time of enactment of

the law, employees would still be required to pay their fair share of union dues and remain members of the union for the remaining term of the agreement. However, for any collective bargaining agreement entered into, renewed or modified after enactment of the legislation, any union security clause requiring employees to be members of the union or any requirement for employees to pay union dues would no longer be enforceable.

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## EMPLOYMENT LAWSCENE ALERT: THE FMLA, WFMLA, AND SAME-SEX SPOUSES

On February 25, 2015, the Department of Labor (DOL) issued a Final Rule revising the definition of "spouse" under the FMLA. Currently, a "spouse" is defined as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." The Final Rule amends the FMLA definition of "spouse" to include eligible employees in same-sex marriages, even in states that do not recognize same-sex marriages. Importantly, same-sex marriages will be deemed valid based on the place in which the marriage was entered into, instead of the state in which the employee lives or works. Marriages will be valid if they are performed in any state or country that deems the marriage legal. Wisconsin, through a series of recent federal court decisions, recognizes same-sex marriages. Therefore, if an employee in a same-sex marriage was married in a place that legally recognizes same-sex marriages, an employer in any state, even those that do not currently recognize same-sex marriages, must grant that employee FMLA leave for the care of a same-sex spouse if the employee is otherwise eligible for that leave.

The amendment to the meaning of "spouse" under the federal FMLA does not affect the Wisconsin Family Medical Leave Act (WFMLA). The WFMLA is broader in scope than the federal FMLA as it not only recognizes the right of an employee to take a leave of absence for the serious health condition of a "spouse," defined as "an employee's legal husband or wife" (including a same-sex spouse), but also provides leave rights to employees engaged in domestic partnerships. The WFMLA defines "domestic partner" in one of two ways. First, domestic partner can mean two individuals who: (i) are 18 years or older and competent to enter into a contract; (ii) are not married to or in a domestic partnership with anyone else; (iii) are not related by blood in a way that would prohibit marriage; (iv) consider themselves each other's immediate family; (v) agree to be responsible for each other's basic living expenses; and (vi) share a common residence. Second, domestic partners can be those who have signed and filed a declaration of domestic partnership in the office of the registrar of deeds of the county in which they reside. In Wisconsin, domestic partnerships can apply to same-sex couples who are not married as well as to opposite-sex couples who are not

married.  Therefore, even employees who are not legally married can be eligible for up to two weeks of WFMLA leave if they are part of a domestic partnership recognized under state law.

The new FMLA regulation goes into effect on March 27, 2015 and the WFMLA is already in effect for Wisconsin employers, so employers should review their policies and educate supervisors, managers, and human resources personnel on the Final Rule as well as Wisconsin law so that they can be applied properly.

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# EMPLOYMENT LAWSCENE ALERT: WISCONSIN PASSES SOCIAL MEDIA PROTECTION ACT – HOW WILL IT AFFECT YOUR EMPLOYMENT PRACTICES?

On April 8, 2014, Governor Scott Walker signed into law the Wisconsin Social Media Protection Act (the "Act"). 2013 Wisconsin Act 208. The new law, which went into effect on April 10, 2014, Wis. Stat. § 995.55, prohibits employers from requesting an employee or an applicant to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's "Personal Internet account," defined as an "Internet-based account that is created and used by an individual exclusively for purposes of personal communications."

Specifically, under the new law, employers may not:

- Request or require an employee or applicant for employment to disclose access information for a Personal Internet account or otherwise grant access to or allow observation of that account as a condition of employment;
- Discharge or otherwise discriminate against an employee for:
    - Exercising his or her right to refuse to disclose access information, grant access to, or allow observation of his or her Personal Internet account;
    - Opposing a practice prohibited under the Act;
    - Filing a complaint or attempting to enforce any right under the Act; or
    - Testifying or assisting in any action or proceeding to enforce any right under the Act.
    - Refuse to hire an applicant for employment because the applicant refused to disclose access information for, grant access to, or allow observation of the applicant's Personal Internet account.

The Act does, however, permit an employer to do any of the following:

- Request or require an employee to disclose access information to allow the employer to gain access to an account, service, or electronic communications device that the employer supplied or paid for (in whole or in part) in connection with the employee's employment or used for the employer's business purposes;
- Discharge or discipline an employee for transferring the employer's proprietary or confidential or financial information to the employee's Personal Internet account without the employer's authorization;
- Conducting an investigation or requiring an employee to cooperate in an investigation if an employer has reasonable cause to believe that there has been:
    - Any alleged unauthorized transfer of confidential, proprietary, or financial information to the employee's Personal Internet account; or
    - Any other allege employment-related misconduct, violation of the law, or violation of the employer's work rules, as specified in an employee handbook, if the misconduct is related to activity on the employee's Personal Internet account.

*(Although an employer can require an employee to grant access to or allow observation of the employee's Personal Internet accounts for this purpose, the employer may not require the employee to disclose access information for that account.)*

- Restrict or prohibit an employee's access to certain internet sites while using an electronic communication device supplied or paid for in whole or in part by the employer or while using the employer's network or other resources;
- Comply with a duty to:
    - Screen applicants prior to hiring; or
    - Monitor or retain employee communications as required by state or federal laws, rules, and regulations or the rules of a self-regulatory organization.
    - View, access, or use information about an employee or applicant for employment that can be obtained without access information or is available in the public domain; and
    - Request or require an employee to disclose his or her personal e-mail address.

An employee or applicant who believes he or she was discharged or otherwise discriminated against in violation of the Act may file a complaint with the Department of Workforce Development in the same manner as other employment discrimination complaints are filed and processed with the Department.

Employers should review and revise their policies and practices to ensure that they are in compliance with the Act. For more information about the Wisconsin Social Media Protection Act or if you have questions about whether your practices comply with the new law, please contact us.

# EMPLOYMENT LAWSCENE ALERT: SHOULD YOU CHANGE YOUR WORKPLACE POLICIES TO ADDRESS E-CIGARETTES?

As “e-cigarettes” grow in popularity, employers must decide how to address the use of e-cigarettes in the workplace. Electronic cigarettes or “e-cigarettes” are battery-operated devices that deliver nicotine or other substances to its user in the form of a vapor that is then inhaled. Many e-cigarettes are manufactured to look just like everyday objects that can be found in the workplace, such as pens or USB sticks.

E-cigarettes are currently unregulated by the U.S. Food and Drug Administration, which means the FDA has not evaluated any e-cigarettes for safety or effectiveness. A number of recent independent studies on the effects of e-cigarettes and the emissions from those devices have yielded mixed results, with some indicating that the vapor emitted by e-cigarettes contains some of the same carcinogens that you find in traditional cigarette smoke. So, as an employer, how can you know whether you should be regulating the use of these devices in the workplace?

Currently, there is no federal law regulating the use of e-cigarettes and no state has completely banned their use. Twenty-four (24) states, including Wisconsin, and the District of Columbia currently have “smoke-free” laws that prohibit smoking of traditional tobacco cigarettes in the workplace. Because e-cigarettes are still fairly new, most of these “smoke-free” laws do not address whether the use of e-cigarettes is also prohibited in the workplace. Recently, a number of municipalities and some states have enacted new laws or amended their “smoke-free” laws to ban the use of e-cigarettes in the same way use of traditional tobacco cigarettes is prohibited in the workplace.

Wisconsin’s legislature has taken an approach quite different from the trend toward banning the use of e-cigarettes in the workplace and other public places. The Wisconsin legislature has introduced a bill that, if passed, would exclude e-cigarettes from the types of smoking devices that are prohibited under Wisconsin’s “smoke-free” law, which would mean that using e-cigarettes would be permitted in those places where smoking traditional cigarettes is now prohibited. It is not likely, however, that this bill would require private employers to allow employees to use e-cigarettes in the workplace.

With more employees bringing e-cigarettes into the workplace, employers are faced with the decision whether to permit or ban employees’ use of e-cigarettes at work. Some employers find that permitting employees to use e-cigarettes cuts down on the number of smoking breaks employees take each day, thereby increasing some employees’ productivity, while other employers find that e-cigarettes create a distraction for users and non-users alike.

Absent legal restrictions regarding the use of e-cigarettes in most cities and states, employers in those jurisdictions are free to create their own reasonable policies addressing the use of e-cigarettes just as they would maintain policies addressing or restricting other activities and conduct that could interfere with employees' ability to do their jobs or otherwise disrupt the workplace.

Employers should stay up to date on state and municipal laws and ordinances that could affect how employers may be required to treat the use of e-cigarettes in the workplace.

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## NEW CHANGES TO WISCONSIN'S UNEMPLOYMENT INSURANCE LAWS TAKE EFFECT JANUARY 5, 2014

The Wisconsin Legislature recently enacted major changes to Wisconsin's unemployment insurance laws, a number of which will become effective on January 5, 2014. The most significant changes include an expansion of what conduct constitutes "misconduct" and establishes a new standard of "substantial fault," which if proven, can temporarily disqualify an employee for unemployment insurance benefits. Another significant change limits the circumstances under which an employee may be entitled to unemployment benefits following a voluntary resignation. These new changes can be found in Wisconsin's 2013-2015 Biennial Budget Bill, 2013 Wisconsin Act 20 ("Act 20"). The Wisconsin Legislature recently enacted major changes to Wisconsin's unemployment insurance laws, a number of which will become effective on January 5, 2014. The most significant changes include an expansion of what conduct constitutes "misconduct" and establishes a new standard of "substantial fault," which if proven, can temporarily disqualify an employee for unemployment insurance benefits. Another significant change limits the circumstances under which an employee may be entitled to unemployment benefits following a voluntary resignation. These new changes can be found in Wisconsin's 2013-2015 Biennial Budget Bill, 2013 Wisconsin Act 20 ("Act 20").

Definition of Misconduct Wis. Stat. § 108.04(5) currently provides that claimants who are terminated for "misconduct" are temporarily ineligible for unemployment compensation benefits. Act 20 amends Wis. Stat. § 108.04(5) to incorporate the longstanding definition of "misconduct" that was set forth by the Wisconsin Supreme Court in Boynton Cab Co. v. Neubeck and Industrial Comm'n, 237 Wis. 249, 296 (1941). Boynton set a high standard for misconduct that was difficult for employers to meet. Act 20 incorporates, but further expands that standard to include actions and conduct that may not have been considered

“misconduct” under the Boynton standard.

Act 20 also eliminates the stringent requirements relating to termination for absenteeism and tardiness (formerly set forth in Wis. Stat. § 108.04(5g)) and incorporates absenteeism and tardiness within the new definition of “misconduct.” Pursuant to Wis. Stat. § 108.04(5)(e), absenteeism or excessive tardiness by an employee in violation of the employer’s policy, if the employee does not provide both notice and a valid reason for the absenteeism or tardiness, constitutes misconduct.

This new definition of misconduct applies to new unemployment compensation claims filed on or after January 5, 2014.

Substantial Fault Act 20 also creates a new standard – the “substantial fault” standard – intended to cover conduct by an employee that does not rise to the level of misconduct, but can still temporarily disqualify employees for unemployment compensation benefits. An employee who is terminated for “substantial fault” of the employee connected with the employee’s work, will be temporarily ineligible for benefits. “Substantial fault” includes acts or omissions over which an employee exercised reasonable control and which violate reasonable requirements of the employer. Substantial fault does not include: minor rule violations, unless the violation is repeated after the employee is warned; inadvertent errors by the employee; and any failure of the employee to perform work due to insufficient skill, ability, or equipment.

Voluntary Resignation/Quit Exceptions Act 20 changes the law with respect to the current statutory exceptions that allow an employee to voluntarily resign from employment and still collect unemployment benefits if the resignation involved certain circumstances. Act 20 eliminates 8 of the previously recognized exceptions and modifies four of the remaining exceptions. These changes will first apply to claims for unemployment benefits filed on or after January 5, 2014.

The following exceptions are no longer recognized under Wisconsin law and will no longer be valid reasons for an employee to collect unemployment benefits after he or she has voluntarily resigned employment:

1. Employee terminated his or her employment to accept a recall to work for a former employer within 52 weeks after having last worked for that employer.

2. Employee maintained temporary residence near the work terminated, maintained a permanent residence in another locality, and terminated the work and returned to his or her permanent residence because the work available was reduced to less than 20 hours per week in at least 2 consecutive weeks.

3. Employee left or lost his or her work because of reaching the employer’s compulsory

retirement age.

4. Employee terminated part-time work because of loss of other full-time employment makes it economically unfeasible for employee to continue part-time work.

5. Employee terminates work with a labor organization if termination cause employee to lose seniority rights granted under a collective bargaining agreement and if termination results in loss of employee's employment with the employer that is party to the collective bargaining agreement.

6. Employee terminated work in a position serving as a part-time elected or appointed member of a government body or representative of employees, employee was engaged in work for an employer other than the employer in which the employee served as the member or representative, and employee was paid wages in terminated work constituting not more than 5% of employee's base period wages for purpose of entitlement for benefits.

7. Employee owns or controls an ownership interest in a family corporation and employee's employment was terminated because of an involuntary cessation of the business of the corporation under certain conditions.

Employers should be sure to update their employee handbooks, policies, and procedures to reflect these new changes that will take effect January 5th. If you have questions about which policies you should update or would like assistance in reviewing your existing policies to ensure compliance with these updates, please contact us.

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## SENATE TO VOTE ON EMPLOYMENT NON-DISCRIMINATION ACT (ENDA)

Senate Majority Leader Harry Reid (D-Nev.) has announced that the U.S. Senate will vote on the Employment Non-Discrimination Act ("ENDA") before the Thanksgiving recess, and perhaps as early as Monday, November 4th.

The Employment Discrimination Act (S. 815) would prohibit employers from discriminating against individuals based on the individual's sexual orientation or gender identity, just as current federal law prohibits discrimination based on race, sex, national origin, religion, age, and disability.

ENDA is sponsored in the Senate by Senators Jeff Merkley (D-Ore.) and Tom Harkin (D-Iowa).

The bill would need 60 votes before it goes to a final vote. Employers should stay tuned to find out whether ENDA will become law.

To view a full copy of the Senate Bill, click here.